



REPUBLIC OF KENYA



KENYA LAW
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**Wang'ara v Wang'ara & 13 others (Civil Application
69 of 2017) [2025] KECA 1230 (KLR) (23 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1230 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 69 OF 2017
A ALI-ARONI, JA
JUNE 23, 2025**

BETWEEN

JASON GITIMU WANG'ARA APPLICANT

AND

MARTIN MUNENE WANG'ARA 1ST RESPONDENT

JOHN MUTUGI 2ND RESPONDENT

SIMON MUCHIRI 3RD RESPONDENT

FRANCIS GITHAKA 4TH RESPONDENT

JOHN KARATU 5TH RESPONDENT

JOSEPH MUCHIRI 6TH RESPONDENT

JOSEPH MURIITHU WANG'ARA 7TH RESPONDENT

LAZARIUS GITHAKA 8TH RESPONDENT

CHARLES WARUI 9TH RESPONDENT

SIMON NDEGE 10TH RESPONDENT

FRANCIS MUTURI 11TH RESPONDENT

FRANCIS GACHOKI 12TH RESPONDENT

PETER GAKIRI 13TH RESPONDENT

ONESMUS MUTHIKE 14TH RESPONDENT

(An application for extension of time to file appeal out of time and leave to appeal against the Judgment and Order of the High Court of Kenya at Kerugoya (Olao, J.) delivered on 26th August 2013 in Page 3 of 10 ELC Case No. 278 of 2013)



RULING

1. Before the court is an application by way of notice of motion dated 16th June 2017, brought under Rules 1(2), 4, 39, 41, 42 and 43 of the Court of Appeal Rules 2010, Section 72 of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, seeking an extension of time to file and serve the notice of appeal; and for leave to appeal out of time.
2. The application is predicated on the grounds on the face of the application, which are replicated in the supporting affidavit of the applicant Jason Gitimu Wang'ara, sworn on 16th June 2017, where he deposed that having been dissatisfied with the judgment of the Environment and Land Court, he instructed his counsel to appeal; his counsel lodged a notice of appeal dated 1st October, 2013; he thereafter personally followed up with the court registry at the Kerugoya court for copies of the typed proceedings which did not bear fruits; he sought the intervention of the Office of the Ombudsman; further the respondents obtained ex-parte orders without effecting service on the applicant or his advocates on record; obtained orders and as a result, Land Parcel No. Mwea/Tebere B/61 was subdivided into other parcels being Mwea/Tebere B/4291, Mwea/Tebere B/4292, Mwea/Tebere B/4293, Mwea/Tebere B/4294, Mwea/Tebere B/4295, Mwea/Tebere B/4296, Mwea/Tebere B/4297, Mwea/Tebere B/4298, Mwea/Tebere B/4299, Mwea/Tebere B/4300, Mwea/Tebere B/4301 and Mwea/Tebere B/4302; he has an arguable appeal with high chances of success; unless this application is allowed the applicant's constitutional right to recover his land which he has held since the year 1959, more than 57 years will be frustrated; the respondents will suffer no prejudice if the application is allowed; there is a real threat if stay is not granted as the applicant and his large family will be rendered landless and homeless; he is of an advanced age; and that he tried his best to follow up on the proceedings to enable him proceed effectively with this appeal.
3. The application is further supported by the affidavits of the applicant's son, Julius Kibonge Jason, and that of the applicant's counsel, now on record, Emmanuel Kyalo Mutinda, both sworn on 16th June 2017, reiterating the averments in the applicant's affidavit.
4. The respondents opposed the application and filed a replying affidavit, sworn by Martin Munene Wang'ara, the 1st respondent, on his behalf and of the 2nd, 3rd, 4th, 6th, 7th, 8th, 9th, 12th, 13th and 14th respondents, sworn on 12th September 2017. He deposed that the application is defective as the 5th respondent is deceased and no substitution has been done; 4 years had lapsed since the impugned judgment which was delivered on 26th August 2013; the delay is inordinate and the reasons for the delay not sufficiently explained; further; that there is no proof to support the claim that the court delayed in supplying the certified copies of the proceeding and judgement; further the applicant failed to follow the process provided for in law in following proceedings and involved the Office of the Ombudsman on 21st March, 2017 through a phone call alleging that he applied for proceedings on 17th September, 2013 yet there is no supporting document that he made the application for proceedings on that date; further the request for proceedings made by Nduku Njuki & Co. Advocates was un-procedurally as the firm was not on record for the applicant; though it was brought to the applicant attention by the 1st respondent's advocate that his notice of appeal dated 16th October, 2013 was irregular and filed out of time he chose to do nothing about it until 4 years later; judgement was effected and subdivision of the suit property as a result the respondents stand to suffer great prejudice if the applicant is allowed to appeal out of time, as they have now settled on their portions and developed them; and that a draft memorandum of appeal demonstrating his grounds of appeal was not annexed to the application.



