



REPUBLIC OF KENYA



**Keya & another v Musa (Civil Application E138 of 2023)
[2024] KECA 398 (KLR) (19 April 2024) (Ruling)**

Neutral citation: [2024] KECA 398 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E138 OF 2023**

HA OMONDI, JA

APRIL 19, 2024

IN CHAMBERS

BETWEEN

FRANCIS EYINDA KEYA 1ST APPLICANT

JOHN ORIENYO KEYA 2ND APPLICANT

AND

JUMA MANGALA MUSA RESPONDENT

(An application for extension of time to file and serve a Notice of Appeal and a Record of Appeal out of time from the judgment of the Environment & Land Court at Kakamega (Ohungo, J.) dated 19th September, 2023 in ELC Case No. 136 of 2014)

RULING

1. By an application dated 3rd November, 2023 the applicants, Francis Eyinda Keya and John Orienyo Keya, seek an order of extension of time for filing a Notice and Record of Appeal against the judgment of (D.O. Ohungo, J.) dated 19th September, 2023 in Kakamega ELC No. 136 of 2014; and that costs abide the outcome of the appeal. The applicants had filed a suit for title to a portion of land measuring 8 acres out of the suit land parcel No. Marama/Shinamwenyuli/899 which they claimed to have occupied exclusively, by virtue of the doctrine of adverse possession from 1963 to-date. By a judgment delivered on 19th September, 2023 (Ohungo, J.) the claim was dismissed with costs.
2. Being aggrieved by the said judgment, on the same day, the applicants instructed their then advocates on record, M/s Nandwa & Co. Advocates to immediately appeal against the said judgment; and they believed that counsel had filed a Notice of Appeal and was taking the appropriate steps to progress the appeal. To their utter consternation, upon visiting the offices of M/s. Nandwa & Co. Advocates on



- 24th October, 2023, to check on the progress of the appeal, they learnt that not even filed a Notice of Appeal had been filed, nor had any step been taken in regard to the appeal.
3. The result is that the time within which the applicants ought to have filed their Notice of Appeal against the Judgment has already lapsed on account of what they term as an omission, fault or delay on the part of their former advocates, Messers Nandwa and Co. Advocates. They are now apprehensive that the decree in Kakamega ELC No. 136 of 2014 is due for, and may be executed any time now; which would result in their eviction from the suit land; and this would occasion them irreparable loss and damage, and render the intended appeal nugatory. They have now instructed another firm Messers Akwala and Co Advocates; and plead that they should not be faulted or punished for an error or omission on the part of their lawyers then on record.
 4. The applicants point out that the present application was filed on the 8th November, 2023 a period of less than two months after delivery of the judgment sought to be appealed against, which delay was not inordinate; and that the reason for the delay has been explained. Further, that the respondent will have the opportunity to respond to the intended appeal and will not be prejudiced.
 5. In the replying affidavit dated 17th November 2023, sworn by Juma Mangala Musa the respondent opposes the application, on grounds that the prayers sought are untenable, a waste of courts time and are geared towards delaying justice; that the allegations about a let down by their former advocate on record are not supported by any iota of proof, written or in whichever form, to confirm that instructions to file the appeal had been given; that in any event, under the Appellate Jurisdiction Act a party changing an advocate is required to lodge with the Registrar a notice of the change and serve a copy of such notice which has not been done. The respondent deposes that in any event, he has initiated eviction proceedings, as demonstrated by a demand notice to vacate, dated 2nd October 2023.
 6. I only received the applicants' written submissions. It is the applicant's contention that lack of a Notice of Change of Advocate or leave from the Registrar for such change is irrelevant, as the applicants have not acted through a different Advocate in the present application so, there is no need to file a Notice of Change; and in any event, it is a mere technicality which contradicts Article 159(d) of the *Constitution of Kenya* 2010. Further, that the respondent does also not explain how the issue of the applicants' representation prejudices him; and that the intended appeal raises serious issues of law and public importance including adverse possession and the respondent will not suffer any prejudice as he will have the opportunity to respond to the appeal. The applicant argues that an application is made under Rules 4; and 41 of the *Court of Appeal Rules* which grants this Court unfettered discretion without paying regard to several factors which were set out in various authorities such as *Fakir Mohammed v Joseph Mugambi & 2 others* which was quoted in *Mukunga Njoka v Wanjiku Njoka* (2005) eKLR.
 7. It has been pointed out in various authorities by this Court that extension of time is not a right to a party, rather it is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks extension of time has the burden of laying basis to the satisfaction of the court. In considering the prayer, a court must also take into account whether there will be any prejudice suffered by the respondent if extension is granted; and whether the application has been brought without undue delay. I acknowledge that indeed, the Supreme Court of Kenya in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR set down the guiding principles to consider in the exercise of discretion. One other consideration included by the learned Judge in the case of *Julius Kamau Kitbeka v Waruguru Kitbaki & 2 Others* (2013) eKLR is whether prima facie the intended Appeal/ Appeal has chances of success or is a mere frivolity.
 8. The applicants in their submissions have attempted to explain the delay as an omission and/or mistake on the part of their previous lawyers and not their own fault; and that they acted without undue delay



the moment they realised the state their matter was at. I recognise that the alleged mistake of counsel does not of itself cure a litigant’s own inaction, basically because it is a litigant’s case and not that of his counsel. The primary responsibility to act within the prescribed timelines under this Court’s Rules rests heavily on the litigant’s shoulders. Indeed, with regard to the responsibility of the litigant to follow up their case, Waki, J.A. had this to say in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

9. On the issue as to whether or not the intended appeal has no chance of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of *Athuman Nasura Juma v Afwa Mohammed Ramadhan* [2016] eKLR:

“... this court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge”.

10. I bear in mind the afore-going principles whilst determining this application. In this case, judgment was delivered on 19th September 2023; the Notice of Appeal ought to have been filed within 14 days of the judgment. The instant application was filed on 3rd November 2023. Of course, the applicants have not presented any letter of instruction to their previous advocate, to fortify their claim that they had given instructions. However, to be fair to them, a month after the judgment in October 2023, they visited their previous advocate to follow up on their appeal – this is not contested; and within two months of the date of judgment, they had moved to court to file this application. Indeed, the previous advocate is no longer on record, and in his place, features another firm, albeit holes being poked at the manner in which he has come on record. I think what is critical at this stage is, whether reason for the delay has been adequately explained, and whether thereafter the applicant acted in a timely manner. The issue as to whether the advocate currently on record, came on board procedurally, would not offer an answer regarding the cause of the delay.

11. The other consideration to be borne in mind, relates to whether the respondent will suffer any prejudice. The very fact of attempting eviction is a demonstration that the applicants are on the land, the only action so far taken by the respondent is to send a demand notice regarding their occupation. No prejudice has been demonstrated by the respondent.

12. The delay has been adequately explained, and I do not consider it inordinate and the applicants herein, have made the present application without delay; they have met and satisfied the principles set out for this Court to exercise its discretion in her favour and grant the extension. The applicants are therefore, in my view deserving of the orders sought, to the extent that leave is granted to the applicants to file and serve the Notice of Appeal, and the Record of Appeal, within 14 (Fourteen) days from the date of this ruling. The costs shall abide the appeal.

DATED AND DELIVERED AT KISUMU THIS 19TH, DAY OF APRIL 2024.

H. A. OMONDI

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JUDGE OF APPEAL

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



signed

DEPUTY REGISTRAR

