



**Mashele v Wanzetse & another (Civil Application E003 of 2025)
[2025] KECA 475 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 475 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E003 OF 2025
LA ACHODE, JA
MARCH 7, 2025**

BETWEEN

MANASSEH EMISEMBE MASHELE APPLICANT

AND

KALORI WANZETSE 1ST RESPONDENT

DAVID WANZETSE 2ND RESPONDENT

(Being an application seeking extension of time to file an appeal out of time against the Judgment of the Environment and Land Court at Busia (Omollo J) dated 19th December, 2024 in Busia ELC No. 53 OF 2016)

RULING

1. By the Notice of Motion dated 19th December, 2024, Mansseh Emisembe Mashele, the applicant seeks leave to lodge an appeal out of time against the judgment delivered on 8th June, 2022, in the Environment and Land Court (ELC) at Busia in ELC No. 53 of 2016 by Omollo J, and that the cost of the application be in the cause. The application is expressed to be brought under rules 4, 41, 43 and 45 of the Court of Appeal Rules 2010.
2. The grounds of the application as set out on the face thereof, state that the applicant was aggrieved by the judgment in the afore stated case and lodged the Notice of Appeal dated 15th June, 2022 at the Busia Environment and Land Court. On 21st January, 2023, he filed for review of the judgment in the trial court and the application was struck out on 20th November, 2023 by Olao J.
3. He states that the intended appeal raises arguable issues: that the delay was due to inability to retrieve the typed proceedings despite numerous phone calls to the registry and the appeal could not be lodged without them; the respondent will not suffer any prejudice if the application is allowed; and that unless



leave is granted, the intended appeal which has overwhelming chances of success will be rendered nugatory.

4. In the applicant's supporting affidavit sworn on 19th December 2024, he deposes that he instructed his advocate Messrs Ashioya & Co. Advocates to lodge and serve the Notice of Appeal dated 15th June, 2022 in the Busia ELC. He later appointed a new counsel Messrs Abdulrahman Saad & Associates Advocates. Further, that unless this court intervenes, he will continue to suffer prejudice, primarily the threat over his land L.R. No. Bukhayo/Nasewa/1491, the subject of the ELC suit.
5. He deposes that this appeal is arguable on the grounds that: the learned judge failed to address substantial issues in the pleadings: to consider the applicants evidence on record; and, that she disregarded the fact that the applicant had a valid sale agreement and transfer instruments for the subject land and a valid title at the time of the sale emanating from the subdivision done on 11th November, 1996. Further, that the learned judge held that the applicant's interest in the land was taken away due to subdivision that occurred after the land was transferred to him. He avers that the appeal has high chances of success and the respondent will not suffer any prejudice if this application is allowed.
6. The applicant filed submissions dated 6th February, 2025 through the firm of Messrs Abdulrahman Saad & Associates Advocates and reiterated all the averments set out in the grounds and in the supporting affidavit. He also relied on the case of Fakir Mohamed vs Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai 332 of 2004 (Nyr 32/04) to urge that the exercise of this courts discretion under rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by the amendment in 1985. There is therefore no limit to the number of factors that the court would consider so long as they are relevant.
7. The applicant cites Article 50(1) of the Constitution to urge that everyone has a right to have any dispute that can be resolved by the application of the law, decided in a fair and public hearing before a court or independent tribunal or body. Further, that the Constitution guarantees everybody access to justice under Article 48. He asserts that the respondent will suffer no prejudice as they continue to enjoy possession of the suit property and on the other hand the applicant will suffer prejudice by being denied access to title and land to which he has a rightful claim.
8. The application is unopposed, the respondent having filed neither replying affidavit nor submissions in it.
9. The Court's mandate to exercise the discretion to extend time otherwise limited by the rules, or decision of this Court, or Superior Court is unfettered. It is donated by Rule 4 of this Court's Rules 2022 which provides as follows:

"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."
10. I have considered the principles that guide this Court in the exercise of that discretion as set out in Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others, Supreme Court of Kenya Application No. 16 of 2014, which are:
 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;



2. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court’
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court’
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petition, public interest should be a consideration for extending time.”
11. The applicants’ sole reason for the delay is that there was inadvertent error on the part of the counsel who erroneously assumed that the letter requesting for proceedings had accompanied the Notice of Appeal filed and served on 12th November, 2019.
 12. As is pointed out in Nicholas Kiptoo Arap Korir Salat (supra), that Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court and that a party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court. A delay of more than 2 years is inordinate by any standard and will definitely cause prejudice to the respondent who has a right to bring their dispute to conclusion.
 13. It is my considered view that the applicant is not deserving of this Court’s discretion to extend time for filing of his application.
 15. Reasons wherefore, the application dated 19th December, 2024 is found to lack merit and is hereby dismissed. There are no orders as to costs since the respondent did not respond to the application or file submissions.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF MARCH, 2025.

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

