



**Sayo & 5 others v Gichuru (Civil Application E409 of 2023)  
[2024] KECA 27 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 27 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E409 OF 2023  
M NGUGI, JA  
JANUARY 25, 2024**

**BETWEEN**

**MARY MORIPET SAYO & 5 OTHERS ..... APPLICANT**

**AND**

**STEPHEN KIRUMBA GICHURU ..... RESPONDENT**

*(Being an application for extension of time to file and serve a notice of appeal from the judgment and order of the Environment and Land Court at Kajiado (C.Ochieng J.) dated 4th March, 2020 in Kajiado ELC 262 of 2017 (Previously Machakos HCCC No. 218 of 2012))*

**RULING**

1. The applicants have filed the application dated 21<sup>st</sup> August 2023 brought under section 3, 3A and 3B of the *Appellate Jurisdiction Act* and rule 4 of the *Court of Appeal Rules, 2010*. They seek orders, first, that the firm of Wachira Gachoka & Co. Advocates be allowed to come on record; secondly, that the time limited for service of a notice of appeal be extended; that the applicants be allowed to file a notice of appeal and the notice of appeal be deemed to have been filed and served within the extended period; that a stay of execution order be issued against enforcement of the orders of the court in Kajiado ELC No. 262 of 2012; the appeal, once filed, be heard on priority basis, and that the costs of the application do abide the outcome of the appeal.
2. The application is based on the grounds set out on its face and is supported by an affidavit sworn by Mary Moripet Sayo on 21<sup>st</sup> August, 2023. The applicants aver that the judgment that they seek to appeal from was delivered on 4<sup>th</sup> March, 2020. Since they were aggrieved by the decision, they instructed the firm of B.J Sawe & Co. Advocates. They contend that it is only recently that they have discovered the failure by that advocate to file the notice of appeal within the statutory timelines, and they contend that the mistake of their advocate should not be visited on them. They assert that the intended appeal is founded on sound grounds, and should the impugned judgment be executed, the appeal will be rendered nugatory.



3. The application is opposed. In an affidavit sworn on 29<sup>th</sup> August, 2023, the respondent, Stephen Kirumba Gichuru, avers that the application has been filed after an inordinate delay. He avers that the applicants are indolent, having slept on their rights for over 3 years and 5 months. The respondent avers further that despite having been served with the decree of the trial court through the area chief and being required to comply within 90 days, the applicants failed to do so, thus the respondent moved the trial court for enforcement of the decree and judgment through an application dated 15<sup>th</sup> July, 2020. He further avers that the respondents were summoned by the Deputy County Commissioner on 25<sup>th</sup> May, 2023 to show cause why they should not be evicted from the suit property, but they failed to honour the summons.
4. The applicants filed submissions dated 6<sup>th</sup> September, 2023 while the respondent filed submissions dated 11<sup>th</sup> September, 2023 which I have read and considered.
5. I observe that the application before me is an omnibus application seeking not just extension of time but also orders of stay of execution and for allowing a new advocate to come on record. Given the different rules and considerations relating to these other orders, I will confine myself to the prayer for extension of time which is a pre-requisite for consideration of the other prayers sought- one cannot seek stay of execution of a judgment when there is no valid notice of appeal or appeal relating to the judgment sought to be appealed from.
6. The court has discretion, under rule 4 of this [Court's Rules](#), to extend time, on such terms as it thinks just, for the doing of any act authorised or required by the Rules. In doing so, the Court is required to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted- see *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application Nai. 251 of 1997 and [Donald O. Raballa v Judicial Service Commission & another](#) [2018] eKLR.
7. In [Fabim Yasin Twaba v Timamy Issa Abdalla & 2 others](#) [2015] eKLR the Supreme Court laid out some general principles with respect to extension of time and in doing so, stated as follows:
 

“As regards extension of time, this Court has already laid down certain guiding principles. In the *Nick Salat case*, it was thus held:

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”
8. In the present case, judgment was delivered on 4<sup>th</sup> March, 2020. Under rule 77(2) of the [Rules](#) of this Court, the applicants should have lodged their notice of appeal within 14 days of the 4<sup>th</sup> of March 2020. Instead, they have filed the present application seeking extension of time to file the notice. The application, and the notice they ask this Court to deem as duly filed, are dated 21<sup>st</sup> August, 2023, more than three years after the date of the judgment they seek to appeal against.
9. The applicants blame their previous advocates for the failure to file the notice of appeal on time, contending that they have just learnt that their previous advocates did not file the notice. They also seek leave to replace the said advocates.
10. In his affidavit in opposition to the application, the respondent avers that he served the decree dated 12<sup>th</sup> March 2020 and the judgment on the applicants, but they took no action. He then filed an application dated 12<sup>th</sup> July 2020 for enforcement of the decree, which was also served on the applicants. He has



annexed to his affidavit evidence of service of these documents on the applicants. It appears that the applicants were only moved to act after notice of their intended eviction was served upon them in May 2023, more than three years from the date of the judgment, and from the date when they were required to file their notice of appeal. Even then, they took a further three months from the date of service with the summons from the Deputy County Commissioner dated 25<sup>th</sup> May 2023 before approaching this Court for extension of time.

11. The period of three years is an inordinate length of time for parties interested in pursuing an appeal to wait before taking action. Blaming counsel for the delay is not an acceptable reason to justify the exercise of the Court's discretion in favour of the applicants. The material before the Court, indeed, does not bear out the applicants' argument that the delay was as a result of failure by their counsel to take action. The applicants had ample notice about the judgment; the decree was served on them personally; the application for eviction orders was also served on them; and it seems that they only roused themselves three months after the summons from the Deputy County Commissioner.
12. A final consideration in an application such as this is (possibly), the chances of the appeal succeeding. The applicants have not annexed a draft memorandum of appeal to their application. They have, however, set out in the affidavit in support of the application some five or so grounds that they wish to raise on appeal: that the trial court erred in not finding that there was no sale agreement between the 1<sup>st</sup> defendant before it (one Parsitau Ole Sayo) and one Joseph Muigai Wanene, the person found to have sold the suit land to the respondent; that there was no valuable consideration between the said Wanene and the 1<sup>st</sup> defendant; and in failing to find that the applicants had been in continuous possession of the suit property prior to and after 1988. It is not the duty of this Court to analyse these proposed grounds and weigh their possibility of success, save to note that a perusal of the decision of the trial court does not reveal these as the issues the respondents raised before it.
13. Further, given the three-year delay, it would be prejudicial to the respondent, who has had a judgment in his favour for the last three years with no indication, until a few months ago, that it was subject to a challenge, and who has litigated against the applicants for more than 12 years, the suit having been filed in 2012, to grant the orders that the applicants seek.
14. Accordingly, I find that the application dated 21<sup>st</sup> August, 2023 is without merit, and it is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

