



**Gathekia & 5 others v Mukui & another (Civil Application
E042 of 2023) [2024] KECA 1039 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KECA 1039 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E042 OF 2023
J MOHAMMED, JA
MAY 28, 2024
[IN CHAMBERS]**

BETWEEN

**WANJIRU GATHEKIA 1ST APPLICANT
KAGIRI GATHEKIA 2ND APPLICANT
MWANGI GATHEKIA 3RD APPLICANT
KIMEMIA GATHEKIA 4TH APPLICANT
KAMAU GATHEKIA 5TH APPLICANT
JAMES MWANIKI KINUTHIA 6TH APPLICANT**

AND

**HEMED IDD MUKUI 1ST RESPONDENT
KANGETHE ABDULLAHI IDD (SUBSTITUTED AS LEGAL REPRESENTATIVE
OF IDD RAJAB) 2ND RESPONDENT**

*(An application for extension of time to file the Record of Appeal out of
time from the decision of the ELC at Murang'a (J. G. Kemei, J.) dated 20th
January 2021 in ELC No. 224 of 2017 Consolidated with ELC no. 517 of 2017)*

RULING

Background

1. Before me is an application dated 23rd May, 2023 expressed to be brought under Rule 4 of the Court of Appeal Rules, 2010 (this Court's Rules) where Wanjiru Gathekia, Kagiri Gathekia, Kimemia Gathekia,



Kamau Gathekia and James Mwaniki Kinuthia (the 1st to 6th applicants respectively) seek orders in the main:

- a. That this Court do grant the applicants leave to file the record of appeal out of time; and
 - b. That the costs of this application be in the intended appeal. Hemed Idd Mukui and Kangethe Abdullahi Idd (Substituted as legal representative of Idd Rajab) are the 1st and 2nd respondents respectively.
2. The application is supported by the applicants' joint affidavit and premised on the grounds inter alia: that the applicants were the defendants in High Court Case No. 224 of 2017 Consolidated with ELC case No. 517 of 2017 as they were claiming land from the same parties; that the judgment of the Environment and Land Court (ELC) (J.G. Kemei J.) dated 20th January, 2021 in Murang'a ELC Case No. 224 of 226 consolidated with Murang'a Case No. 517 of 2017 dismissed all cases on grounds that controverted their case when they had clearly stated in their defence that they had acquired the land by way of adverse possession; that the applicants were aggrieved by the said orders and immediately instructed their advocates on record, Messrs. Kirubi, Mwangi Ben & Co. Advocates to file an appeal; that the said firm filed a notice of appeal on 21st January, 2021 in which it was clearly indicated that the 6th applicant, being a representative of the other applicants and the plaintiff in ELC case No. 224 of 2017, would appeal against the impugned judgment. That the said firm did not follow up on the proceedings and along the line the applicants disagreed with the advocates and decided to handle the matter on their own; that they managed to retrieve the proceedings and certified copies of the Decree on 20th March, 2023 when they prepared the record of appeal; and that on presenting the record of appeal to this Court, they were informed that it was out of time hence the instant application. It is the applicant's contention that they risk being evicted from the only place they have known as their home since 1968; and that the mistake of the advocates should not be visited on them. The applicants urge that it is in the interest of justice to allow the application so that the matter can be resolved on merits.
3. The 1st respondent filed his replying affidavit sworn on 26th January, 2024 opposing the application and deponed inter alia: that the application is a belated afterthought having been filed 2 years and 4 months after the impugned judgment was delivered and after lodging their notice of appeal; that the delay is inordinate and is contrary to the law to wit Order 42 rule 6(2)(a) and (b) of the [Civil Procedure Rules](#). That the applicants' indolence is exemplified by their inaction in their own appeal by paying for proceedings on 26th January, 2021 and collecting the said proceedings 2 years and 2 months later, despite having been notified of the proceedings being ready by 11th February, 2021. That the tendency to blame advocates on record should be condemned as it is merely a way of scapegoating the said advocates as the applicants obviously went to sleep, which shows their lack of interest in prosecuting their intended appeal. That on 25th August, 2022, the applicants were personally served with court documents which is clear that they were unrepresented. That there is no reason why the applicants did not file the instant application until 9 months later. Further, that the applicants sought to use gimmicks to delay the execution of the impugned judgment by lodging an appeal first then filing an application for stay of execution.

The 1st respondent urged that the application be dismissed with costs.

Submissions

4. At the hearing of the application, the application was disposed of by way of written submissions. Citing the case of [Sokoro Savings and Credit Co-operatives Society Ltd v Mwambui](#) Civil Application no. E032 of 2022, the applicants who were unrepresented submitted that this Court has discretion to extend time under rule 4 of this [Court's Rules](#). They relied on the grounds on the face of the application as laid



out above and maintained that the advocates on record did not obtain the proceedings in time; and that they were only able to obtain the proceedings and certified copies of the decree on 20th March, 2023. Further, that the notice of appeal was filed on 21st January, 2021; and that the failure to file and serve the memorandum of appeal and the record of appeal in time was because of circumstances beyond their control. Further, that the instant application was filed immediately upon learning that the time within which to file the record of appeal had lapsed.

