



**Kitati & another v Kithongo (Civil Application E553 of 2023)
[2024] KECA 144 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KECA 144 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E553 OF 2023
DK MUSINGA, JA
FEBRUARY 16, 2024**

BETWEEN

MUINDE MASILA KITATI 1ST APPLICANT

DANIEL MASILA 2ND APPLICANT

AND

PETER NZIOKA KITHONGO RESPONDENT

(An application for extension of time within which to file and serve an appeal against the whole Judgment and Order of the Environment and Land Court at Makueni (Mbogo, J.) dated 26th January 2023 in ELC Case No. 80 of 2018)

RULING

1. The applicants’ Notice of Motion dated 20th November 2023 seeks extension of time to file a record of appeal from the judgment of Mbogo, J. delivered on 26th January, 2023 in ELC Case No. 80 of 2018.
2. The application was supported by an affidavit sworn by the 2nd applicant who stated, inter alia, that following delivery of the trial court’s judgment, which they were not satisfied with, they instructed their advocate to file a notice of appeal, which he did on 6th February 2023; that on 30th January 2023 their advocates also applied for certified copies of the judgment, proceedings and the decree; that the said documents were not supplied in time, hence a certificate of delay dated 8th September 2023 was given to their advocates; that the dispute between the parties is over parcels of land known as Makueni/ Nguu Ranch/1066 and 1067 (suit properties) which they occupy.
3. The applicants believe that their intended appeal has high chances of success. They contend that the documents and titles that the respondent relied upon to assert his ownership of the suit properties were fraudulently obtained, and the trial court did not consider historical injustices that were committed against them.



4. The hearing notice for 13th February 2024 was served on 2nd February 2024 by way of email. The respondent’s advocate did not file a replying affidavit or submissions. That notwithstanding, I am duty bound to determine the application on its merits.

5. The factors that this Court considers in an application for extension of time were well summarized in *Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustee* [2020] eKLR as follows:

“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. In considering the last principle, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

6. The applicants’ advocates filed the notice of appeal in time. They applied for certified copies of the proceedings, judgment and decree but there was delay by trial court in providing the said documents. The trial court issued a certificate of delay dated 8th September 2023. In my view, the delay has been well explained.

7. The applicants contend that the intended appeal has high chances of success. It is not for me to determine that issue, it will fall upon the bench that will hear the appeal. All I can state is that considering the two main grounds of appeal that have been identified by the applicants, the intended appeal is not frivolous.

8. Whereas the respondent has legitimate expectation that he should enjoy the fruits of his judgment, that right has to be balanced against the applicants’ constitutional right of appeal, which shall be extinguished unless this Court grants leave to appeal out of time. The applicants should not be driven out of the seat of justice for no fault of their own because it is the trial court that delayed in supplying them with the necessary documents to enable them mount an appeal.

9. For these reasons, I grant the order sought in this application.

The memorandum and record of appeal should be filed and served within fourteen (14) days from the date hereof. The costs of this application shall be costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

