



REPUBLIC OF KENYA



**Nzioka & 3 others v Nzioka; Kioko (Interested Party) (Civil Application
E525 of 2023) [2024] KECA 587 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 587 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E525 OF 2023**

LA ACHODE, JA

MAY 24, 2024

BETWEEN

JAMES NZIOKA 1ST APPLICANT

MUSEMBI NZIOKA 2ND APPLICANT

JOSEPH KATWIWA NZIOKA 3RD APPLICANT

MAURICE KIOKO NZIOKA 4TH APPLICANT

AND

HILLARY NGUMBAU NZIOKA RESPONDENT

AND

MAGDALENE WANZA KIOKO INTERESTED PARTY

(Application for extension of time to file an appeal against the judgment of Machakos High court (Hon Rayola Olel), dated 21st September, 2023 in HC SUCC CAUSE NO. 286 OF 2007)

RULING

1. The four applicants James Nzioka, Musembi Nzioka, Joseph Katwiwa Nzioka and Maurice Kioko Nzioka filed this Notice of Motion dated 25th October, 2023, said to be brought under Section 3A and 3B of the *Appellate Jurisdiction Act* and Rule 4 of the *Court of Appeal Rules*, 2010. The applicants are seeking to be allowed to file their appeal out of time and the cost of this appeal to be provided.
2. The grounds of the application are to be found on the face thereof. The applicants state that although they were aggrieved by the ruling delivered on 21st September 2023 and wished to appeal, they did not instruct their advocate to proceed due to financial constraints. They were unable to file a Notice of Appeal on or before 12th October 2023 to meet the statutory deadline. It is the applicants' claim that



- the intended appeal raises critical and triable issues that if not heard on appeal, would prejudice the applicants. They state that it would be in the interest of justice for the application to be allowed.
3. The dispute in this matter is over a piece of land said to have been bequeathed to one of the beneficiaries leaving out the applicants. The applicants filed summons for revocation of the grant dated 25th October 2018, contending that the respondent had fraudulently obtained the grant by excluding their names from the petition. The interested party joined the suit as a purchaser of the suit land from the respondent. The learned trial judge considered the summons and ruled that it was unmerited and vexatious, thereby striking it out.
 4. In opposition to the application, the respondent Hillary Ngumbau Nzioka swore and filed a replying Affidavit dated 21st November 2023, and averred that the application is incompetent for several reasons; that the 4th Applicant did not swear the supporting affidavit in the motion, nor give written authority for the motion to be instituted on his behalf; that the motion seeks leave to file a Notice of Appeal, which has been delayed for 54 days; that the respondent seeks extension of time to file an appeal without first filing a Notice of Appeal; that the applicants' counsel Omondi Ogwel was still working at the firm of Nyongesa Nafula & Company Advocates and not at the firm indicated in the motion; that the reason provided by the applicants, for failing to instruct an advocate in time is inexcusable and intended only to delay justice; and, that the grounds the applicants intend to raise on appeal lack merit. In sum, he deposed that the motion lacked merit and ought to be dismissed with costs to the respondent.
 5. The interested party Magdalene Wanza Kioko, also filed a replying affidavit she swore on 17th November 2023 opposing the application. She averred that the applicants had forced her out of the land in dispute against an order of the court and were thus approaching this Court with unclean hands. Further that the applicants' counsel, Omondi Ogwel is still working in the firm of Nyongesa Nafula & Company Advocates and not the firm indicated in the motion which was not even registered with the Law Society of Kenya.
 6. It was deposed that the applicants had a pattern of changing advocates during trial and moving the court late, for instance, seeking revocation of grant six years after it was confirmed, in a bid to delay justice. Further that the reason provided by the applicants for failure to file an appeal lacks merit and the extension of time would be prejudicial to her, since she has waited for justice since 2021 and the applicants have always caused the delay.
 7. The applicants filed a further affidavit sworn on 22nd November 2023 rebutting the averments by the respondent and the interested party. They deposed that their counsel practiced at the claimed firm before he opened his own firm on 2nd February 2023, and that he was still operating under the practicing certificate he took, while at the previous firm. Further, that the ruling was delivered after their counsel exited the previous firm. It was averred that this Court is not in a position to consider the delays referred to since those facts are not before the Court. Lastly, that the subject matter is land, and it would be an injustice for the matter not to be heard.
 8. This motion was disposed of by way of written submissions. The applicants' submission filed through the firm of Omondi Ogwel & Company Advocates are dated 5th December 2023; those of the respondent filed through the firm of B.M Kituku & Company Advocates are dated 2nd February 2024; and, those of the interested party filed through the firm of Keli Mwinzi Advocates are dated 18th January 2024.
 9. The applicants echoed the grounds of their application and added that the respondent would not suffer prejudice if the application is allowed. They referred to the cases of *Clemensia Nyanchoa Kinaro v Joyce Nyansiaboka Onchomba* (2011) eKLR, which set out the factors to be considered by courts when



