



REPUBLIC OF KENYA



**Njoroge & 2 others v Murang'a & 2 others (Civil Application
E026 of 2023) [2024] KECA 1014 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KECA 1014 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E026 OF 2023
AO MUCHELULE, JA
MAY 31, 2024**

BETWEEN

FREDRICK WAINAINA NJOROGI 1ST APPLICANT

CECILIA WAMBUI WATUKU 2ND APPLICANT

GRACE WANGECHI NDUNG'U 3RD APPLICANT

AND

THE DISTRICT SURVEYOR MURANG'A 1ST RESPONDENT

STEPHEN KARIUKI NDUNG'U 2ND RESPONDENT

THE DIRECTOR OF SURVEY 3RD RESPONDENT

(Application for extension of time to file and serve a memorandum and record of appeal out of time in an intended appeal from the ruling by Hon. Lady Justice J.G Kemei dated 28th January, 2021 in the Environment and Land Court at Murang'a in ELC No. 40 of 2020)

RULING

1. The dispute before the Environment and Land Court (J.G. Kemei, J.) was over the boundary of land parcels Makuyu/Makuyu/Block-1/9058 (formerly Makuyu/Makuyu – Block – 1/872, Makuyu/Makuyu – Block 1/871 (formerly Plot No. 1049) and Makuyu/Makuyu – Block 1/870 (formerly Plot No. 1070), belonging to the 1st applicant Fredrick Wainaina Njoroge, 2nd applicant Cecilia Wambui Watuku and 3rd applicant Grace Wangechi Ndung'u respectively, and Makuyu/Makuyu/Block – 1/869 (formerly Plot No. 1052) belonging to the 1st respondent Stephen Kariuki Ndung'u and his late father Jonathan Ndung'u Chege. The dispute arose on 18th June 2020 when the 2nd applicant accused the 1st respondent of blocking the road of access. The 2nd applicant was fencing her land using barbed wire. On the same day the 1st respondent engaged a private surveyor who came to the site and produced a map showing that the 1st respondent's parcel was bigger in size and that it extended to the



- access roads that separated the parcels. The map had unilaterally been altered to the disadvantage of the applicants. The applicants brought the suit to have the map declared to be illegal and irregular, and an order directing the 2nd and 3rd respondents to resurvey the parcels to restore the original boundaries of the parcels.
2. The suit was brought along with an application seeking an order to restrain the respondents from visiting the parcels to conduct a survey to verify the boundaries until the suit was heard and finalised. The 1st respondent responded to the application with a plea that the court had no jurisdiction to hear and determine the dispute in view of section 18(2) of the *Land Registration Act*, 2012 that required that any boundary dispute over registered parcels should first of all be determined by the Land Registrar.
 3. The superior court heard the preliminary objection and sustained it. It found that until the dispute was determined by the Land Registrar, the court had no jurisdiction to hear and determine the matter. The decision was on 28th January 2021.
 4. The applicants were aggrieved and on 12th February 2021 filed a notice of appeal to challenge the decision before this Court. The present application is a motion dated 24th March 2023 brought under Rules 4, 41 and 42(1) of the Court of Appeal Rules, 2010 seeking the extension of time to file and serve the Memorandum of Appeal and Record of Appeal. Their case is that, following the notice of appeal, and before they could give further instructions to their advocate to file the Memorandum and Record of Appeal, the 2nd applicant fell ill and was treated in various hospitals and the family used massive resources. It was only after she improved that they were able to pay attention to the appeal. In the meantime the time for the filing of the Memorandum and Record of Appeal had passed. They prayed for extension of time, saying that they had an appeal with good chances of success.
 5. In the draft Memorandum of Appeal annexed to the application, the applicants relied on the following grounds:-
 - “ 1. That the Honourable learned Judge erred in law and fact in finding that the Appellant’s claim was solely about a boundary dispute between them and the respondents.
 - 2). That the Honourable learned Judge erred in law and fact in failing to appreciate that there was in existence two maps for the same area one of which had been illegally registered.
 - 3) That the Honourable learned Judge erred in law and fact in failing to appreciate that there was a prayer for permanent injunction which the registrar of land did not have power to grant.”
 6. The 1st respondent opposed the application through a replying affidavit sworn on 5th May 2023, to reiterate that the parties had a boundary dispute which the court correctly held to be within the purview of the Land Registrar. He deponed that there was no sufficient proof of the illness of the 2nd applicant; that the parties had been indolent and were using the alleged sickness as an excuse to have a second bite at the cherry, as it were. He stated that the applicants woke up when the Land Registrar served them with notice to demarcate the boundary.
 7. The applicants’ counsel filed written submissions in which they urged the court to find that the application was merited; that the principles governing the extension of time as laid out in *Nicholas Kiptoo Arap Korir Salat -v- IEBC & 7 Others [2014]eKLR and Ngunjiri -v- Mbugua & Another [2921]KECA 22*, among other decisions, had been substantially met. They contended that they would be unduly prejudiced if they were not allowed to appeal.



8. I have considered the application, the rival affidavits and the written submissions.
9. Rule 4 of the Court of Appeal Rules, 2022 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 or of a superior court, for the doing of any act authorised or required by these Rules, whether before or after the doing of the ac, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
10. Execution of time entails the exercise of judicial discretion whose main concern is to do justice of between the parties. The settled jurisprudence in *Nicholas Kiptoo Arap Korir Salat -v- IEBC & 7 Others, Imperial Bank Ltd (In Receivership) and Another -v- Alnasir Popat and 18 Others* [2018]eKLR, *Andrew Kiplagat Chemarigo -v- Paul Kipkorir Kibet* [2018]eKLR, and various other cases, is basically that the applicant was to explain the delay; the delay should not be inordinate; he has to demonstrate the possible prejudice that he will suffer if extension is not granted; such prejudice should be weighed against that which the respondent, who has a decision in his favour, will suffer with execution being delayed; he should demonstrate that his appeal has possible chances of success, and not a mere frivolity; and the court should bear in mind the need to timeously resolve the dispute, and check to see if there is any public interest in the matter. Each case depends on its peculiar facts.
11. Following the filing of the notice of appeal, under Rule 84(1) of the Rules, the applicants had 60 days to file the Memorandum and Record of Appeal. The notice was filed on 12th February 2021. The application for extension was bought one year after the notice of appeal. I have seen a bundle of medical chits and reports showing that the 2nd respondent was generally attending consultation and treatment in various hospitals and clinics as an outpatient. It does appear that she was unwell for the longest period. That would generally explain the delay in filing the Memorandum and Record of Appeal. The other applicants state that they expended a lot of resources on the treatment.
12. It is a full bench, when constituted, that would normally deal with the merits of the appeal. For now all that this court may comment on is the possible chance that the appeal may have. I have looked at the draft Memorandum of Appeal. There appears to be no quarrel with the finding that the curt had no jurisdiction to hear and determine the dispute before the Land Registrar had determined the boundary. In ground 3 of the draft, however, the applicants state that the superior court should have noted that there was a prayer for permanent injunction, and that such prayer could not be granted by the Land Registrar. It was clear from the plaint that the dispute was about the boundary between their parcels and that of the 1st respondent, and the applicants were seeking that the same be restored by the District Surveyor Muranga and the Director of Survey (2nd and 3rd respondents). It was obvious that the restoration was going to follow the determination of the boundary. There was no other dispute between the parties. In other words, the draft Memorandum of Appeal did not disclose any possible chance that the appeal would succeed. There would be no need to push this matter beyond here.
13. The result is that the application lacks merits and is dismissed.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF MAY 2023

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

