



**Kimani v Thuku & 2 others (Civil Application E028 of 2024)
[2024] KECA 682 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KECA 682 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E028 OF 2024
S OLE KANTAI, JA
JUNE 14, 2024**

BETWEEN

EUNICE WANJIKU KIMANI APPLICANT

AND

SAMUEL NDUNGU THUKU 1ST RESPONDENT

JOHNSON KIHORO WAMBUGU 2ND RESPONDENT

NYAKINYUA INVESTMENTS LIMITED 3RD RESPONDENT

(Being an application for extension of time to file and serve the notice and record of appeal against the Judgment and Decree of the Environment and Land Court at Thika (B. M. Eboso, J.) dated 24th October, 2023 in E.L.C. Case No. 315 of 2017)

RULING

1. The applicant Eunice Wanjiku Kimani by Motion on notice brought under sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 4 and 47 of the [Court of Appeal Rules](#) prays that I extend the time for filing and serving of Notice of Appeal and Record of Appeal and the applicant be allowed to file and serve the said documents within extended time; that Notice of Appeal filed on 17th January, 2024 be deemed as duly filed and served. In grounds in support of the motion and in a supporting affidavit of the applicant it is said amongst other things that judgment was delivered on 24th October, 2023 by Environment and Land Court (ELC) at Thika; that the lawyer on record for the applicant passed away in the course of the trial and the lawyer who took over conduct of the matter did not update the applicant on the goings on in the proceedings; that being dissatisfied with the outcome of the judgment the applicant instructed the lawyer who had taken over the brief to mount an appeal but the lawyer did not undertake the instructions leading to time for filing appeal elapsing; that the intended appeal has high chances of success and failure to file an appeal was occasioned by circumstances beyond the applicant's control as the lawyer failed to file an appeal as instructed. Further, that the applicant



appointed her current lawyers who put themselves on record on 17th November, 2023 (post judgment) and were formally allowed to be on record by an order made on 16th January, 2024; they filed a Notice of Appeal on 17th January, 2024 but it was out of time; that the applicant has acted diligently in pursuing her right of appeal. The applicant further states that the dispute at ELC involved ownership of L.R No. Ruiru/Ruiru East Block 2/4936 which was initially registered in her name and which she had sold and transferred to the 2nd respondent Johnson Kihoro Wambugu; that upon being served with Summons to Enter Appearance in the ELC case she appointed a lawyer who died in the course of the proceedings; she then appointed M/S Bwogo Manoti & Chepng'eno Advocates who proceeded with the case to conclusion but according to her the new lawyers were not updating her about the case. That when she was ultimately advised about the outcome of the case she instructed the said advocates to appeal but they did not, information which she received in November 2023; that it was also in the said month of November 2023 that she learnt from the 2nd respondent that he had filed a Notice of Appeal but her lawyers had not which led her to appoint yet another law firm to represent her. She blames her previous lawyers for the predicament she finds herself in and says that she has an arguable appeal with high chances of success as shown in draft memorandum of appeal which she has attached to the application; that as the 2nd respondent had already filed a Notice of Appeal no prejudice can be suffered by the respondents if she is allowed to file an appeal.

2. Attached to the motion is judgment of ELC where the applicant was the 1st defendant and the plaintiff was Samuel Ndungu Thuku (the 1st respondent here). Johnson Kihoro Wambugu and Nyakinyua Investments Limited (2nd and 3rd respondents) were defendants in the suit. The dispute revolved around ownership of a parcel of land L.R No. Ruiru/Ruiru East Block 2/4936 which was a sub-division of a larger parcel of land owned by Nyakinyua Investments Limited. Eboso, J. found that the 1st respondent is the beneficial owner of the suit land and a declaration was made that the suit land was fraudulently registered in the applicant's name and a subsequent transfer to the 2nd respondent was found to be null and void, amongst other orders made by the Judge.
3. The 1st respondent filed a document "Grounds of Opposition" through his lawyers M/s Mwangi & Partners Advocates. We do not have a place for that document in our rules.
4. I have seen and considered written submissions by the applicant.
5. The principles that apply in an application of this nature are well known and were well summarized in the oft-cited case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2 EA 231 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 stated 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."
6. As we have seen judgment of ELC was delivered on 24th October, 2023. The applicant says that she instructed her lawyers then on record to file an appeal but that they never did so nor did they inform her of their failure to carry out her instructions. That it was not until she learnt from one of the respondents that he had lodged a Notice of Appeal that she found out that her lawyers had not acted as instructed; that when she appointed her current lawyers the previous lawyers did not cooperate and that it took getting court orders for the new lawyers to be allowed to come on record; those new lawyers filed a Notice of Appeal but it was out of time.



7. I note the period from when judgment was delivered (24th October, 2023) to 17th November, 2023 when efforts were made by the new lawyers to rescue the situation is a short period so there is no inordinate delay. I accept the explanation by the applicant why there was delay in lodging a notice of appeal. I have seen draft memorandum of Appeal and I think there are reasonable grounds to be argued on appeal.
8. I cannot see any prejudice that can be suffered by the respondents.
9. I allow the motion dated 26th January, 2024 by extending time to file appeal. Let the applicant lodge a Notice of Appeal within ten (10) days of today. Costs of the motion will be in the appeal

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