5. The applicant in a further affidavit sworn on 2nd November 2017, deposed that he was not aware of the demise of the 5th respondent and had moved the relevant court for substitution; he annexed a certificate of delay from the court which explains the delay; further he stated that he instructed the firm of Nduku Njuki & Co. Advocates on 17th September 2013 to apply for certified copies of the proceedings, which they did, he used all means to ensure that he received the proceedings and the certificate of delay.
6. Learned counsel for the applicant filed undated submissions, and cited *Leo Sila Mutiso vs. Hellen Wangari Mwangi* [1999] 2 EA 231, *Fakir Mohamed vs. Joseph Mugambi & 2 Others* [2005] eKLR & *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR, wherein this Court held that the decision to extend the time for appealing is essentially discretionary, and the court in deciding whether to grant an extension of time, will take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice to the respondents if the application is granted, in support of the contention that the applicant provided a reasonable explanation for the delay in failing to comply with the strict time frames prescribed under the law. Learned counsel further submits that a perusal of the record of appeal and the memorandum of appeal will reveal arguable grounds of appeal, which ought to be considered by the court.
7. Learned counsel submitted further that the deviations and lapses by the applicant were not intentional and that all the documents have now been filed, and the matter is ready for hearing. In support of this contention, he cited the case of *Nicholas Kiptoo Arap Korir vs. IEBC & 6 Others* [2013] eKLR. He urged the court to be guided by the overriding objective in allowing the applicant to participate in these proceedings and prosecute his appeal.
8. The respondents filed submissions dated 20th June 2025, and a list of authorities dated 12th September 2017. Learned counsel referenced the case of *Nicholas Kiptoo Korir Arap Salat vs. IEBC* [2014] eKLR, where the Supreme Court settled the principles that guide courts in the exercise of discretion to extend time.
9. Learned counsel submitted that the applicant was not candid in his explanation for the delay. He seems to blame his advocate for filing the notice of appeal late, and at the same time, blames the court for taking long to supply the proceedings; the applicant has not denied that he was aware of the judgment and was present in court when it was read; hence, he should have filed his appeal within 60 days from the date when the notice of appeal was lodged.
10. Learned counsel further submitted that the applicant, knowing fully well that he had instructed the firm of *Wangari & Co. Advocates*, failed to instruct counsel to file the notice of appeal. Furthermore, the applicant has not explained the specific time he instructed the firm of *Nduku Njuki & Co. Advocates*, and the court needs to ascertain whether the advocate is the one who delayed or whether blaming the advocate is merely an excuse.
11. Further learned counsel submitted that it is trite law that after judgment is delivered, one cannot change one's advocate without leave of the court. The applicant did not seek leave of the court when changing from *Wangari & Co. Advocates* to *Nduku Njuki & Co. Advocates*, hence the author of his own misfortune. Furthermore, the applicant did not seek leave to appeal from the trial court. Counsel submits that the reasons for the delay in filing the appeal have not been sufficiently explained.
12. Further learned counsel contended that the property has since been subdivided, new owners have taken possession and settled on their respective portions, and they will suffer great prejudice as their mode of settlement will be interfered with; there is no public interest that can warrant the court to extend the time in this matter; further the applicant has not demonstrated that he has an arguable appeal; some respondents have died, and the appeal against them has abated.



13. This Court enjoys an unfettered discretion under Rule 4 of the Court’s Rules to enlarge time within which an act is to be done. Rule 4 stipulates that:

“The Court of Appeal may; on such terms as may be just, by order, extend the time limited by these rules, or by any decision of the court or 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.”

14. The judgment herein was entered on 26th August 2013. There is on record a notice of appeal dated 1st of October 2013; which ought to have been filed by 9th September 2013; no copy of the letter bespeaking proceedings was annexed, however, the letter from the Ombudsman and the certificate of delay acknowledge that the proceedings were sought in a letter dated 18th September 2017. The notice of appeal was filed 21 days late, and the appeal was filed significantly after the allowed time. The applicant blames his counsel, who was then on record, for failing to lodge the notice of appeal on time, and the court for failing to receive certified copies of the proceedings and judgment on time.

15. On the first issue, the applicant has demonstrated, in various ways, including following up on proceedings himself and having to change counsel, that his lawyer on record was not diligent, hence the delay in acting on instructions. He has proved with zeal his intention to appeal to this Court. Lawyers do make mistakes that have ramifications on their clients. Although a litigant ought to be vigilant, when a lawyer is involved, one hopes that the correct steps are being taken, and a litigant should not be easily reprimanded for a lawyer’s mistake. In the case of *Belinda Murai & 9 Others vs. Amos Wainaina* [1979] eKLR, the court had this to say of counsel’s mistake:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel, though in the case of a junior counsel, the court might feel more compassionate. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes, which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view, which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said Change is inevitable. In a progressive country, change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress.”

16. The applicant has produced a certificate of delay indicating that, in a letter dated 17th September 2013 and filed on 18th September 2013, they sought typed proceedings. The proceedings became available for collection on 17th April 2017, nearly four (4) years after the judgment was read. The applicant cannot be blamed more particularly against the backdrop of an intervention from the Ombudsman.
17. The applicant had demonstrated issues that he would like the court to consider, which appear arguable, without the court going into their merit. On the other hand, it has not been shown how the orders sought in this application will prejudice the respondents. Furthermore, regarding the death of respondents, the alleged change of counsel, and the appeal not being meritorious, all of these issues



may be addressed by the court; however, this is not the proper forum. Before the court today was the issue of the extension of time.

18. Consequently, I allow the prayers sought in the application dated June 16, 2017.

19. Costs to abide by the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF JUNE, 2025.

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

