



**Aketch & 3 others v Kisaka (Civil Application E038 of 2024)
[2024] KECA 613 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 613 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E038 OF 2024**

**M NGUGI, JA
MAY 24, 2024**

BETWEEN

**FREDRICK AKETCH 1ST APPLICANT
GALLANT AUCTIONEERS 2ND APPLICANT
FREDRICK AKETCH (IN HIS CAPACITY AS THE ADMINISTRATOR OF THE
ESTATE OF DISMUS OKUNG’U AKETCH (DECEASED) 3RD APPLICANT
PHILIP KIPKOROR SAMBU (IN HIS CAPACITY AS ADMINISTRATOR OF
THE ESTATE OF ANNE CHEMUTAI SAMBU (DECEASED) 4TH APPLICANT**

AND

ALFRED KISAKA RESPONDENT

(eing an application for leave to come on record and for extension of time to file Notice of Appeal and Record of Appeal out of time in an intended appeal from the judgment of the Environment and Land Court (Komingoi J.) dated 12th October, 2023 in ELC NO. 259 of 2009)

RULING

1. In the application dated 19th January, 2024 brought under Article 159(2)(d) of *the Constitution*, Rules 4 of the Court of Appeal Rules and sections 1A, 1B and 3A of the *Civil Procedure Act* (which is not applicable to applications before this Court), the applicants seek leave to file their Notice of Appeal out of time. In the alternative, they pray that the Notice of Appeal dated and filed on 30th November, 2023 be deemed to be properly filed.
2. The application is based on the grounds on its face and is supported by two affidavits, both sworn on 19th January 2024. The first is sworn by Achieng Otieno, the applicants’ advocate who, it would appear, also seeks leave to come on record, and the second by the 1st applicant.



3. The applicants aver that in the judgment dated 12th October, 2023, they were ordered to transfer the suit property to the respondent. They were aggrieved by the judgment and wish to appeal against it, but the permitted time for so doing has lapsed. They aver that they filed a Notice of Appeal on 30th November, 2023 but erroneously failed to apply for leave to file it out of time. They attribute the delay to the fact that the 1st applicant was out of the county, where he encountered communication hiccups, yet he was the one with proper instructions. It is their contention that a delay of two months is not inordinate and that the applicants took necessary steps and diligently followed up on the matter.
4. The applicants aver that they have an arguable appeal with high chances of success, that they will suffer substantial loss and the appeal will be rendered nugatory if the application is not allowed.
5. In further explaining the delay in filing the notice of appeal on time, the 1st applicant avers that the applicants' Advocate has informed them that the omission to make an application for leave to file a Notice of Appeal out of time was an honest mistake. Further, that the delay was not intentional as the 1st applicant was away from the country and faced challenges communicating with his advocates on record. The applicants exhibit air tickets indicating that the 1st applicant had travelled to New York on 17th August 2023 and returned on 24th December 2023.
6. The respondent opposes the application and has filed an affidavit by Alfred Kisaka Mandila on 8th April, 2024. The respondent challenges, first, the representation of the applicants by the firm of Belinda Otieno & Co. Advocates, averring that the firm has not complied with the provisions of Order 9 rule 5 and 9 of the Civil Procedure Rules, 2010 and is therefore not properly on record. Further, that the applicants are guilty of willful non-disclosure of material facts, namely that there is a pending application before this Court in Civil Application E574 of 2023 which seek to strike out the notice of appeal dated 30th November, 2023. The respondent avers that the applicants have not satisfactorily explained the inordinate delay of 3 months in filing the present application, which he terms as fatally defective and incomplete for lack of all requisite prayers.
7. The parties hereto have filed submissions dated 5th March 2024 and 9th April 2024 respectively, which I have read and considered.
8. Rule 4 of the Rules of this Court grant the Court the discretion to extend time for the doing of any act for which time is prescribed under the Rules. The principles which the Court will consider in determining whether or not to extend time are now settled. In *Fakir Mohammed v Joseph Mugambi and two others [2005]* eKLR this Court stated:

“The exercise of this Court’s discretion under Rule

4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”

9. The judgment in this matter was delivered on 12th October 2023.
Rule 77 (2) of this Court’s Rules requires that a party who wishes to appeal against a decision files and serves a notice of appeal within 14 days of the date of the decision to be appealed from. In this case, the notice of appeal should have been filed by the 19th of October 2023. Through their counsel, the



applicants aver that the failure to file the notice of appeal in time was an honest mistake, but that they filed a notice dated 30th November 2023 without seeking leave to file it out of time.

10. A different argument is also advanced by the applicants to explain the delay in complying with the timeliness prescribed under the Rules of this Court. This is that he had travelled outside the country and had challenges in communicating with his counsel.
11. As I observed earlier, the 1st respondent annexes to his affidavit documents which he avers demonstrate that he had travelled to New York in August and only returned on 24th December 2023. Perhaps passport entries would have served better as evidence, but that is neither here nor there. The 1st applicant avers that he had travelled to New York. He does not indicate what kind of communication challenges he had: telephone? email? In these days of multifarious means of communication, it is hard to conceive of a situation in which one is unable to communicate with counsel, unless one was in the depths of the Amazon or Congo forests. The averments of the applicant and his counsel, however, are contradictory and indicate an attempt to be less than candid with the Court. The applicants had instructed counsel to file a notice of appeal in November, 2023, which counsel avers was done in error as the applicants had not sought to leave to file the notice out of time. At the same time, the applicants ask the Court to believe that they could not issue instructions because the 1st applicant was away until December 2023. This application was filed on 19th January 2024, a delay of over three months from the date of the judgment. The delay, I find, was inordinate, and the explanation for it, garbed in untruths, does not incline the Court to exercise discretion in favour of the applicants.
12. The other two principles for consideration in a rule 4 application are, possibly, the chances of success of the appeal and the prejudice to be suffered by the respondent should the orders sought be granted. I have considered the judgment of the trial court. I note that the applicants have not placed a draft memorandum of appeal before the Court to enable the Court gauge the possibility of their appeal succeeding. Nonetheless, I note that the trial court found that the 1st applicant's parents ceased to be the owners of the suit property on 16th January 1991. Further, that he had no right to transfer it to the 4th applicant in 2009, as there was an order of the court restraining him from transfer the property pending hearing of the suit. Without entering into an analysis of the merits of the matter, I must express some reservations about the possibility of success of the appeal.
13. As regards prejudice, I note that the finding of the trial court is that the respondent purchased the suit property from the 1st applicant's deceased parents and paid the full purchase price thirty-three years ago, and doubtless it would occasion the respondent great prejudice for the matter to be kept alive at the behest of the 1st applicant. Given the totality of the facts and circumstances of this case, I find that the applicants have not satisfied the conditions for the exercise of discretion in their favour. The delay of three months is inordinate, and the explanation advanced for the delay is contradictory and less than candid. I therefore find the application dated 19th January 2024 to be without merit, and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

