



REPUBLIC OF KENYA



**Khisia & 5 others v Wasike (Civil Application E141 of 2023)
[2024] KECA 405 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 405 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E141 OF 2023**

JM NGUGI, JA

APRIL 26, 2024

BETWEEN

BENSON WAMALWA KHISIA 1ST APPLICANT
ERNEST MUTUNGA KUYA 2ND APPLICANT
JULIUS ASHIKANGA ALUTA 3RD APPLICANT
JOHN NALIANYA SANYA 4TH APPLICANT
JOHN NYONGESA NASIUMA 5TH APPLICANT
ABDALLA MUSA ABD 6TH APPLICANT

AND

**DORCAS INDOMBI WASIKE ALIAS DORIKA INDOMBI
WASIKE RESPONDENT**

*(Being an Application for Extension of time to file Memorandum and Record
of Appeal against the Judgment of the Environment and Land Court at
Bungoma, (Cherono, J.) dated 25th July, 2023 in ELC Case No. 33 of 2014)*

RULING

1. The applicants herein were defendants in Bungoma Environment and Land Court Case No. 033 OF 2014. They were sued by the respondent herein for vacant possession of the land then formerly known as LR No. Bungoma/Naitiri/83 (suit property) and for rectification of all entries in the land register to indicate that the respondent is the *bona fide* proprietor of the suit property.
2. The respondent prevailed at the Environment and Land Court. In a judgment dated 25th July, 2023, the Environment and Land Court ordered the applicants to give vacant possession to the respondent and that the entries in the land register be rectified as prayed in the respondent's plaint.



3. The applicants say that they did not immediately learn of the judgment from their previous lawyer. When they did, they say, they immediately changed lawyers and instructed the new counsel to file an appeal on their behalf. The new counsel, who is presently on record, reacted by filing an application dated 11/08/2023 to the Environment and Land Court seeking, inter alia, for leave to file a Notice of Appeal out of time. The applicants have disclosed that their Environment and Land Court did not grant his prayer although they have not attached a copy of the ruling.
4. It is against this background that the applicant has filed the instant application. The only substantive prayers in the application dated 8th October, 2023 is for the applicants to be allowed to file and serve a Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time.
5. The application is supported by an affidavit which is (wrongly and) jointly sworn by all the applicants. Both on the face of the application and in the supporting affidavit, the applicants make the following points:
 - a. First, that they were not immediately informed about the judgment which was delivered on 25th July, 2023.
 - b. Second, that immediately they learnt about the judgment, they instructed a new lawyer to file an appeal since they were aggrieved by the judgment.
 - c. Third, that their new lawyer immediately approached the Environment and Land Court for extension of time since they were already two days late in filing a Notice of Appeal.
 - d. Fourth, that, in fact, they were only two days late in approaching the Environment and Land Court for relief and that the delay was excusable and not inordinate and should be excused.
 - e. Fifth, that they have an arguable appeal, and that the case involves land over which the parties should be allowed to ventilate to the last permissible forum.
6. The applicants' counsel also filed written submissions and a digest of cases. The respondent has not filed any response to the application. Neither has she filed any written submissions. The Honourable Deputy Registrar directed the applicants' counsel to ensure service on the respondent and file an affidavit of service. The applicants' counsel obliged. I have seen the affidavit of service and I am satisfied that service was effected on the respondent's counsel.
7. I have considered the application, the affidavit in support thereto and its annexures – including the judgment of the Environment and Land Court, and the written submissions by the applicants. The only question for determination is whether the applicants have met the threshold for the exercise of the Court's discretion to grant leave for them to file an appeal out of time.
8. This Court is empowered to grant extension of time under Rule 4 of the [Court of Appeal Rules](#) which 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.”



9. 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 in to 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.”

10. In the present case, the impugned judgment was delivered on 25th July, 2023. There is evidence in the form of an application before the Environment and Land Court, that the applicants’ new advocate acted as early as 11th August, 2023 to get extension of time. It is not clear why the Environment and Land Court declined to grant an extension of time since the ruling is not attached to the applicants’ application. However, what is clear is that the applicants’ delay in acting to perfect their right of appeal was hardly two (2) days. The reason they give for this delay – the fact that they did not immediately learn of the judgment from their previous lawyer and the fact that they had to change lawyers – is eminently plausible and reasonable. It would be monstrously unfair to deny the applicants their right to pursue an appeal merely because of a two-day delay which has been explained in terms which are understandable. I also note that the underlying dispute is about land. As much as possible, where no prejudice incapable of restituting with damages is caused to a respondent, courts try to decide land matters on their substantive merits.

11. Consequently, in the circumstances of this case, I am persuaded that the applicants have sufficiently brought themselves within the equitable embrace of Rule 4 of the *Court of Appeal Rules*. I hereby allow the application dated 8th October, 2023 in the following terms:

- a. The applicants shall file and serve the Notice of Appeal within seven (7) days of today;
- b. The applicants shall file and serve the Memorandum and Record of Appeal within thirty (30) days of today.
- c. There shall be no order as to costs.

12. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

