



**Mtana v Munga & 8 others (Civil Application E028 of 2023)
[2025] KECA 803 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 803 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E028 OF 2023**

SG KAIRU, JA

MAY 9, 2025

BETWEEN

JOHNSON ROBERT MTANA APPLICANT

AND

KATANA MWAMUNDA MUNGA 1ST RESPONDENT

MATHIAS HAMISI MWAMUNDA 2ND RESPONDENT

CHARO MWAMUNDA MUNGA 3RD RESPONDENT

JACKSON KASIWA MWAMUNDA 4TH RESPONDENT

MWAMUNDA CULTURAL CENTRE 5TH RESPONDENT

MWAMUNDA CBO 6TH RESPONDENT

THE NATIONAL LAND COMMISSION 7TH RESPONDENT

**THE LAND REGISTRAR, KILIFI DISTRICT LAND REGISTRY 8TH
RESPONDENT**

THE HONORABLE ATTORNEY GENERAL 9TH RESPONDENT

(An application to file and serve a Notice of Appeal out of time against the Judgment of the Environment and Land Court of Kenya at Malindi (M. A. Odeny, J.) dated 25th January, 2023 in ELC Petition No. 13 of 2021)

RULING

1. In his application dated 31st August 2023 brought principally under Rule 4 of the Court of Appeal Rules, the applicant Johnson Robert Mtana seeks leave “to file a Notice of Appeal out of time against the Judgment” of the Environment and Land Court (ELC) at Malindi (M. A. Odeny, J.) dated 25th



- January 2023 in ELC Petition No. 13 of 2021. In that judgment, the ELC dismissed, for want of jurisdiction, his petition in which he sought, among other reliefs, a declaration that he is the owner of Chembe/Kibabamshe/152 (the property).
2. Based on the material before the Court, the applicant's case before the ELC was that he was the registered owner of the property until 2017 when the 7th respondent, National Land Commission (NLC), determined that the property be repossessed from him and re-allocated to the community; that pursuant to that determination the 8th respondent, Land Registrar, purported to irregularly cancel the applicant's title to the property.
 3. In its judgment dismissing the suit, the ELC stated that the applicant participated in the proceedings before the NLC; that under Rule 29 of the National Land Commission (Historical Land Injustices) Rules, 2016, the applicant was required, if aggrieved by the decision of the NLC, to have appealed the same within 28 days; that the applicant did not do so; that three years later, he filed the petition before the ELC. In that regard, the learned Judge posed the question "why did it take the petitioner 3 years to notice that his rights had been violated yet he participated in the proceedings that gave rise to the recommendations by the National Land Commission?" The Judge concluded that the applicant did not follow the laid down procedures for appeal as provided for and "hence this court does not have jurisdiction to hear and determine this petition."
 4. Aggrieved, the applicant is now before the Court with the present application seeking extension of time to challenge that judgment. In his affidavit in support of the application, the applicant deponed that judgment was delivered on 25th January 2023; that by a letter dated 15th February 2023, his advocates applied for copies of the proceedings and judgment; that after delivery of the judgment he "suffered a strange sickness where [he] got paralyzed from waste downwards and have been unable to use [his legs]"; that tests carried out could not explain his condition and has "never been able to walk since January 2023"; that he has been undergoing physiotherapy sessions "done traditionally at home"; that it was for that reason that he was unable to instruct his advocates to file and serve a notice of appeal; that by the time he was able to read the judgment of the ELC, the time allowed to file a notice of appeal had lapsed; and that the intended appeal is arguable.
 5. In his written and oral submissions in support of the application, learned counsel for the applicant Mr. Kaingu reiterated the contents of the supporting affidavit maintaining that the delay involved is not inordinate; that the applicant was unable to read and appreciate the reasons for the decision of the ELC in good time to enable him instruct his advocates to lodge the appeal and that this is a proper case for the Court to exercise its discretion in favour of the applicant.
 6. Cited in support of the application are decisions of the Court in Charles Gitonga Gakuu & 2 Others v Lee Eun Hee [2003] eKLR; Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 of 1997 among others.
 7. The application is opposed by the 1st to 6th respondents and the 8th and 9th respondents. In replying affidavits sworn by Jackson Kasiwa Mwamunda, the 1st respondent on behalf of himself and the 2nd to 6th respondents, and by Gabriel Ojwang on behalf of the 8th and 9th respondents, it is deponed that the application, filed 7 months after delivery of the judgment by ELC is an afterthought; that there is "no single medical evidence attached to the application" to support the claim by the applicant that he suffered unknown paralysis; that there is lack of honesty on the part of the applicant in stating that it was upon receipt of the certified copies of the proceedings and judgment that he was able to draft the Notice of Appeal, yet the judgment was delivered on 25th January 2023 and the same delivered to the parties on the same day; that furthermore, as early as, and by a letter dated 15th February 2023, the advocates for the applicant applied for proceedings.



