



REPUBLIC OF KENYA



KENYA LAW
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**Kitere v Sadera (Civil Appeal (Application) E079 of 2023)
[2024] KECA 722 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 722 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E079 OF 2023
FA OCHIENG, JA
JUNE 21, 2024**

BETWEEN

PARMATANKA OLE KITERE APPLICANT

AND

MATIKO OLE SADERA RESPONDENT

(An application for leave to lodge an appeal out of time against the Ruling of Environment and Land Court at Narok (M. Kullow, J) delivered and dated on 4th March 2020 in ELC Miscellaneous Application no. 2 of 2019)

RULING

1. Before me is an application dated 19th September 2023, through which the applicant was seeking leave to lodge his appeal out of time.
2. The applicant indicated that the ruling which he wished to appeal against, was delivered on 4th March 2020.
3. The said ruling was in respect of the application dated 16th January 2019, which was filed by the applicant herein, seeking leave to appeal against a judgment dated 15th April 2003.
4. In that application, the applicant explained that he had only become aware of the proceedings in the case before the magistrate's court, in the year 2014, after judgment had been entered against him.
5. After he had learnt about the judgment, the applicant lodged an application to have it set aside. The trial court dismissed the application, prompting the applicant to file ELC Misc. Application No. 2 of 2019.
6. It is the ruling made in that application that the applicant now wishes to be granted leave to appeal.



7. In answer to the application, the respondent filed a replying affidavit which was sworn on 9th October 2023.
8. In the first instance, the respondent pointed out that the decree issued by the trial court had already been executed more than 20 years ago. He said that the suit land had been sub-divided and thereafter sold to third parties. As a consequence of the said execution, the respondent told this Court that the suit property, L.R. No. CIS-Mara/Olelesha/795, was no longer in existence.
9. Secondly, the respondent asserted that the delay in moving this Court was inordinate, considering that it was filed after more than 3 years since the Notice of Appeal was filed on 19th March 2020.
10. When called upon to determine an application for extension of time, the Court has an unfettered discretion. The Court's said jurisdiction was captured in the following words, in the case of *Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi* [1999] Z EA 231;

“It is now well settled that the decision whether or not to extend 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.”
11. However, although the Court has laid down the foregoing list of matters to guide it when giving consideration to an application for extension of time to appeal, the said list is not by any means exhaustive.
12. The circumstances of each particular case could give rise to unique factors which may have to be accorded due consideration, in order to enable the Court come up with an appropriate determination to the application.
13. In the case of *Muringa Company Ltd Vs Archdiocese of Nairobi registered trustees*, Civil Application No. 190 of 2019, the Court expressed itself thus:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reasons for the delay, the possible prejudice, if any, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”
14. I will be duly guided by those considerations when determining the application.
15. The notice of appeal was filed on 19th March 2020. By seeking an extension of time, through an application dated 19th September 2023, the applicant has moved the Court after 3 years and 8 months. The period, of itself, is considerable, and unless the applicant provides a plausible explanation for it, I do find that it is inordinate.



16. So, what explanation did the applicant give?
- “ e. THat the delay in lodging the intended Appeal has not been deliberate on the part of the Applicant, but caused by a failure to find the much needed legal assistance due to financial challenges.”
17. That is what the applicant states as ground numbered (e) on the face of his application.
18. Meanwhile it is noted from the applicant’s affidavit that soon after he learnt of the judgment, he instructed the firm of M/S Nchoe, Jaoko & Lempaa Advocates, to expeditiously file an application to set aside the said judgment.
19. When the application was dismissed, on 4th September 2014, the applicant instructed M/S Ochengo – Onduso & Company Advocates to lodge an appeal against the ruling. The said advocates also filed an application for stay of execution.
20. However, on 4th March 2020, the High Court dismissed the application.
21. The notice of appeal, in respect to the High Court’s ruling delivered on 4th March 2020, was lodged on 19th March 2020.
22. At paragraph 21 of his affidavit, the applicant deponed thus;
- “ That I have been a victim of repeat professional failures on the part of my previous Advocates who failed to act on my instructions to promptly file an Application to set aside the ex-parte judgment entered against me in the Senior Resident Magistrate’s Court at Narok delivered on 15ht April, 2003 and also the Application before the High Court for leave to appeal the ex-parte judgment.”
23. Clearly, the explanation tendered relates to earlier applications.
24. I have combed through the application and the supporting affidavits, but I failed to find any explanation for the delay between 19th March 2020 and 19th September 2020.
25. Accordingly, I hold that the inordinate delay in lodging the appeal, has not been explained by the applicant.
26. Secondly, I note that the judgment was already executed more than 20 years ago. In those circumstances, the possible prejudice that could be occasioned to persons who acquired portions of the suit property, after it had been sub-divided, would be immense, if the case were to be re-opened.
27. The intended appeal may, of itself, be arguable, as the ruling in question does not appear to have directly addressed the quest for leave to appeal out of time.
28. Nonetheless, as the applicant is guilty of unexplained inordinate delay, and also because he possible prejudice that could be occasioned by a re-opening of the case was so vast, I find that justice demands that the application be rejected.
29. Accordingly, the application dated 19th September 2023 is dismissed, with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024.

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

