



REPUBLIC OF KENYA



KENYA LAW
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**Mwanja v M’itiri (Civil Application 093 of 2022)
[2024] KECA 1013 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 1013 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 093 OF 2022
AO MUCHELULE, JA
MAY 24, 2024**

BETWEEN

JOSPHAT KINOTI MWANJA APPLICANT

AND

SAMSON M MIRITI M’ITIRI RESPONDENT

(Being an application for extension of time under Rule 4 of the Court of Appeal Rules against the judgment and decree of the High Court at Meru (Y.M. Angima, J) dated 20th May 2021 In Meru ELC No. 52 of 2019)

RULING

1. In Nkubu PMCC No 47 of 2006, the respondent Samson Miriti M’Itiri sued the applicant seeking to recover land parcels Nkuene/Kithunguri/566 and 567 (“the suit properties”) which the latter had allegedly fraudulently and unlawfully acquired from the deceased M’Itiri M’Mugane. The applicant claimed to have obtained the parcels lawfully, having bought them from the deceased. The court heard the dispute and found that there had been no valid sale agreement and that, in any case, the transaction had not received the blessings of the Land Control Board. Judgment was given in favour of the respondent. The applicant appealed to the Environment and Land Court at Meru in ELC Appeal No 52 of 2019. The learned Y.M. Angima, J. heard the appeal, and on 20th May 2021 confirmed the findings by the trial court. He dismissed the appeal with costs.
2. The applicant has moved this Court by way of Notice of Motion dated 31st October 2022 pursuant to section 78 of the *Civil Procedure Act* seeking that the time for the filing the Notice of Appeal be extended to enable him to file the appeal out of time. In the grounds and supporting affidavit, the applicant’s case was that he was not present in court when the impugned ELC appeal case was determined, and that the only time he became aware of the decision was in August 2022 when he went to his lawyer’s office to find out the outcome. On learning of the outcome, he sought to appeal. However, the lawyer advised that the time for the filing of the appeal had come and passed. As to why



he had not checked on his lawyer earlier, he stated that he was over 80 years old and had been ailing. His further case was that he had a good appeal since he had been in occupation of the suit premises since 1985; the lower courts had been wrong in their findings since he had produced evidence of the written agreement of sale; because of the long stay on the parcels he had become entitled by way of constructive trust; the respondent's suit was time barred at the time it was brought; and that the respondent had no capacity to challenge his titles. He annexed a Draft Memorandum of Appeal.

3. The application was served but did not elicit any response. The applicant filed written submissions which I have considered.
4. This Court's jurisdiction to extend time is donated by Rule 4 of the [Court of Appeal Rules, 2022](#) which provides as follows:-

“The Court may, on such terms as may be 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.”

5. The principles that guide the court's discretion to extend time have been settled. This is a judicial discretion. The party seeking extension of time is expected to explain to the satisfaction of the court the reasons why he was not able to bring the action in question within the provided time. The period for the delay should not be inordinate, and it should be evident that the respondent will not be prejudiced if time is extended for the applicant. The possible chances of the appeal succeeding have to be demonstrated; the court has to consider the importance of compliance with the set time limits; whether the dispute raises any matters of public importance; and, lastly, the court will consider whether there was undue delay in bringing the application. The applicant's counsel indeed cited the decisions in [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others](#) [2014]eKLR and [Edith Gichungu Koine v Stephen Njagi Thoithi](#) [2014]eKLR which are indicative on the matters to be considered when dealing with the request to extend time to appeal. I should reiterate that there is a duty imposed on the courts to ensure that, while dealing with such an application, the overriding objective of just, expeditious, proportionate and affordable resolution of civil disputes are at the core of the exercise of the discretion.
6. I reiterate that the factual basis of the application was not challenged. However, even assuming that there was explanation regarding the delay between the judgment date and August 2022, there was no explanation at all for the inaction on the part of the applicant for the period between August 2022 and when the application was finally brought on 18th November 2022 seeking to extend time. It was the applicant's case that he was an old man and he had been ailing since 2020. The judgement was on 27th May 2021. It was known that the suit by the respondent sought to cancel his titles to the suit premises and consequently remove him from the parcels. He had participated in the appeal and he knew judgment was awaited. Is he saying the only way to get to the advocate was for him to personally visit the office? He could not call? He could not send a member of his family to check with either his advocate or the court's registry? Was he hospitalized? Was he bedridden? I ask these questions to show that his explanation, given the inordinate delay between 27th May 2021 and August 2022 when he says he visited his advocate's offices, was neither reasonable nor plausible.
7. I do not want to say that both in the supporting affidavit and in the written submissions, there was no demonstration of the possible chances of success than the intended appeal will have. I find that the application lacks merits. It is dismissed.

DATED AND DELIVERED AT NYERI THIS 24TH 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