granting leave for extension of time, and *Stecol Corporation Limited v Susan Awuor Mudembi* (2011) eKLR, to urge that a court of law should not be quick to close the door to justice before a complainant is heard.

10. The Respondent restated the contents of his replying affidavit and relied on the case of *Nkoliai v Oloparaki & 2 Others (Civil Appeal 63 of 2019)* [2023] in the Court of Appeal at Nakuru, the contents of which are captured in the submission.
11. The interested party recapped the particulars of her replying affidavit, and added that extension of time is not a right and should only be awarded to a deserving party. She submitted that the applicants did not show sufficient evidence of the effort they made to seek resources to institute an appeal. She cited *Francis Mwai Karani v Robert Mwai Karani* [2012] Eklr, where the Court stated that lack of money cannot be accepted as a valid reason to extend time to appeal, and *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* (2013) eKLR which highlighted the factors for consideration by the Court when extending time.
12. This application is erroneously stated to be brought under rule 4 of the Court of Appeal Rules 2010. It is however dated 25th October, 2023, and the applicable law should be rule 4 of the Court of Appeal Rules 2022. Rule 4 which confers discretionary power upon the Court to extend the time limited in the following terms:

“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 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.”
13. In determining this application, I turned to the decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2013] eKLR where the Supreme Court spelled out the guiding principles in granting leave for extension of time to appeal as follows:
 - i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
 - iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
 - iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
 - v. Whether there will be any prejudice suffered by the Respondent if extension is granted.
 - vi. Whether the application has been brought without undue delay.
 - vii. Whether in certain cases public interest should be a consideration for extension of time.
14. Regarding whether the intended appeal raises arguable issues, I referred to the decision in *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan* [2016] eKLR for the holding that:

“Whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of



the appeal. That is why the requirement that the intended appeal be arguable is preferred with the word “possibly”.

The subject matter of the intended appeal is family land and the dispute, revolves around the legality of the process leading to the confirmation of grant. The issues the applicants intend to raise on appeal are, in my view, arguable.

15. The reason for the delay was stated to be lack of resources to file the Notice of Appeal. This brings to mind the case referred to by the interested party, that is, Francis Mwai Karani (supra), where the learned judge stated that lack of money could not be accepted as a valid reason for extension of time to appeal. The Apex Court considered lack of resources as a reason for delay in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR and stated that:

“It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate the adjudication of disputes; they ensure the orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules.”

Upon considering the reason given by the applicants for the delay, I find that it is not sufficient to compel the Court to suspend procedural rules in their favour.

16. On the extent of the delay, the respondent submitted that the applicants had not filed a Notice of Appeal even as they were seeking extension of time, and the application is thereby rendered invalid. The applicants filed this application on 14th November 2023 following delivery of the ruling on 21st September 2023. Under Rule 77 an intending appellant is required to file a Notice of Appeal within 14 days of delivery of the ruling. Therefore, the applicant ought to have filed a Notice of Appeal by 5th October 2023. Ordinarily justice is to be found in sustaining a matter for it to be heard on merit, instead of striking it out on a technicality. Indeed, that is the overriding objective principle.
17. It is the filing of a Notice of Appeal that signifies the intention to proceed on appeal. The Supreme Court emphasized the importance of a Notice to Appeal in Bookpoint Limited v Guardian Bank Limited & another [2021] eKLR, where it held that the absence of a valid Notice of Appeal renders any motion for extension to file an appeal out of time futile. No Notice of Appeal has been filed to date and there is therefore, nothing to signify the intention to file an appeal in this matter. For that reason, there is nothing for this application to stand on.
18. The upshot of the foregoing analysis is that the applicants have failed to satisfy this Court, that they are deserving of the equitable remedy they seek, which is only available to a party at the discretion of the court. Consequently, I have arrived at the conclusion that the Notice of Motion dated 25th October, 2023 is lacking in merit and I therefore, dismiss it with costs to the respondent.

It is so ordered.

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

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