8. In their respective written and oral submissions, learned counsel Ms. Amina and Mr. Ojwang for the 1st to 6th respondents and the 8th and 9th respondents respectively urged that in considering the application, the Court should consider, among other factors, the period of delay; reasons for the delay; arguability of the appeal, degree of prejudice; and the importance of compliance with time limits. Cited in support include decision in *Mombasa County Government v Kenya Ferry Services & Anor* [2019] eKLR; *Mwangi v Kenya Airways Limited* [2003] KLR; and *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] KECA 701(KLR). In that regard, it was submitted that the delay of 7 months is inordinate and has not been satisfactorily explained and neither is the explanation convincing; that it is not demonstrated, absent grounds of intended appeal, that the same is arguable.
9. The 7th respondent neither responded to the application, nor appeared on the date of the hearing, despite service of hearing notice on 4th February 2025.
10. I have considered the application, the affidavits and the submissions. The principles applicable in applications of this nature are established. Although the Court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time, that discretion should be exercised judicially. In *Fakir Mohamed v Joseph Mugambi & 2 Others* [2005] eKLR (Civil Application No. Nai. 332 of 2004 Waki, JA stated as follows:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor”.
11. In the same vein, the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, Supreme Court Application No. 16 of 2014 stated that 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.
12. As already noted, the judgment of the ELC the subject of intended appeal was delivered on 25th January 2023. Rule 77(2) of the Court of Appeal Rules requires that a person who desires to appeal to the Court shall lodge a notice of appeal within 14 days after the date of the judgment. The applicant should have done so by 8th February 2023 but did not do so. However, by a letter dated 15th February 2023, the advocates for the applicant applied to the Deputy Registrar of the ELC for typed proceedings. The present application was not filed until 31st August 2023. From 8th February 2023, by when the notice of appeal should have been filed, to 31st August 2023 when the present application was made is a period of over six months. The explanation given by the applicant is that he suddenly became paralyzed after delivery of the judgment. However, sympathetic and empathetic as one might be, the applicant did not at all produce any material to support that claim. To echo the words of the respondents there is “no single medical evidence attached to the application”. Although the applicant stated in his affidavit that he gets treatment at home in the form of physiotherapy, he also stated that he went for tests after



he became unwell, and it would not have been difficult to exhibit material in that regard to assist the Court. In short, beyond the applicant's unsupported statement, there is not much for the Court to go on in that regard.

13. The other reason given for the delay is that the applicant was not able to read and appreciate the judgment until much later. He does not say when he read it. In response, it was asserted by the respondents that upon delivery of the judgment on 25th January 2023, the same was transmitted to the parties on same day. As already noted, the advocates for the applicant applied by letter dated 15th February 2023 for typed proceedings, implying that by that time a decision had already been taken to challenge the judgment. Is it that the applicant was able, despite his ailment, to instruct his advocates to apply for proceedings but was unable to instruct them to lodge a notice of appeal?
14. It is therefore difficult to appreciate why a notice of appeal or an application for extension of time could not have been filed at the same time or soon thereafter and had to wait until the end of August 2023. All in all, the explanation given by the applicant for the delay is not in my view convincing. It bears repeating, as stated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, (above), that a party seeking extension of time has the burden to lay a basis to the satisfaction of the court to enable the Court to exercise its discretion in his favour. The applicant has not done so in this case.
15. Consequently, the applicant's application dated 31st August 2023 fails and is hereby dismissed with costs to the respondents, except the 7th respondent which did not participate in the application.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

