



**Lukhakha v Makokha & 5 others (Civil Application
E147 of 2023) [2024] KECA 582 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KECA 582 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E147 OF 2023
HA OMONDI, JA
MAY 23, 2024**

BETWEEN

LEONIDA KHALUYI LUKHAKHA APPLICANT

AND

NATHAN LUSASI MUKHONO 1ST RESPONDENT

MAURICE PIUS MAKOKHA 2ND RESPONDENT

PETER ORODI 3RD RESPONDENT

LUBONGA ZACHARIA LUSWETI 4TH RESPONDENT

VINCENT OFISI 5TH RESPONDENT

ERASTUS MATHEW MUCHANGA 6TH RESPONDENT

*(Being an application for leave to file an appeal out of time from
the judgment of the Environment and Land Court at Busia (A.
Omollo J.) dated 16th March, 2022 in ELC Case No. 185 of 2014)*

RULING

1. By an application described as a chamber summons dated 1st December 2023, made pursuant to Article 159(2) (d) of *the Constitution*, sections 34 and 3B of the *Appellate Jurisdiction Act*, rules 4, 43 and 49 of the Court of Appeal Rules 2022; and supported by the affidavit of the applicant, Leonida Khaluyi Lukhakha of even date, a prayer is sought for leave to be granted to file her appeal out of time; and that upon such leave being granted, the record of appeal annexed to this application be deemed as duly filed.
2. The applicant contends that she has a good and arguable appeal with high chances of success; the respondents will not be prejudiced if the orders sought are granted; she is willing to comply with any condition that may be issued by the court for grant of the reliefs sought.



3. A brief background to this matter is that the 1st applicant filed a suit by way of originating summons against the applicant and the other 4 respondents claiming that he had acquired by way of adverse possession, rights over L.R No. Bukhayo/Kisoko/7020 which was sub-divided from L.R. No. Bukhayo/Kisoko/5012 & 4674 or any other title derived therefrom as on the ground currently registered in the present applicant's name. Among the orders he sought were that the applicants' rights over the said parcel got extinguished by adverse possession upon the expiry of 12 years from the date he came into possession of the said half an acre out of the original parcel; a declaration that he had been in actual possession, exclusive, continuous and uninterrupted occupation and use of the whole portion measuring 0.5 acres; and was entitled to be registered as the proprietor of the suit land; and the applicant herein be ordered to execute all the necessary documents to effect the transfer, with a default clause empowering the Deputy Registrar of the Environment and Land Court to execute all such documents.
4. The applicant's contention before the learned judge was that the whole claim was based on an alleged sale of land, which contradicted the doctrine of adverse possession, which was rejected by the learned judge, and judgment entered in favour of the 1st respondent.
5. The applicant states that, being dissatisfied with the judgment, she instructed her then advocate on record to immediately lodge an appeal; and was given an assurance that a Notice of Appeal dated 16th March (whose copy is annexed) had been lodged in the High Court of Kenya at Busia on 21st March 2022. Thereafter, her advocate on record then demanded Kshs.200,000/= as legal fees for prosecuting the appeal; and she paid a deposit of Kshs. 50,000/=, being under the impression that the appeal had been filed.
6. Apparently, no such step had taken place; and she subsequently instructed the firm of Calistus & Co. Advocates to take over conduct of the case and acting on my behalf; that is what now led to the current advocates writing a letter dated 17th April, 2023, to her former Advocate on record, requesting for the file, which was eventually handed over to the current advocates on 18th May 2023. She explains that the time taken to hand over file from the previous Advocate was too long. The applicant's position is that she has a good and arguable appeal; and laments that the delay to file an appeal within the stipulated time was caused by her previous Advocate.
7. There is no response by the respondents, either by way of a replying affidavit, or written submissions. In her written submissions, the applicant refers to the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014]* eKLR which set out the considerations to guide a court in exercising its discretion in cases of this nature, as not being a right of a part, but an equitable remedy that is only available to a deserving party at the discretion of the court; the burden of laying a basis to the satisfaction of the court, lies on the party applying for extension; among other issues to be considered is whether there will be any prejudice suffered by the respondents if the extension is granted; whether there is a reasonable reason for the delay.
8. Basically the application is unopposed, In this case, judgment was delivered on 16th March 2022; the Notice of Appeal ought to have been filed within 14 days of the judgment; the former advocates seem to have dangled the prepared Notice of Appeal dated the very day the judgment was delivered as a red herring pegged to payment of fees result; and somehow got to hoodwink the applicant by a stamp appended on the Notice, that it had been lodged in court. Meanwhile, the previous advocate operated on the principle that a quarter loaf was not equal to a full loaf, and would not meet his side of the bargain, I suspect on account of full fees not being paid up front.



9. The result is that the time within which the applicant ought to have filed their Notice of Appeal against the Judgment lapsed on account of what she terms as an omission, fault or delay on the part of their former advocates. She is now apprehensive that the decree in is due for, and may be executed any time now; which would result in her eviction from the suit land; and this would occasion them irreparable loss and damage, and render the intended appeal nugatory.
10. Rule 4 of the Court of Appeal Rules gives this Court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso v Rose Wangari Mwangi* CA No. Nai. 255/97 (UR) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka v Waruguru Kithaki & 2 Others* [2013] eKLR. I find that the applicant has demonstrated good faith, indeed she has now instructed another firm of advocates; and I am persuaded that she should not be faulted or punished for an error or omission on the part of their lawyers then on record.
11. On the issue as to whether or not the intended appeal has good chances of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of Athuman [*Nasura Juma v Afwa Mohammed Ramadhan* \[2016\]](#) eKLR:

“...this court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge”.
12. I bear in mind the afore-going principles whilst determining this application – the less said the better – my only observation is that there is nothing to suggest that the appeal is frivolous. I find that the applicant has adequately explained the delay; and in my view is deserving of the orders sought, to the extent that leave is granted to the applicant to file and serve the Notice of Appeal out of time. The Notice of Appeal annexed herein shall be deemed as properly filed and served. The costs shall abide the appeal.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

