



**Njoki v Macharia (Civil Application E371 of 2024)
[2025] KECA 807 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 807 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E371 OF 2024**

SG KAIRU, JA

MAY 9, 2025

BETWEEN

PETER GITHUA NJOKI APPLICANT

AND

MICHAEL MWANGI MACHARIA RESPONDENT

(An application for leave to appeal against the ruling of the Environment and Land Court of Kenya at Thika (J.G. Kemei, J.) dated on 20th March 2024 in ELC Cause No. E091 of 2022)

RULING

1. In his application dated 17th July 2024 made under Rule 4 of the *Court of Appeal Rules*, the applicant, Peter Githua Njoki, seeks leave to appeal out of time against the ruling of the Environment and Land Court (ELC) at Thika (J.G. Kemei, J.) delivered on 20th March 2024 in Thika ELCA No. E091 of 2022. In that ruling, the ELC dismissed the applicant's appeal against a ruling of the Magistrate's Court delivered on 5th October 2022 dismissing his application dated 11th August 2022 in which he had sought, among other reliefs, an order to be joined in the suit; setting aside of ex-parte judgment in favour of the respondent; and an order of injunction to restrain the respondent from evicting, trespassing or interfering with the property known as Title Number Ruiru East/ Juja East Block 2/ 4047 (the property).
2. The context in brief is that the applicant and the respondent claim ownership of the property. The applicant's case, it would appear, is that one Peter Mburu Waithaka purchased the property at a public auction conducted in exercise of statutory power of sale; and that the applicant in turn purchased the property from said Peter Mburu Waithaka. The respondent, asserting ownership of the property successfully sued the said Peter Mburu Waithaka in Thika MCELC 3 of 2021 and obtained orders of eviction affecting the applicant, who was apparently not privy to the suit, in a judgment delivered on 15th June 2022. The respondent then moved to evict the applicant, an occupant of the property



whereupon the applicant filed an application dated 11th August 2022 seeking to be joined in the suit; an order to set aside the judgement, and orders to restrain the respondent from evicting him from the property. That application was dismissed by the Magistrate’s Court in ruling delivered on 5th October 2022 on grounds that the court was functus officio.

3. Aggrieved by that ruling, the applicant then lodged an appeal before the ELC, being Thika ELC Appeal No. 91 of 2022. The ELC upheld the decision of the Magistrate’s Court delivered on 5th October 2022 in its ruling (which is strictly speaking a judgment) delivered on 20th March 2024 which is the subject of the intended appeal.
4. Under Rule 77(2) of the Court of Appeal Rules, the applicant was required to lodge his notice of appeal within 14 days. He should have done so on or before 3rd April 2024 but did not do so and hence the present application.
5. In support of the application, learned counsel Ms. Wanjiru Njihia holding brief for Mr. Muchai for the applicant relied on the grounds in support of the application, the applicant’s supporting affidavit and the applicant’s written submissions. In essence, the explanation offered by the applicant is that the judgment of the ELC was initially scheduled for delivery on 18th January 2024 but delivery was adjourned; that when it was finally delivered on 20th March 2024 “another counsel” held brief for his advocates but he was not informed of the outcome; that he only learnt of the outcome when he was served with a notice dated 6th June 2024 to vacate the property; that by that time, the time for appealing had lapsed; that thereafter his advocates experienced difficulties in uploading the present application on the Case Tracking System (CTS) which was rejected on various grounds; that the delay involved in presenting the application was inadvertent and mistakes of his advocate should not visited on him; that the intended appeal raises triable issues and there is a risk that he will be evicted from the property before he gets an opportunity to ventilate his appeal.
6. In opposition to the application, learned counsel for the respondent Mr. Charles Kimathi relied on his replying affidavit and written submissions which he briefly orally highlighted. The respondent contends that there is no plausible explanation for the inordinate delay in filing the intended appeal or in taking action; that excusable delays are delays that are unforeseeable and beyond the control of a party, and in that regard the decision of the Court in *Njoroge v Kimani*, Civil Application No. Nai. E049 of 2022 [2022] KECA 1188 (KLR) was cited; that the applicant was only jolted to action after being served with the notice dated 6th June 2024 to vacate the property; that indolence of counsel is not enough to warrant extension of time as the applicant has not demonstrated the efforts he made to follow up the matter with his advocates; and that the application is a delaying tactic made in bad faith and should be dismissed.
7. To succeed, the applicant has the burden to satisfy the Court that he is deserving of the exercise of the Court’s discretion. As the Supreme Court stated in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, Supreme Court Application No. 16 of 2014, extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other considerations include whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay. Public interest is also a relevant consideration.
8. With those principles in mind, what is the applicant’s explanation? As already noted above, his explanation, which the respondent contends is not a plausible explanation for the delay, is that he only become aware of the judgment of the ELC after he was served with the notice to vacate the property



dated 6th June 2024; that the date for delivery of the judgment was initially scheduled for 18th January 2024 when the matter was adjourned to a date to be given on notice; that he did not receive notice of delivery and his advocates, who were represented during delivery by an advocate who held their brief, did not inform him; that he only became aware of the judgment upon being served with notice to vacate the property.

9. It is noteworthy that during the delivery of the judgment by the ELC on 20th March 2024, the record shows that one “Kololo” held brief for Miss. Wanjiru Njihia for the applicant. Ms. Wanjiru Njihia is the same one who appeared before me during the hearing of the present application. Therefore, the claim by the applicant in his supporting affidavit blaming his “former advocates” for failure to communicate is not entirely clear and raises questions.
10. Nonetheless, the applicant has demonstrated through exhibits to his affidavit namely numerous extracts from the judiciary CTS, showing failed attempts by his advocates to upload documents onto the system from late June 2024 which were declined for different reasons.
11. I am prepared to give the applicant the benefit of doubt and accept, as a reasonable explanation, that he only became aware of the delivery of the judgment when he was served with the notice dated 6th June 2024 to vacate the property. He appears to have taken steps in the same month to instruct his advocates to apply for extension of time who then appear to have made blunders in their attempts to upload documents unto the CTS system resulting in further delays.
12. Considering also that the dispute involves ownership of the property, I reluctantly exercise the court’s discretion in favour of the applicant and grant the orders sought. The applicant is directed: to file and serve the notice of appeal within 7 days of delivery of this ruling; to file and serve the memorandum and record of appeal within 30 days from the date of delivery of this ruling.
13. The applicant shall bear the respondent’s costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025.

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

