



REPUBLIC OF KENYA



KENYA LAW
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**Mbugua & 79 others v Ngotho & 9 others (Civil Appeal (Application)
E050 of 2023) [2024] KECA 455 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 455 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E050 OF 2023**

WK KORIR, JA

APRIL 12, 2024

BETWEEN

JOHN NJOGU MBUGUA & 79 OTHERS APPLICANT

AND

CHARLES NGARUIYA NGOTHO 1ST RESPONDENT

JOHN GITHIRI NDURO 2ND RESPONDENT

STEPHEN KAGWE 3RD RESPONDENT

NAOMI WARUKIRA GITHENDU 4TH RESPONDENT

PETER KARIUKI KURIA 5TH RESPONDENT

MONICA NJOKI KINYANJUI 6TH RESPONDENT

SAMUEL KAMONDAI 7TH RESPONDENT

DAVID MWAURA NJAU 8TH RESPONDENT

JOSEPH NJAU KAHIGA 9TH RESPONDENT

HARAKA FARMERS CO LTD 10TH RESPONDENT

*(Being an application for leave to file an appeal out of time against
the judgment of the Environment and Land Court at Nakuru (M.
Njoroge, J) issued and dated 12th July 2022 in E&LC No. 161 of 2023)*

RULING

1. Before me is a notice of motion dated 14th June 2023 filed under to rules 4, 41, 49(1) and 55 of the [Court of Appeal Rules](#). The application is itself omnibus as it also seeks stay orders which cannot be



granted by a single judge. Therefore, the prayer that is ripe for my determination is the one brought pursuant to rule 4 seeking the extension of time for filing the record of appeal.

2. The gist of the application is that M. Njoroge, J. of the Environment and Land Court (E&LC) at Nakuru entered judgment on 12th July 2022 in [Case No. 161 of 2023](#) against the applicants and the applicants lodged a notice of appeal dated 18th July 2022 against the said judgment. It is the applicants' assertion that their intended appeal is arguable and also that the applicants are apprehensive that the respondents shall move to execute the decree arising out of the said judgment. The application is supported by the affidavit of Muriithi S. Kiragu sworn on 14th June 2023.
3. The application is opposed through the replying affidavit sworn on 29th June 2023 by Hiram Ng'ang'a. He avers that although the notice of appeal was filed on 18th July 2022, the applicants were yet to file the appeal. According to the respondents, the applicants are time-barred as they did not request for a copy of the trial court proceedings. Further, that pursuant to rule 83 of [Court of Appeal Rules](#), the appeal is deemed to have been withdrawn. Finally, the respondents contend that the applicants have not tendered any explanation as to what occasioned the delay in filing an appeal.
4. The application proceeded by way of written submissions. Counsel for the applicants submitted that the delay in filing the appeal was occasioned by the advanced ages and sickness of some of the applicants which hindered the process of securing instructions to file the appeal. Counsel relied on the case of [Salkas Contractors Ltd v. Kenya Petroleum Refineries Ltd](#) [2004] eKLR to urge that the delay was excusable and prayed that the application be allowed.
5. On the part of the respondents, counsel filed written submissions dated 27th September 2023 through which he urged that the application was incurably defective and ripe for dismissal as it is omnibus and premised on legal provisions not applicable to proceedings before the Court. Turning to the substance of the application, counsel submitted that the applicants had not proffered any reasons for the delay in filing the appeal hence the application should not be allowed. Counsel urged the Court to invoke rule 85(1) of the [Court of Appeal Rules](#) and mark the notice of appeal as withdrawn. Counsel buttressed these submissions by referring to the case of [Mae Properties Ltd v. Joseph Kibe](#) [2017] eKLR and [Peterkeen Mwiu Kimweli & 47 others v. NSSF Board of Trustees](#) [2021] KECA 167 (KLR) in support of the assertion that a notice of appeal dies a natural death if the record of appeal is not filed within the prescribed time. Counsel therefore prayed for the dismissal of the application with costs.
6. As I have already stated, the application before me is omnibus.
Pursuant to the provisions of rule 55 of the [Court of Appeal Rules](#), sitting as a single judge, I can only entertain an application for extension of time under rule 4 and not an application for stay of execution under rule 5(2)(b). I will therefore proceed to exercise my jurisdiction accordingly by considering the application for extension of time only.
7. The principles upon which this Court determines an application for extension of time under rule 4 are well settled. The Court considers the length of the delay, the reason for the delay, and the degree of prejudice that would be occasioned to the respondent were the application to succeed. These principles have been reiterated in previous decisions of the Court, including [Paul Wanjohi Mathenge v. Duncan Gichane Mathenge](#) [2013] eKLR where the Court stated as follows:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the



respondent and interested parties if the application is granted, and whether the matter raises issues of public importanc...”

8. Abiding by the above principles, this application will be determined by answering the question as to whether the applicants have tendered satisfactory reasons for the delay.
9. Rule 84(1) of the [Court of Appeal Rules](#), 2022 required the applicants to file their record of appeal by 17th September 2022 being 60 days from 18th July 2022 when they filed the notice of appeal. The present application being dated 14th June 2023, the delay period is therefore that of about 9 months. In an application for enlargement of time, the applicant is not only required to place sufficient material before the Court which would explain why there was a delay ([Kenya Railways Corporation v. Quicklubes E.A. Limited](#) [2015] eKLR) but also expected to declare and explain the whole period of delay ([County Executive of Kisumu v. County Government of Kisumu & 8 others](#) [2017] eKLR).
10. In the motion and the supporting affidavit, the applicants did not tender any explanation as to why they did not file the record of appeal within 60 days from the date of filing the notice of appeal. Instead, they majored on grounds in support of the application for stay of execution pending appeal. It was in their counsel’s submissions that an attempt was made to explain the delay being that some of the applicants were of advanced age while some were sickly and others deceased hence the process of getting the instructions took time. In my view, the statements made in submissions by counsel cannot play the role of evidence, which evidence in an application of this nature should be tendered through an affidavit. I therefore find that the applicants have not tendered any plausible explanation for the delay to warrant the exercise of my discretion to enlarge time.
11. Before I conclude, I note that counsel for the respondents asked that I invoke rule 85(1) of the [Court of Appeal Rules](#) and mark the notice of appeal as withdrawn. In response to this submission, it is important to note that first, under rule 55(2)(c) of this Court’s rules, an application to strike out a notice of appeal or an appeal is within the remit of the full bench and not a single judge. This provision therefore distinguishes the proceedings in [Peterkeen Mwiu Kimweli & 47 others v. NSSF Board of Trustees](#) (*supra*), which has been cited by the respondents, from the present proceedings. In that case, the matter was before a full bench. Similarly, in [Mae Properties Ltd v. Joseph Kibe](#) (*supra*) which has also been cited by the respondents, the proceedings concerned an application to strike out an appeal and the matter was before a full bench of the Court. I therefore decline the invitation by the respondents to strike out the notice of appeal.
12. Finally, on the issue of costs, I find no reason to depart from the general rule that costs follow the event save for where there are reasons to warrant the court’s departure. The costs of the application are thus awarded to the respondents.
13. In the end, the notice of motion dated 14th June 2023 is devoid of merit and is hereby dismissed. The applicants shall bear the costs of the application.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF APRIL, 2024

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

