Katram Limited & another v Waithaka (Civil Application E460 of 2024) [2025] KECA 985 (KLR) (30 May 2025) (Ruling)

Neutral citation: [2025] KECA 985 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E460 OF 2024

W KARANJA, JA

MAY 30, 2025

BETWEEN

KATRAM LIMITED ..... 1ST APPLICANT

RAHAB MUKIAMA ..... 2ND APPLICANT

AND

JOHN ROKI WAITHAKA ..... RESPONDENT

(Being an application for extension of time to file an appeal out of time from the Judgment and Orders of the Environment and Land Court at Nairobi (L. Mbugua, J.) dated on 27th October 2022 in ELC Case No. 177 of 2010)

RULING

1. The applicants herein were the defendants in ELC Suit No. 177 of 2010 filed against them by the respondent herein. The court entered judgment in favour of the respondent and declared him the legitimate owner of all that parcel of land known as LR No. 20530; that any purported allotment of the said land to any of the applicants was wrongful, illegal, null and void. The applicants were also ordered to pay the respondent Kshs.1,500,000.00 as general damages for trespass on his property. The judgment in the matter was rendered on 27th October 2022 by L. Mbugua, J.

2. The applicants, through their counsel then on record, filed a Notice of appeal dated 7th November 2022. They did not file the record of appeal as prescribed, hence this application in which they seek enlargement of time to file the record of appeal. The application, dated 10th September 2024 is premised on twelve grounds on its face and is supported by an affidavit sworn by Rahab Mukiama (the 2nd applicant) on even date.

3. The reason given by the respondent for the said delay was that their erstwhile advocates informed them that the appeal had been filed and it was not until 3rd September 2024 that she discovered that the

record of appeal had not been filed. The 2nd applicant deposes that being dissatisfied with the way their former advocates had handled the matter, she instructed the firm of Mutunga Justus Associates, who are currently on record to take over the matter. They did so and filed this application seeking extension of time.

4. According to the applicant, the delay involved is not inordinate, and the same has been sufficiently explained. She states that mistake of her former counsel should not be visited on her. She also urges that they have a good appeal with high chances of success and the court should grant the orders prayed.

5. The depositions are emphasized in the applicants' submissions dated 25th October 2024 wherein they also cite the relevant case law. They aver that the respondent will not be prejudiced if the application is allowed. They also assert that since the subject of the appeal is title to land, they should be given an opportunity to be heard. Their averment that they have a good appeal with chances to success is based on the fact that the defence was ordered to close its case before the 2nd applicant could testify.

6. The application is opposed through the replying affidavit sworn by Evans Wachira, the respondent's counsel on record, dated 22nd May 2025. According to Mr. Wachira, the applicants were all along aware of the matter. After filing the Notice of appeal, they filed an application for stay of execution dated 20th January 2023 which was heard and conditional stay was granted on 13th April 2023. Counsel deposes that there was communication between him and counsel for the applicants as they sought to reach an out of court settlement, which counsel for the respondent declined. Several emails to that effect are annexed to the affidavit.

7. The applicants were ordered to deposit Kshs.1,500,000 in an escrow account in order to get the stay orders but they failed to comply and the orders lapsed after six months. It was only after their delaying tactics failed that they decided to file this application. Counsel reiterated that applicant's former counsel collected the typed proceedings on 1st March 2023 and there was no reason why they had not filed the record of appeal. Learned counsel maintained that the application before the Court is an abuse of the court process, and further that the applicants appeal is "outrightly hopeless" and the application should be dismissed.

8. Learned counsel for the respondent also filed submissions dated 23rd May 2025 in which he has expounded the contents of his replying affidavit.

9. I have considered the application, the rival affidavits, the submissions and the applicable law, particularly as espoused in the authorities cited by both parties. The law in this area is settled and authorities abound in regard to the principles the court should apply before allowing extension of time. This is notwithstanding the fact that the discretion under Rule 4 of the Court of Appeal Rules is unfettered. However, like with any other unfettered discretion, the same must be exercised judiciously and not capriciously or on a whim.

10. Rule 4 of the Court of Appeal Rules does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving an objective decision in the circumstances of each case. The case of *Leo Sila Mutiso -vs- Hellen Wangari Mwangi [1999] 2 EA 231* which is the locus classicus, laid down the parameters as follows:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first 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 also *Muringa Company Ltd -vs- Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019

11. Applying the principles set out in the foregoing cases, my view of this matter is that it can be disposed of on the first two requirements. Firstly, it is not denied that a Notice of appeal in this matter was filed and served on time. It also comes out from the record that the typed copies of the proceedings were applied for and collected on 1st March 2023. A certificate of delay was collected later on 6th April 2023. The applicants had until 7th June 2023 to file the record of appeal. They did not do so. Instead, they waited until 10th September 2024, one (1) year three (3) months to file this application. I am not persuaded that this delay is not inordinate, given the nature of the subject matter.

12. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [*2018] eKLR while addressing this issue this Court stated:

> "The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

13. Whether the delay involved is inordinate or not depends on the peculiar circumstances of each case. The reason given for the delay in this case is that the applicants believed that their erstwhile advocates had filed the appeal, and learnt much later that the appeal had not been filed. I have some difficulty in believing this explanation. I say so because between delivery of the judgment and the filing of this application, there were active proceedings going on in respect of the subject matter. An application for stay of execution was filed, heard and conditional stay granted. The applicants failed to comply with the conditions given by the court and instead they tried to engage the respondent's counsel in discussions to agree to an out of court settlement. Counsel must have been doing so on behalf of his clients.

14. The applicants appear to say that they did not know that their counsel had not filed the record and it was on that basis that they relieved him of the brief to handle the matter. I have gone through the proceedings before the trial court, and without saying much, I can state that the applicants' conduct of causing delay and changing advocates at critical moments speaks for itself. Given the circumstances of this case, my conclusion is that fifteen (15) months' delay in this matter is inordinate.

15. I also find the explanation given for the delay implausible. I believe that counsel's conduct was on instructions of the applicants. This application appears to have been an afterthought after the respondent declined to entertain an out of court settlement and after the conditional orders of stay of execution lapsed.

16. On whether they have a good appeal, I acknowledge that it is not my place to say at this point whether the intended appeal has good chances of succeeding. However, from the proceedings and the judgment of the trial court, the applicants will have a herculean task in convincing the court to rule in their favour. The fact that the subject matter herein is land does not absolve the applicants from demonstrating the requirements set out in the above cited cases.

17. Ultimately, I find this application devoid of merit and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2025.

W. KARANJA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.