



REPUBLIC OF KENYA



Baraiwo v Ruto (Civil Application E022 of 2022) [2024] KECA 530 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KECA 530 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E022 OF 2022
LA ACHODE, JA
MAY 9, 2024**

BETWEEN

MERCY CHEPKURGAT BARAIWO APPLICANT

AND

MARSELLA JEBITOK RUTO RESPONDENT

(Being an application to Strike Out the Notice of Appeal dated 5th December 2022 against the Ruling of the Environment & Land Court at Kitale (Nyangaka J), dated 5th December 2022 in ELC Case No. 103 of 2008)

RULING

1. Mary Chepkurgat Baraiwo, the applicant herein has filed a Notice of Motion dated 7th November, 2022, founded on Rule 4 of the [Court of Appeal Rules](#) 2010. She seeks for orders that:
 - a. The honorable court be pleased to extend time within which the Applicant can file and serve a Record of Appeal herein.
 - b. The costs of this Motion be provided for.

The respondent is Marsella Jebitok Ruto.

2. The application arose from Civil Suit No ELC 327 of 2013, instituted by the respondent, vide Originating Summons dated 5th June 2013. In the said suit the respondent sought orders that the applicant's proprietary rights be extinguished and the respondent be registered as the sole proprietor of the parcel of land known as Nandi/Chepkunyuk/422. The applicant was established as the administrator of the estate of Jemaiyo Tabletgoi Kerich who died on 28th June 2000. The court ordered that the originating summons be treated as the plaint and the replying affidavit as the defence.
3. The respondent's (who was the applicant) evidence was that she entered into a sale agreement with the deceased for the suit land in 1972 and henceforth, she was in continuous, exclusive and uninterrupted



- possession of the parcel of land. That she had planted trees and kept livestock in the suit land prior to the demise of the deceased in the year 2000. That the parcel of land was still registered under the name of the deceased and the respondent's requests to the son of the deceased to transfer the suit land to her had been rejected.
4. The applicant (who was the respondent) on her part told the court that the suit land belonged to her mother, the deceased and that no one was in occupation of the parcel of land. Additionally, that she was appointed as the administrator of the estate of the deceased, Jemaiyo Tabletgoi Kerich, and had added value to the property by fencing and building a house on it after the demise of the deceased.
 5. The learned Judge in a Judgement given on 28th June, 2018, found that the applicant (who was the respondent) and her witnesses had given contradictory evidence as to the real position of the suit land and possession thereof. Further, that the respondent (who was the applicant) was in continuous, open and uninterrupted possession of the suit land as established from the evidence and had thus satisfied the ingredients of adverse possession. The learned Judge granted the orders as prayed in the summons.
 6. By a supporting affidavit dated 7th November, 2022, to this application the applicant has aired her intention to appeal the judgment delivered on 28th June, 2018 with which she is dissatisfied and seeks leave to file and serve the record of appeal out of time. She expresses that she was niece to the late Jemaiyo Tabletgoi Kerich and stayed with her in the suit property, Nandi/Chepkunyuk/422. That upon Jemaiyo's demise, she initiated succession proceedings in the estate which resulted in the title deed being registered in her name.
 7. The applicant affirms that the reason for her delay in filing the Notice of Appeal was due to reliance on the advice of her former advocate and such a mistake by an advocate should not be visited on her. Additionally, that they went through a financial crisis and subsequently lost touch with the said advocate until early August 2022, when she got some finances and retained another advocate.
 8. The applicant states that the intended appeal is arguable and has high chances of success having had possession and utilized the land continuously and uninterrupted for over 50 years. She expresses that the appeal raises serious issues including whether a beneficiary of a fraudulent and illegal act can be left to enjoy the fruits of illegality at the expense of innocent victims before a matter is heard on merit. She has urged this Court to grant the orders sought as she stands to suffer irreparable damage and loss if evicted.
 9. The respondent has opposed this application by a replying affidavit dated 20th December, 2022, urging for its dismissal with costs. She avers that the application is without merit and no satisfactory explanation has been provided for the delay in filing the record of appeal. Additionally, that the period of 4 years delay is inordinate and the application has been filed as an afterthought.
 10. The respondent states that she made an application to the Deputy Registrar to execute transfer of documents on behalf of the applicant who declined to do so and the application was allowed on 2nd October 2019. Moreover, that the applicant failed to pay the Kshs 198,660/= taxed on 8th February, 2019 by the Deputy Registrar as costs of the suit after the judgement was delivered.
 11. This application was disposed of by way of written submissions. In the applicant's submissions dated 18th November, 2022, filed by Bulbul-Koitui & Co. Advocates currently on record for the applicant, it is submitted that indeed, this Court has unfettered discretion under Rule 4 of the Court of Appeal Rules to grant extension of time limited by these Rules. She refers to the decision of the Supreme Court in *Fahim Yasin Twaha v Timami Issa Abdalla and 2 others* [2015] eKLR as well as *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* and *Wasike v Swala* (1984) KLR p59, as precedents that highlight the guiding principles in exercising such discretion.



