



**Busienei v Busienei & another (Civil Application E028 of 2024)  
[2025] KECA 1053 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1053 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E028 OF 2024  
MA WARSAME, JA  
JUNE 12, 2025**

**BETWEEN**

**SELLY J BUSIENEI ..... APPLICANT**

**AND**

**RICHARD K BUSIENEI ..... 1<sup>ST</sup> RESPONDENT**

**JACKSON K CHEBETT ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to file an appeal against the judgment of the Environment and Land Court at Eldoret (E.O Obaga, J.) dated 19th September, 2023 in Civil Case No. 235 of 2014)*

**RULING**

1. Selly J. Busenei (hereinafter ‘the applicant’) has moved this Court by way of a Notice of Motion dated 14<sup>th</sup> May, 2024, brought pursuant to Rule 4, 5, 41, 49, 51, 55, 56 and 58 of this Court’s Rules (hereinafter ‘the Rules’) seeking the following orders: -

“ ...

2. That this honourable be pleased to grant leave to the applicant to file and serve a notice of appeal upon the respondents out of time
3. That upon granting prayer (2) above, the time be named within which the said notice be filed and the very grace period do operate as stay of execution
4. The propose appeal be heard on priority basis”

2. Briefly, the dispute began in the year 2014 when the 1<sup>st</sup> respondent entered into a sale agreement for the sale of LR No. 6459/4 measuring 108.64 acres to the 2<sup>nd</sup> respondent after showing him the said



parcel on the ground. Subsequently, after the 2<sup>nd</sup> respondent had extensively developed the land, the 1<sup>st</sup> respondent alleged he intended to sell LR No. 6459/5. The applicant denied knowledge of the transaction and filed a suit seeking to nullify the sale transaction for, inter alia, lack of spousal consent and CFC Stanbic Bank Limited exercised its statutory power of sale and sold LR No. 6459/5.

3. On 9<sup>th</sup> April 2019, a partial judgment was entered to the effect that the 1<sup>st</sup> respondent would refund the 2<sup>nd</sup> respondent a sum of Ksh.34,340,000/= within sixty (60) days. In default of such refund, the 1<sup>st</sup> respondent would transfer 50 acres from the lower part of the suit land to the 2<sup>nd</sup> respondent. The partial judgment further provided that claims of lost profits by the applicant and the 1<sup>st</sup> respondent would be determined by the trial court.
4. The resulting determination by Chemitei, J. was that the partial judgment entered on 9<sup>th</sup> April 2019 settled the issue of ownership and lack of consents given that the 1<sup>st</sup> respondent failed to refund the aforementioned purchase price and the 2<sup>nd</sup> respondent has been compensated by transfer of LR No. 6459/5. As for the prayers of mesne profits the court found the applicant's claim for mesne profits was not warranted and allowed the 2<sup>nd</sup> respondent's counterclaim for Kshs.16,300,000/ for developments which he carried out in the suit property.
2. This decision is the subject of this application and what the applicant seeks to stay.
3. The grounds adduced in support of the application and which appear on its face are that:- the applicant sued the respondents before the trial court seeking to declare the transaction between the respondents leading to the sale of the suit land Parcel No. 6459/4 being a matrimonial property void for lack of various consents, that the court issued directions that judgment would be delivered on 13<sup>th</sup> July 2023 and on the said date parties were informed that judgment was not ready and that judgment would be delivered on notice, that the applicant discovered that judgment was delivered on 19<sup>th</sup> September 2024 in the 2<sup>nd</sup> respondent's favour upon being issued with a taxation notice on 15<sup>th</sup> April 2024, that by the time she informed her Advocates the time to file the notice of appeal had lapsed.
2. The applicant further states that the appeal has high chances of success, that the applicant will suffer great prejudice and lose her proprietary rights if the judgment of Kshs.16,300,000/= is executed against her and lastly if stay of execution is not granted she is likely to be evicted from the land which she has been in lawful ownership and possession.
3. In response, the 2<sup>nd</sup> respondent filed a replying affidavit dated 14<sup>th</sup> June 2024 stating that the application is an attempt by the applicant to breathe life into her case after a delay of 8 months, that the applicant did not make any enquiries on the status of her case, further no explanation has been offered on the delay of 1 month of filing the instant application since they made the discovery of its existence on 15<sup>th</sup> April 2024 and there is no threat of eviction since the payment is for the sum of Kshs.16,300,000/=. Moreover, the 2<sup>nd</sup> respondent is not a man of straw and can reimburse the applicant in the event the appeal succeeds.
4. I have considered the application, the supporting affidavit, annexures thereto, submissions by counsel and the law. The unfettered discretion of this court in an application under rule 4 can only flow when an applicant explains to the satisfaction of the court that they are entitled to the exercise of discretion in their favour. 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, (possibly) 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 factors. (See *Mwangi v Kenya Airways Ltd* [2003] eKLR)



5. The applicant alleges that the ensuing delay was occasioned by failure on the part of the court to inform her of the outcome of the judgment which was rendered in the absence of both parties. She failed to lodge a Notice of Appeal as required and only found out about the judgment when she was served with a notice of taxation on 15<sup>th</sup> April 2024. I have examined the response by the 2<sup>nd</sup> respondent and note that the he has not refuted that the Judgment notice was not served or communicated by the court to the parties.
2. Again, I have perused the attached draft memorandum of appeal and I find that it raises pertinent issues that warrant consideration by the court. In any event they delay of about one month to file the instant application was not inordinate.
3. I am therefore inclined to allow the application and order that the appeal be filed within 60 days. Costs to the 2<sup>nd</sup> respondent.

**DATED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF JUNE, 2025.**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

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

Signed.

**DEPUTY REGISTRAR**

