



REPUBLIC OF KENYA



**Muthui (Sued as the Administrator of the Estate of Muthui Mwinzi - Deceased) v Mbuthi
(Civil Application E049 of 2024) [2024] KECA 592 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 592 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E049 OF 2024**

M NGUGI, JA

MAY 24, 2024

BETWEEN

**FRANCIS MUSYOKA MUTHUI (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF MUTHUI MWINZI - DECEASED) APPLICANT**

AND

ONESMUS KASAKI MBUTHI RESPONDENT

(Being an application for extension of time to file a memorandum of appeal and Record of Appeal in an intended appeal from the decision of the Environment and Land Court at Kitui (L.G. Kimani J.) dated 21st September, 2023 in ELC No. 15 OF 2021 (OS))

RULING

1. In the application dated 9th February 2024, the applicant, Francis Musyoka Muthui, seeks leave to file and serve an appeal out of time from the judgment in Kitui ELC (O.S) 15 of 2021 dated 21st September, 2023. The application is brought under Article 159 of the Constitution, section 3A of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya and rules 1(2), 4 and 47 of the Court of Appeal Rules, 2010 (rules 1(2), 4 and 49 of the 2022 Rules).
2. In the grounds and affidavit in support of the application, the applicant avers that the impugned judgment was entered on 21st September, 2023 in favour of the respondent, imposing an obligation upon him to cede a substantial portion of the suit property known as Matinyani/Matulu/716 to the respondent, and the respondent has commenced execution of the said judgment. The appellant states that he was aggrieved by the judgment and that he filed a Notice of Appeal on 5th October, 2023, within the set timeline.
3. He avers that he is, however, yet to file a Record of Appeal as the typed proceedings are not ready. He states that he is desirous of prosecuting his appeal and therefore seeks an extension of time to file and



serve the same. He further contends that his appeal raises serious points of law and facts and has high chances of success, and unless the orders sought herein are granted, he stands to suffer irreparable loss.

4. The applicant has filed submissions dated 9th April, 2024 in which he submits that the dispute before the Court involves land, which is a scarce resource, and that there is need for issues revolving around the ownership of land to be determined with finality. He prays that this Court does not drive him away from the seat of justice but exercises its discretion in his favour.
5. There is no response or submissions in opposition to the application.
6. Under Rule 77(2) of the *Rules* of this Court, a party wishing to appeal against a judgment is required to file and serve a notice of appeal within 14 days of the date of the decision against which he seeks to appeal. The applicant has done this, having filed a notice of appeal on 5th October 2023.
7. Rule 84 of this *Court's Rules* states that:

“

“(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;...

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.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent. (Emphasis added.)”

8. I have considered the application, the affidavit in support and the applicant's submissions. I note that the applicant filed a notice of appeal dated 4th October 2023 and served it on the advocates for the respondent on 11th October 2023. He had therefore complied with the requirements of rule 77 of *Rules* of this Court. The proviso to rule 84(1) affords a party the leeway, in the event that there is a delay in obtaining the proceedings from the lower court, to rely on a certificate of delay issued by the lower court. The provisions of the rule, however, are only available where a party has copied the letter bespeaking the proceedings to the opposing party. The applicant applied for copies of the proceedings of the lower court by the letter dated, rather strangely, 31. 2. 24 annexed to the applicant's affidavit as annexure FMM3a. The letter does not comply with the requirements of rule 84(2), not having been copied to the respondent.
9. It seems to me, however, that the present application is premature. The applicant is yet to obtain the typed proceedings;
not having done so, he can only approach the Court for extension of time after he obtains the said proceedings. In the circumstances, I hereby dismiss the application. Since it is unopposed, I make no order as to costs.

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



MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

