



**Ngugi & 2 others v Kihui (Civil Application E536 of 2023)
[2024] KECA 140 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KECA 140 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E536 OF 2023
DK MUSINGA, JA
FEBRUARY 16, 2024**

BETWEEN

LUCY WANGUI NGUGI 1ST APPLICANT

DAVID NDUNGU KAMAU 2ND APPLICANT

COSTA MWANGI MUTHONI 3RD APPLICANT

AND

MARY WAMBUI KIHUI RESPONDENT

(An application seeking extension of time to file a notice of appeal against the Judgment and Decree of the Environment and Land Court at Nairobi (Komingoi, J.) dated 5th October 2023 in ELC Case No. 881 of 2013)

RULING

1. The applicant's notice of motion dated November 10, 2023 brought under rule 4 of this [Court's Rules](#) seeks extension of time to file a notice of appeal from the judgment of Komingoi, J. that was delivered on October 5, 2023.
2. The 1st respondent, in her affidavit filed with authority of the other applicants, states, *inter alia*, that the dispute before the trial court was over a parcel of land known as LR No. Dagoretti/ Thogoto/T.430 (suit property), which they have occupied since , but which the respondent claimed was hers by virtue of its allocation to her in 2010; that their former advocates, M/s Wokabi Mathenge & Company, did not notify them about delivery of the judgment until October 31, 2023; that thereafter they raised some money and instructed another firm of advocates, Gitari Barrison & Company, to file this application; and if this application is not granted they will suffer great prejudice as they will be evicted from the suit property.



3. The respondent opposed the application. In her replying affidavit she stated, *inter alia*, that the impugned judgment was delivered on October 5, 2023 in the presence of the applicants' advocates and therefore the applicants are deemed to have been aware of it from that date; that there is no reasonable explanation for the delay in filing the notice of appeal; that she will be prejudiced if this application is granted because continued litigation shall deny her the fruits of the judgment; that the dispute was first instituted before the Kikuyu Land Disputes Tribunal in 2011; and that taking all the relevant factors into consideration, the application ought to be dismissed.

4. The parties filed their submissions and I have perused the same.

Rule 4 of this [Court's Rules](#) states as follows:

“4. The Court 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 of 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.”

5. Some of the factors that this Court has to take into account in an application of this nature were set out in [Muringa Company Limited v 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 trial court delivered the impugned judgment on October 5, 2023. Although the respondent states that the applicants' advocate was in court when the judgment was delivered, I have no reason to doubt the applicants' averment that they were notified of its delivery on October 31, 2023 when the 14 days' statutory period for filing a notice of appeal had already lapsed. Thereafter, the applicant's decided to instruct another firm of advocates to represent them, and that took them about 10 days, since this application was filed on November 10, 2023.

7. The delay is not inordinate, and has been well explained. The applicants have been in occupation of the suit property since 1993, and unless the order sought is granted, they will have no opportunity to exercise their constitutional right of appeal and may be evicted.

8. While I appreciate the respondent's right to enjoy the fruits of her judgment, that right must be balanced against the constitutional right of appeal, which should not be denied to a litigant, except for very clear reasons and factors that militate against grant of the same, which are not manifest in this application.

9. For these reasons, I allow the application dated November 10, 2023. Consequently, I direct that the notice of appeal be filed and served within ten (10) days of delivery of this ruling, and the record of appeal be filed and served within 30 days from the date hereof. The costs of the application shall abide the outcome of 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.

