



**Wangora v Njoroge (Civil Application E635 of 2024)
[2025] KECA 668 (KLR) (11 April 2025) (Ruling)**

Neutral citation: [2025] KECA 668 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E635 OF 2024**

M NGUGI, JA

APRIL 11, 2025

BETWEEN

EUNICE NJAMBI WANGORA APPLICANT

AND

ESTHER WAMBUI NJOROGE RESPONDENT

(Being an application for extension of time to file and serve the memorandum of appeal and record of appeal out of time in an intended appeal from the judgment of the Environment and Land Court at Kajiado (M. N. Gicheru J.) dated 26th April 2022)

RULING

1. In the application dated 21st November 2024, the applicant, Eunice Njambi Wangora, asks this Court to grant her leave to file a memorandum and record of appeal out of time from the decision of the ELC in Kajiado in ELCC No. 12 of 2019 rendered on 26th April 2022. She further prays that a time be named within which the record of appeal should be filed, and that her intended appeal be heard on priority basis.
2. The application, which is supported by an affidavit sworn by the applicant's counsel, Ooko Steven, on 21st November 2024, as well as a further affidavit sworn by Mr. Ooko on 9th December 2024, is brought under section 3A and 3B of the *Appellate Jurisdiction Act*, rule 4, 5(2)(b), 41, 42(1) and 76(1) of the Court of Appeal Rules 2022, and Article 159(2) of *the Constitution*.
3. It is averred for the applicant that she is aggrieved by the judgment of the ELC at Kajiado dated 26th April 2022, which allowed the respondent's appeal and set aside the judgment of the Magistrate's Court in Nairobi CMCC No. 11535 of 2003. She filed a notice of appeal on 16th May 2022 through the firm of MNM Advocates, LLP, which firm also applied for typed proceedings on 12th May 2022.



4. The applicant avers that the process of typing and furnishing her with the typed proceedings took an inordinately long time, but her advocates herein were notified that the proceedings were ready for collection on 30th October 2024. The applicant applied for a certificate of delay, which was issued on 19th November, 2024. It is therefore her averment that she could not file the memorandum and record of appeal on time, thereby necessitating the filing of this application for extension of time.
5. The applicant further avers that the delay in filing the memorandum and record of appeal as well as this application was occasioned by delay in obtaining typed proceedings and the certificate of delay, and not willful action or inaction on her part. She further avers that unless her application is granted, she will be completely denied her right to appeal to this Court through no fault of her own, and the intended appeal will be rendered nugatory. Further, that she should not be penalized for the delay in the court process that was beyond her control. It is her case that her appeal has overwhelming prospects of success as evidenced by the draft memorandum of appeal annexed to her application.
6. The respondent opposes the application by an affidavit she swore on 3rd December 2024. She avers that the application as filed is incompetent as it is supported by an affidavit sworn by the applicant's advocate, who is not competent to depose to the facts and issues contained in the said affidavit. She avers further that the orders sought are discretionary in nature, and this Court has the unfettered discretion to either allow or deny the prayers on the basis of well-established principles.
7. While confirming that the applicant had filed a notice of appeal dated 6th May 2022 and that her advocate had requested for the typed proceedings on 12th May 2022, the respondent avers that the certificate of delay issued on 19th November 2024 exhibited by the applicant is incomplete as the day when it was prepared and made ready for collection by the applicant had not been indicated. She avers therefore that it is not possible to know when the applicant or her counsel collected the certificate of delay. Further, that from the date when the applicant applied for the proceedings on 12th May 2022 until 30th October 2024 when her advocate was informed that the proceedings were ready, a total of 891 days had elapsed, and the applicant had not shown what she or her counsel did to pursue the expeditious typing of the proceedings.
8. It is her contention therefore that the applicant and her counsel were indolent; that it had taken the applicant a further 26 days before filing the present application; that the period of 891 days and a further 26 days was inordinate; and there was no competent application before the Court as the affidavit in support was not sworn by the applicant.
9. The respondent further avers that the applicant's intended appeal is not arguable. She contends that the draft memorandum of appeal erroneously states that the applicant intends to appeal against the judgment delivered on 24th April, 2022, while the relevant judgment was delivered on 26th April, 2022; that the draft memorandum of appeal seeks an irrelevant order to the dispute at hand as the impugned judgment did not decide any issue of liability between the parties, nor did the dispute between the parties pertain to issue of a road accident and/ or a deceased person; that the main issue in dispute between the parties before the trial court was the extent of encroachment by the respondent into the applicant's plot No. 63 and not ownership thereof. She argues that there is no need to disturb the status quo since all parties are now enjoying their respective plots after a re- survey was carried out by the County Government of OlKejuado, which is the authority that allocated the plots. The respondent therefore asks that the present application be dismissed with costs.
10. The parties hereto have filed submissions dated 3rd February 2025 and 13th December, 2024 respectively in support of their positions on the appeal, which I have read and considered alongside the depositions of the parties.