5. The applicants submitted that the application should be allowed to pave way for the appeal which in their view has high chances of success as the respondents intend to evict them from the suit property that was bought way back in 1950's and that is the place they know as their home. They relied on the decision of *Sokoro Savings and Credit Co-operative Society Ltd case* (*supra*) submitting that this Court extended the time to file a notice of appeal despite time having lapsed.
6. Relying on this Court's decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) (2022) KECA 1188 (KLR (Ruling) learned counsel for the respondents from the firm of Messrs J. N. Mbuthia & Co. Advocates submitted that the applicants were disinterested in prosecuting their appeal and they have not presented this to Court any sufficient reasons for their undue delay. Counsel further relied on the 1st respondents' replying affidavit stating that the application has no merit, is bad in law and should be dismissed with costs.
7. Counsel for the respondents further submitted that the respondents are totally opposed to the application due to the prolonged and unexplained delay occasioned by the applicants as they took two (2) years to give any attention to the said appeal. The respondents maintained that it is the applicants who failed to follow up on their matter since the proceedings were ready by 11th February, 2021. That the applicants' failure of collecting the proceedings for more than a year since the time they were ready for collection shows that the applicants were not interested in prosecuting their appeal. Counsel further submitted that the filing of the instant application is to buy them more time to delay the respondents' enjoyment of the fruits of their judgment. Counsel further submitted that the instant application is an afterthought and not sought in good faith.

Counsel urged the Court to dismiss the application for enlargement of time.

Determination

8. I have carefully considered the application, the grounds and affidavit in support thereof, the replying affidavit, written submissions, authorities cited and the law. The discretion that I am being called upon to exercise in this application is provided under Rule 4 of this *Court's Rules* which states 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 governing the exercise of the discretion to extend time under Rule 4 of this Court's Rules were well stated in the case of *Leo Sila Mutiso v Rose Hellen Wangare Mwangi*, [1999] 2 EA 231 as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this



Court takes into account in deciding whether to grant an extension of time are: First, the length of the delay; secondly, the reason 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. Rule 4 of this [Court's Rules](#) requires me to exercise my discretion judicially. There has to be valid and clear reasons upon which discretion can be favourably exercised.

11. Rule 84 of this [Court's Rules](#), 2022 provides for institution of appeals as follows:

1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—

- a. a memorandum of appeal, in four copies;
- b. the record of appeal, in four copies;
- c. the prescribed fee; and
- d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule

2. within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

12. The impugned judgment was delivered on 20th January, 2021. As per the notice annexed by the 1st respondent in his replying affidavit sworn on 26th January, 2024, the request for typed proceedings was done on 26th January, 2021 and the proceedings were typed and ready for collection on 11th February, 2021. This information was however not disclosed by the applicants. The applicants stated, on the face of their application that they obtained the proceedings on 20th March, 2023 and thereafter prepared the record of appeal. Thus, from the above quoted provision of the law, it is not in dispute that the applicants failed to file the record of appeal within the required timelines even taking into account the provision under Rule 88(1) of this [Court's Rules](#). The instant application is dated 23rd May 2023. The explanation given for the delay in filing the record of appeal is that their erstwhile advocates failed to follow up on proceedings and along the line they disagreed and decided to handle the matter on their own and they managed to retrieve the proceedings on 20th March, 2023.

13. The Supreme Court decision in [Fabim Yasin Twaba v Timamy Issa Abdalla & 2 others](#) [2015] eKLR laid down guidelines for exercise of discretion in extending time:

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;



4. Where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” (Emphasis supplied.)

14. This Court (Waki, JA) *Habo Agencies Limited v. Wilfred Odhiambo Musingo* [2015] eKLR, stated as follows:

“In this case, however, the erstwhile advocates are simply accused of inaction. In the case of *Rajesh Rughani v Fifty Investment Ltd. & Another* [2005] eKLR the Court of Appeal held,

“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.

15. The applicants have not demonstrated to my satisfaction any steps taken to follow up on the appeal, the filing the notice of appeal and making the request for proceedings way back from 20th January, 2021 until 20th March, 2023 when they collected the typed proceedings. As per the affidavit of the 1st respondent, the proceedings were ready for collection on 11th February, 2021. As stated by this Court (Odek, JA.) in *Church of God East Africa & Another v. Dinah Buluma* [2019] eKLR:

“It behooves a client/litigant to exercise diligence and follow up the progress and outcome of his/her case.”

16. Further, in *Bi-Mach Engineers Limited v James Kaboro Mwangi*[2011] eKLR this Court held inter alia that:

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.” [Emphasis supplied.]

17. I find that in the circumstances of this case, the delay in filing the record is inordinate and the reasons for the delay advanced by the applicants are not plausible and satisfactory.

18. From the circumstances of the instant application, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso (supra)*.

19. Accordingly, I find no merit in the notice of motion dated 23rd May, 2023 and dismiss it with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF MAY, 2024

JAMILA MOHAMMED



JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

