



**Marionga v Agriculture Finance Corporation & 2 others (Civil Application
E160 of 2024) [2025] KECA 821 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 821 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E160 OF 2024
HA OMONDI, JA
MAY 9, 2025
[IN CHAMBERS]**

BETWEEN

JOSEPHINE NYABONYI MARIONGA APPLICANT

AND

AGRICULTURE FINANCE CORPORATION 1ST RESPONDENT

**NIXON ODHIAMBO OKUMU T/A JONI CONSULT AUCTIONEER 2ND
RESPONDENT**

ISMAEL NYABUTI JOSEPH 3RD RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal and Record of Appeal out of time in an intended Appeal from the Judgment and decree of the Environment and Land Court at Kisii (Mutungi J.) dated 26th day of October 2018 in Case No. 49 of 2011)

RULING

1. The background to this matter is that Josephine Nyabonyi Marionga, the applicant herein had filed Kisii Environment and Land Court (ELC) Petition No. 9 of 2011 wherein she had sought a declaration that the sale of LR Central Kitutu/Daraja Mbili by Public Auction on 17th March, 2011 was irregular, unlawful, null and void and violated her constitutional rights; general damages and an order inhibiting the 3rd respondent's title pending hearing and determination of the petition; a permanent injunction issue restraining the 3rd respondent from evicting her from the suit property until the petition is heard and determined; and costs.
2. The matter was dismissed on 26th October 2018 on grounds that there was no demonstration of any constitutional violations; and the applicant, aggrieved by the outcome, is desirous of appealing against



that decision; and she ought to have filed and served the Notice of appeal within 14 days after delivery of the judgment as provided under rule 77 (2) of this *Court's Rules* that:

- (2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.
3. Thereafter the party seeking to appeal is required to file and serve the record of appeal within. However, this did not happen, and by an application dated 31st October 2024, she seeks orders to extend the period of time within which to file and serve the Notice of Appeal and the Record of Appeal out of time; and that time be given for filing the said Notice of Appeal and Record of Appeal.
4. In the grounds on the face of the application, as well as her supporting affidavit of even date, she explains that she was sick for a long time; then Covid 19 pandemic set in March 2020 leading to restriction of movements; and Judiciary scaling down its operations; this had a ripple effect on the pace at which she could move the process. She was acting pro se and as fate would have it, the advocate who had offered pro bono services fell sick as well; and maintains that the delay is not inordinate; and inadvertently the Notice of Appeal was not served in a timely manner.
5. It is the applicant's contention that she has a valid appeal touching on serious constitutional and legal issues regarding Notice under section 96 (2) of the *Land Act* v. Notice under Rule 15 (d) of the *Auctioneers Act*, 1997. The applicant's greatest concern is that the respondents have begun the execution process which will involve evicting her and the children from the only home they know; and that it also raises exceptional matters of public interest regarding public auction and disposal of land.
6. In opposing the application by a replying affidavit dated 12th March 2025, sworn by Ismael Nyabuti Joseph, the 3rd respondent herein, he describes the application as an afterthought which ought to be dismissed, as the applicant participated in various suits filed in relation to the suit property Kisii CMC ELC No. 40B of 2019 and Kisii ELCA NO. E003 of 2023.
7. In urging this Court to grant the prayer sought, the applicant points out that the factors to consider in such an application are basically:
 - i. The reason for the delay.
 - ii. The length of the delay.
 - iii. The possible chances of the appeal succeeding.
 - iv. Whether any prejudice will be occasioned to the respondent.

Drawing from the decision in *Imperial Bank Ltd (In Receivership) & Anor v. Alnashir Papat* Civil Application No 395 of 2017, and *James Muchene Ngei v. Joseph Ngei & Anor*, Civil Appeal (Application) E359 of 2021, the applicant submits that she has met the threshold to warrant extension of time.

8. As to whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time, the 3rd respondent draws from the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR that, to argue that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. In this regard the respondent refers to Section 79G of the *Civil Procedure Act* which provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period



any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

9. This Court is also urged to be guided by the principles set out by the Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v. IEBC and 7 Others* [2014] eKLR which enunciated the principles applicable in an application for leave to appeal out of time to include:
 - a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis.
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted.
 - f. Whether the application has been brought without undue delay.
10. The 3rd respondent points out that Judgment was delivered on 26th October, 2018 yet the applicant filed the instant application six years after the date of judgment delivered by the trial court, which is inordinate and inexcusable. Further, that the reasons given for the delay are not substantiated, hence the application should be dismissed.
11. In the supplementary affidavit the applicant's counsel alludes to the principles of a fair hearing under the *Constitution of Kenya*; and also refers to the Maputo Protocol regarding the protection of the marginalized, elderly women; and women with physical disabilities; and special protection for women in distress.
12. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought. Rule 77 of the *Court of Appeal Rules* requires an intended appellant to lodge the Notice of Appeal, before or within fourteen (14) days of the decision, then within 7 days of lodging the notice of appeal, serve copies thereof on all persons directly affected by the appeal- this did not happen. The discretion that I am called to exercise in the determination of this application is unfettered and is provided under Rule 4 of the *Court of Appeal Rules* 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.
13. Rule 4 of the *Court of Appeal Rules* does not provide factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in



achieving a ‘just’ decision in the circumstances of each case. The case of *Leo Sila Mutiso v. 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.”

14. In *Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees*, Civil Application No.190 of 2019 observed that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

15. Judgment was delivered on 26th October, 2018. The applicant claims she was sick for a prolonged period, the applicant has annexed treatment records dated 5th May 2023 from Kisii Referral Hospital recommending for a CT Scan giving a history of illness in March 2019 and November 2019; and a discharge summary from the Aga Khan Hospital showing that she had a fracture of the ankle and hypertension, she was admitted in hospital on 21st May 2022 and discharged on 25th May 2022. Whereas these documents demonstrate that the applicant was ill intermittently, there are no treatment records to confirm that the illnesses were prolonged, or that she was bed ridden for six years, and the reference to the global vagaries visited on humanity by the C19 virus, is a technicoloured sob story intended to tug at emotions. The applicant has simply tried to make a tapestry of patchwork citing inadvertence, illness, indigence – none of which have any concrete base.
16. As for the attempt to cling to regional instruments to remedy what is definitely indolence- the less said, the better. The upshot is that nothing has been presented as to persuade this Court to exercise its discretion in favour of the applicant. The delay is inordinate, the reasons are merely curry flavoured but do not carry enough spice, consequently the application lacks merit and is dismissed with costs to the 3rd respondent.

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

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