12. The respondent's advocates Kete, Nyolei & CO filed their submissions dated 20th December 2022 and submits that the applicant has not sufficiently explained the reasons for her failure to file the record of appeal within time. She argues that the applicant has not demonstrated that she applied for certified copies of the proceedings in time or at all, and has urged this Court to find the application unmerited. Additionally, the respondent submits that financial constraints cited by the applicant are not sufficient reason for failure to act within time and that the delay of 4 years should be found to be inordinate and inexcusable in the circumstances.
13. The respondent submits that the applicant has not demonstrated that the intended appeal has merit, or is arguable and that the draft memorandum of appeal annexed to the affidavit does not raise any arguable grounds against the judgement of the trial court. Further, that the respondent may face great prejudice if litigation on the same subject matter was to reopen as she is very old and sickly and has lost her eye sight due to age. She has urged this Court to find the application unmerited and dismiss it with costs.
14. I have considered the grounds of the application, the replying affidavit, the submissions and the applicable law to determine whether this application has merit. I place reliance on the case of *Leo Sila Mutiso v Rose Hellen Wangari*, Civil Application No. NAI 255 of 1997 where the principles that guide this Court in applications of this nature were enumerated as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
15. The first issue for determination is whether the applicant has provided sufficient reason for the delay. The applicant expresses within her supporting affidavit that the delay was because she lost touch with her advocate and faced financial constraints thus, she was unable to proceed with the appeal. On this the under the *Civil Procedure Rules*, 2010, Order 44 Rule 1, the law considered the interest of those unable to afford to seek justice by appeal. The rule allowed any person entitled to prefer an appeal, who was unable to pay the fee required for the filing of the memorandum of appeal, to present an application accompanied by the memorandum of appeal, seeking to be allowed to appeal as a pauper. This was subject in all matters, including the presentation of such application, to the provisions relating to suits by paupers in so far as those provisions were applicable
16. It is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her Case. (See the High Court Case of Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002). In view of the foregoing, the applicant has failed to provide sufficient reason for the delay. She has not presented any evidence to show that she tried to pursue her case or make an application to file her appeal as a pauper.
17. The second matter that this Court has addressed is the length of the delay and whether or not it is inordinate. The Judgement of the trial court is dated 28th June, 2018 and the applicant filed this application 4 years later on 7th November, 2022. In the case *Andrew Kiplayat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR the Court of Appeal held that;

“...The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is



the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

Fortified by this precedent it is my considered view that the delay for a period of 4 years is inordinate in the circumstances of this case.

18. The third issue for determination is whether the intended appeal is arguable. On this, I advert to the decision in *Ngei v Kibe & another* (Civil Appeal (Application) E359 of 2021), in which the Court of Appeal cited the case of *Athuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2016, where it was observed that this Court has been careful to ensure that whether the intended appeal has merits or not, is not an issue to be determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.
19. The bone of contention in the intended appeal being adverse possession, it is undeniable that the appeal is one that is arguable.
20. Lastly, on whether allowing this application may prejudice the respondent, the respondent posits that she may be greatly prejudiced if the application is allowed, because she is old and sickly and has lost sight due to old age. That she may therefore, not be able to take on the burden of participating in the suit.
21. This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him or her the right of appeal, unless it can fairly be said that their action was, in the circumstances, inexcusable and that his opponent will be prejudiced by it. From the foregoing, I am satisfied that the delay of 4 years in the circumstances of this case is inordinate and inexcusable, and taken together with the state and well-being of the respondent, may occasion her prejudice if this application is allowed.
22. Having considered the principles applicable as well as the application in its entirety, I find no merit in the application dated 7th November, 2022. In the premise, I dismiss it and award the costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH 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

