



REPUBLIC OF KENYA



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**Ogola & another v Muga (Civil Appeal (Application) E120 of 2023)
[2024] KECA 136 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 136 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E120 OF 2023
JM NGUGI, JA
FEBRUARY 9, 2024**

BETWEEN

PETER OJWANG OGOLA 1ST APPELLANT

JAMES ODHIAMBO NDEGE 2ND APPELLANT

AND

MATIUS BWANA MUGA RESPONDENT

(Being an Application for leave to file Record of Appeal out of time from the Judgment of Environment & Land Court at Nyamira, (Kamau, J.) dated 25th March, 2022 in ELC Case No. 64 of 2021 Formerly Kisii ELC Case No. 99 of 2014)

RULING

1. The application dated 19th September, 2013 contains a single substantive prayer thus:

“That the intended Appellant/Applicant be granted leave to file Record of Appeal against the whole Judgment of the Honourable Justice Mugo Kamau dated 25th March, 2022, Nyamira ELC 64 of 2021 out of time. by filing and serving the Record of Appeal annexed to this application.”
2. Briefly, the background is as follows. The respondent filed a suit against the applicants originally at Kisii High Court in 2014 seeking for a declaration that he is the registered proprietor of the parcel of land known as LR North Mugirango/Magwagwa/II/1089 (the suit property). He also sought for eviction orders against the applicants who, he claimed, had trespassed into the suit land without any lawful justification.
3. The applicants filed their defence and a counter-claim sounding in customary trust. They sought a declaration that they were lawfully in occupation of the suit property and an order cancelling the registration of the suit property in the respondent’s name.



4. The suit was eventually transferred to the ELC Court in Nyamira where Mugo Kamau, J. heard it to conclusion. He rendered his judgment on 25th March, 2022 allowing the respondent's suit and, in the same vein, dismissing the applicants' counter-claim. The learned Judge ordered the applicants to be evicted from the suit property.
5. The applicants were dissatisfied with the judgment of the ELC. Through their lawyer, the applicants timeously lodged a Notice of Appeal dated 13th April, 2022. However, the applicants did not file their record of appeal within the statutory timelines. The present application is aimed at regularizing that. They say that they did not file their record of appeal on time because they were engaged in out-of-court negotiations with the respondent. They say that, in fact, they believed that they had entered into an enforceable post-judgment agreement settling their dispute with the respondent. However, the applicants say that the respondent subsequently spurned the post-judgment agreement and went back to Court to have them evicted. The respondent was, the applicants say, successful in executing the judgment in spite of the post-judgment agreement.
6. Consequently, the applicants say that they were compelled to dust-off their appeal. As evidence of this, the applicants have annexed a document entitled "In the Matter of Settlement Agreement for a Refund of Kshs. 250,000/- in Respect of Land Parcel No. North Mugirango/Magwagwa II/1089". It appears to be dated 21st September, 2022 and appears to be signed by both the applicants and the respondent (although the month on the face of the document is illegible in the electronic version in the Court's possession).
7. The applicants say that it was the fact that they believed that they had settled the matter out of court that they did not timeously file the record of appeal. They, therefore, blame the out of court negotiations for the delay; and pray that they be allowed to file the record of appeal out of time. They say that they have an arguable appeal because the learned Judge was wrong to dismiss their counter-claim.
8. The application is opposed. The respondent filed a Replying Affidavit deposed on 11th October, 2023. The respondent says that no good reason has been given for the delay and vehemently denies that there were any post-judgment negotiations between himself and the applicants. He says that he was always keen to enforce the favourable judgment he got. He points to his Notice of Motion application dated 8th March, 2023 before the ELC whose main prayer was to evict the applicants in accordance with the impugned ELC judgment. That application, the respondent contends, was allowed by the ELC in a ruling dated 11th May, 2023; and that pursuant to that ruling, he proceeded to evict the applicants. He finds it incredulous, therefore, that the applicants would claim that they were negotiating out of court yet he was in court bitterly fighting to evict them.
9. The respondent believes that the application is an afterthought; and that the reasons advanced for the delay are not reasonable; and further that the present application is just an attempt to forestall his enjoyment of the fruits of the judgment he got at the ELC.
10. Only the applicants filed written submissions as directed by the Honourable Deputy Registrar. Their submissions, in large part, reiterated their depositions in the supporting affidavit. They cited the following cases: *Vishva Stone Suppliers Company Limited v RSR Stone [2006]* [2020] eKLR; *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR; *Kenya Power & Lighting Company Ltd v Rose Anyango & Another* [2020] eKLR; and *Lawrence Musyoka Ndambuki & another v Daniel Kato Ndambuki* [2018] eKLR. Some of these are cases decided by the High Court and are not be directly applicable or binding. The thrust of their argument, though, is that the delay in this case is not inordinate; and that the respondent will not be prejudiced by allowing the extension of time.



Finally, they argue that arguability of an appeal is a factor to consider in an application for extension of time; and that they have demonstrated that their appeal is arguable. They point out that they have attached a Memorandum of Appeal listing eight grounds of appeal which are eminently arguable.

11. Extension of time is governed by rule 4 of the *Court of Appeal Rules*. The Rule provides that:

The Court may, on such terms as it thinks 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."

12. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."

13. In the present case, the impugned judgment was delivered on 25th March, 2022. The present application was filed on 19th September, 2023 – one and a half-years later. The explanation for the delay is that the parties were negotiating an out of court settlement. The respondent contests that there were any such negotiations. Although the respondent is quite vehement in the denial, he does not offer any comment on the purported post- judgment agreement attached to the applicants' application.

14. If the existence of the negotiations and agreement was the dispositive factor, the Court would probably have held in favour of the applicants on a balance of probabilities. Unfortunately, that factor is not dispositive. Even if one were to accept that, indeed, such negotiations took place, the question would arise when it became obvious that they had broken down sufficiently to warrant the applicants to revive their appeal. In my view, the applicants had obvious notice that the post-judgment negotiations had irretrievably broken down on 8th March, 2023 when the respondent filed an application to execute the ELC judgment and evict them from the suit property. As soon as that application was filed, the applicants had unequivocal notice that the respondent did not intend to honour any post-judgment agreement. It was, therefore, incumbent upon them at that point to revive the appeal.

15. Yet, it took another six months for the applicants to take any action at all to regularize their appeal. The applicants have offered no explanation at all for this delay. Hence, even if the Court accepts their explanation for the delay until 8th March, 2023, the Court has no explanation whatsoever for the delay for the period between 8th March, 2023 and 19th September, 2023. Without an explanation for this delay, the Court is unable to exercise its discretion on behalf of the applicants. In the circumstances of this case, I do not think that six months is excusable neglect. The applicants were in the ELC Court actively resisting the respondent's application for eviction. The ruling in that application did not come until 11th May, 2023. It surely must have occurred to the applicants to revive or regularize their appeal during that time. That they did not, and only opted to file the present application on 19th September, 2023 – six months later – creates a palpable sense that the application is an afterthought. In my view, the applicants have not brought themselves within the equitable embrace of Rule 4 of the Court of Appeal Rules.



16. Consequently, the Application dated 19th September, 2023 is for dismissing, and I hereby do so with costs to the respondent.

17. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

