



REPUBLIC OF KENYA



**Cherono v Kirui (Civil Application E027 of 2024)
[2024] KECA 465 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KECA 465 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E027 OF 2024**

JM MATIVO, JA

APRIL 18, 2024

BETWEEN

LINER CHERONO APPLICANT

AND

CAROLINE CHERONO KIRUI RESPONDENT

*(Being an application for extension of time to institute Appeal against
the decision of Environment and Land Court at Nakuru (Obungo,
J) delivered on 13th July 2018 in Nakuru ELC No. 26 of 2013)*

RULING

1. Vide an application dated 1st March 2024, brought under Article 159 of *the Constitution*, Section 3, 3A and 3B of the *Appellate Jurisdiction Act*, Rule 4, 33, 41(1) (b), 43, 45, 49 and 55 of the *Court of Appeal Rules* 2022, the applicant prays for orders:
 - a. This Honourable Court be pleased to grant leave to the applicant to file the appeal as well as the application to stay execution of judgment and resultant decree out of time together with other consequential order against Nakuru Environment and Land Court Case No. 26 of 2013.
 - b. This Honourable Court be pleased to extend time for filing the appeal against Nakuru Environment and Land Court Case No. 26 of 2013.
 - c. Upon granting prayer 2 and 3 above, this Court be pleased to provide timelines for filing the application and appeal.
 - d. Cost of and incidental to this application be borne by the Respondent.
2. The application is premised on the grounds listed on the face of the application and the applicant's supporting affidavit sworn on 16th October 2023 by Linner Cherono Towett, the applicant herein and



a Further Affidavit sworn on 15th March 2024. The application is opposed by the respondent vide Replying Affidavit sworn on 11th March 2024. Pursuant to the directions by the Deputy Registrar of the Court, the application was dispensed with via written submissions. The applicant's submissions are dated 27th March 2024 while the respondent's submissions are dated 3rd April 2024.

3. The grounds in support of the application are that: - (a) a Notice of Appeal dated 17th July 2018 was timely filed by the applicant's erstwhile advocate M/S Karanja Mbugua & Company Advocate together with a letter bespeaking proceedings dated 16th July 2018; (b) vide ruling dated 15th May 2019 the Superior Court issued orders of stay of execution of Judgment dated 13th July 2018 and the resultant decree pending hearing and determination of the intended appeal; (c) all along the applicant was under the impression that an appeal was filed by his erstwhile advocate, until on 24th February 2024 when the Respondent visited the suit property, LR No. Njoro/Ngata Block 2/7175 (Kirobon A) accompanied by goons claiming ownership of a portion; (d) the respondent acquired the suit property fraudulently since no subdivision was ever undertaken; (e) the delay in filing the appeal has been occasioned by the mistakes of the applicant's previous advocate and the said mistakes should not prejudice the applicant's right of appeal; (f) the intended appeal raises arguable issues that need to be determined on merit as per the applicant's draft Memorandum of Appeal; the Notice of Appeal dated 17th July 2018 has neither been struck out nor deemed as withdrawn; no prejudice will be occasioned to the respondent if the orders sought are granted; the judgment is yet to be fully executed by the respondent as no surveyor has visited the suit property to undertake subdivision.
4. In opposition to the application, the respondent avers that: (a) no appeal was filed within 60 days of filing the Notice of Appeal; (b) execution of the decree and party to party costs was commenced after the lapse of the stay of execution orders issued on 15th May 2019; (c) the decree issued by the Environment and Land Court in ELC Case No. 26 of 2013 has been satisfied and the respondent has legally acquired the title to a portion of the 0.404 Hectares which was excised from the suit property; (d) the applicant ought to have filed the intended appeal on or before 13th September 2018 and as such there is delay of about five (5) years and 6 months in filing the instant application; (e) a litigant has a duty to be vigilant and follow up their case even when represented by counsel; (f) the applicant has failed to demonstrate steps taken to follow up on filing of the appeal; (g) the draft memorandum of appeal does not set out arguable grounds of appeal capable of succeeding.
5. In her submissions, the applicant reiterated the grounds in support of the application and contended that this Court should exercise its discretion in favour of the applicant, since at all material times, the applicant believed that her erstwhile advocate had filed an appeal and the same was pending hearing. Consequently, mistakes of an advocate should not be visited upon her. To buttress her submission, the applicant cited this Court in *Lukas Mwaura Nduati vs John Henry Okeyo Kisumu* Court of Appeal Civil Application No. 111 of 2006 where it allowed an applicant to file an appeal out of time which had been delayed for over one 1 year due to mistakes of counsel.
6. The applicant also contended that the fact that the respondent has already begun the enjoyment of the fruits of the judgment is not a plausible ground to deny her right of appeal. Furthermore, the appellant maintained that this Court has the power to revert the title of the property to its original owner.
7. In her submissions, the respondent reiterated the contents of her replying affidavit and contended that given the applicant's participation in the execution proceedings and coupled with the dismissal of her application for want of prosecution, it is unconvincing for the applicant to blame her erstwhile advocate for the delay.
8. The respondent also submitted that a cursory look at the annexed draft memorandum of appeal reveals that there are no arguable grounds of appeal but rather generalized grounds.



9. In conclusion, the respondent submitted that she stands to suffer prejudice should the instant appeal be allowed since the intended appeal has already been overtaken by events and it would be unfair and unjust, as the decree has already been satisfied and the respondent has already invested in acquiring the title and securing development on the suit land.
10. The applicant seeks the exercise of this Court's discretion to extend time under Rule 4 of the Court of Appeal Rules, 2022 which provides as follows:
- 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 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.
11. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR summed up the applicable considerations as follows: -
- i. Extension of time is not right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
12. The facts of this case are rather straightforward. It is not in dispute that the applicant's notice of appeal was timely filed in court on 17th July 2018 together with a letter bespeaking proceedings dated 16th July 2018 in accordance with the requirements of Rules 75(2) of the *Court of Appeal Rules*, Rules 2010. It is also not in dispute that there has been a delay of 5 years and 6 months in filing the appeal. No certificate of delay has been annexed to demonstrate that the delay could be attributed to the Environment and Land Court Registry.
13. What then is the applicant's explanation for the inordinate delay? It is the applicant's case that all along she was under the impression that her erstwhile advocate had filed the appeal and the same was pending hearing, until 24th February 2024 when the respondent visited the suit property accompanied by goons claiming ownership.
14. The explanation proffered by the applicant probably could have been plausible. However, the credibility of her explanation (if any) was extinguished the moment the respondent demonstrated that the applicant in a bid to forestall execution, she filed an application in Court and even swore an affidavit on 1st September 2022. Consequently, the averments that she became aware her erstwhile advocate had not filed an appeal on 24th February 2024 is highly unconvincing. As a result, the inordinate delay has not been explained.



15. It is the responsibility of a litigant to follow up his/her case. Waki, J.A. had this to say in *Habo Agencies Limited vs. 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.”

16. The applicant has demonstrated that she deserves the exercise of this Court’s discretion in her favour. In conclusion, I dismiss the applicant’ application dated 1st March 2024 with no orders as to costs.

DATED AND DELIVERED AT NAKURU ON THIS 18TH DAY OF APRIL, 2024.

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