11. The sole issue for determination in this application is whether I should grant the applicant extension of time to file her memorandum and record of appeal. Before addressing this issue, however, I need to address the question of the competency of the application raised by the respondent, the basis of this challenge being that the affidavit in support is sworn by the applicant's advocate. Learned counsel, Mr. Ooko, who has sworn the affidavit in support of the application, is and, from his averments, has been, the applicant's advocate on record. He is therefore well versed in the matters that he deposes to, which are well within his knowledge and competence as the applicant's advocate on record. Consequently, I do not see any basis for the complaint by the respondent in this regard. I therefore turn to consider whether or not I should exercise discretion bestowed on the Court under rule 4 in favour of the applicant.
12. Rule 4 of this Court's Rules gives the Court discretion to extend time for the doing of any act under the Rules. The factors that the Court should consider in determining whether or not to extend time are well settled. The Court should consider, firstly, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted-see *Fakir Mohammed v. Joseph Mugambi & 2 others* [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04)) and *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 and *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231.
13. Turning to the facts of this case, the judgment of the first appellate court was delivered on 26th April 2022. The applicant filed a notice of appeal dated 6th May 2022, and requested for typed proceedings by a letter dated 12th May 2022. Under rule 84 of the Rules of this Court, the applicant should have filed her memorandum and record of appeal within 60 days from 6th May 2022, However, since she had lodged a letter requesting for the proceedings on 12th May 2022 and did obtain a certificate of delay issued on 19th November 2024, the delay in lodging the memorandum and record of appeal which was, admittedly, a lengthy 891 days, cannot be blamed on the applicant. The further period of 26 days between receipt of the certificate of delay and the filing of this application cannot be said to be so inordinate as to deny the applicant the exercise of the Court's discretion in her favour.
14. Also to be considered are the chances of the appeal succeeding if the orders sought are granted. This factor is qualified in our jurisprudence by the use of the word 'possibly' on whether the Court should consider it in determining whether to exercise discretion in favour of a party. This is because, in an application such as this, a single judge should refrain from entering into a consideration of the merits of an appeal. What I believe it is safe to say in this case is that there may be grave doubt about the chances of the applicant's appeal succeeding. This being a second appeal, I have not been able to discern any issue of law in the applicant's draft memorandum of appeal. Secondly, while the appeal before the first appellate court related to alleged encroachment by the respondent on the applicant's land parcel, curiously, the applicant states that she will be asking this Court to 'set aside' the judgment on liability and 'the deceased be held 100% liable for the causation of the accident.' This may be a result of careless drafting, but also an indication that the applicant, or her counsel, has not sufficiently thought through her application.
15. Nonetheless, given that the delay in the matter has been sufficiently explained, and noting that the respondent avers that the parties are each occupying their respective parcels of land after re-survey by the County Government and the respondent will therefore suffer no prejudice, I will allow the applicant to file and serve her record of appeal, for what it is worth in the circumstances. The memorandum and appeal shall be filed and served within 30 days of today.
16. There shall be no order as to costs.



DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL, 2025

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

