



Njeri wa Muthoni ((Administratrix of the Esate of Naomi Muthoni Ngware)) v Kahuthu & another & another ((Suing as Trustees of the Kenya Evangelical Lutheran Church)) (Civil Application E533 of 2023) [2024] KECA 143 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KECA 143 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E533 OF 2023
DK MUSINGA, JA
FEBRUARY 16, 2024**

BETWEEN

**NJERI WA MUTHONI (ADMINISTRATRIX OF THE ESATE OF NAOMI MUTHONI NGWARE) APPLICANT
(ADMINISTRATRIX OF THE ESATE OF NAOMI MUTHONI NGWARE)**

AND

**BISHOP ZACHARIA KAHUTHU, MATHEW M DAMBALA . 1ST RESPONDENT
NAIROBI CITY COUNTY) 2ND RESPONDENT
(SUING AS TRUSTEES OF THE KENYA EVANGELICAL LUTHERAN CHURCH)**

(An application for enlargement of time to file and serve a notice of appeal from the judgment of the Environment and Land Court at Nairobi (Komingoi, J.) dated 21st September, 2023 in ELC Case No. 154 of 2014)

RULING

1. The applicant's Notice of Motion dated 27th October 2023 seeks extension of time to file and serve the notice of appeal from the judgment of Komingoi, J. delivered on 21st September 2023 in ELC Case No. 154 of 2014. The applicant also prays that the notice of appeal filed on 13th October 2023 and served on the same day be deemed as duly filed.
2. In her affidavit in support of the application, the applicant, who is the administratrix of the estate of the late Naomi Muthoni Ngware, (deceased), states that until her death in 1991, the deceased was the registered proprietor of a parcel of land known as L.R No. Dagoretti/Riruta/1035 (the suit property); that some years ago the 1st respondent filed suit against the deceased seeking to be declared owner of



the suit property by adverse possession; and that the trial court found in favour of the 1st respondent in its judgment.

3. The applicant further states that though she was informed of delivery of the said judgment on 22nd September 2023, she fell ill shortly thereafter and was not able to instruct her advocates to file a notice of appeal in time; that she so instructed them on 13th October 2023 when she got better, and the notice was filed and served on the same day, which was 8 days outside the statutory time frame.
4. The applicant also states that the intended appeal has high chances of success; that the delay was not inordinate and was caused by her sickness; and that the estate of the deceased shall be highly prejudiced if the application is not allowed, since it will have no opportunity to challenge the impugned judgment.
5. The 1st respondent opposed the application. In an affidavit sworn by Johnes Kutuk ole Metiyio, a Bishop at the Kenya Evangelical Lutheran Church, he stated, inter alia, that the applicant was not one of the administrators of the deceased's estate and therefore she had no legal capacity to file the application; that there is no documentary evidence to support the applicant's alleged sickness; that the estate of the deceased has two administrators, and in the absence of one of them the other could have given instructions for filing of a notice of appeal; and, the notice of appeal that was filed and served on 13th October 2023 was filed out of time and without leave and ought to be struck out.
6. The parties filed their respective submissions, which I have considered.
7. 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.”

8. 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.”

9. Before I consider the merits of this application, I need to dispose of the issue of the applicant's locus to institute this application that was raised by the 1st respondent. The applicant filed a further affidavit where she explained that she was previously known as Joy Njeri Ngware, which is one of the names appearing in the Certificate of Confirmation of Grant that was relied on by the 1st respondent in alleging that the applicant is not an administratrix of the deceased's estate. For that reason, I am satisfied that she has legal capacity to institute these proceedings.



10. Turning to the relevant factors for my consideration, the applicant has set out several proposed grounds of appeal. I do not think that the intended appeal is frivolous. That is all I wish to say regarding the chances of success of the intended appeal.
11. The delay in filing the notice of appeal was 8 days, which is not inordinate. The applicant was sick around the period that the judgment was delivered. In her further affidavit, she has attached a medical report from her doctor. She has also demonstrated that her co-administratrix, Lucy Wairimu Ngware, died on 17th September 2018, leaving her as the sole administratrix of the deceased's estate. The applicant was therefore the only person who could instruct her advocate to file an appeal, which is commenced by way of a notice of appeal, and which is required to be filed within 14 days from the date of delivery of a judgment.
12. If the applicant is not granted leave to file an appeal out of time, she will suffer great prejudice because she will have been denied an opportunity to exercise her constitutional right of appeal in respect of a land dispute. On the other hand, the 1st respondent will not suffer any serious prejudice since the church is in occupation of the suit property and the appeal can go on without interfering with its operations.
13. Taking all these factors into considerations, I am inclined to exercise my discretion in favour of the applicant. I therefore grant leave to the applicant to file a notice of appeal out of time, and since the same has already been filed and served, it is hereby deemed to have been filed and served in time. The record of appeal should be filed and served within 30 days of delivery of this ruling. The costs of this 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.

