



**Kimuhu v Ngobi (Administrator in the Estate of Richard Moses Ngobi (Dcd) & another
(Civil Application E415 of 2023) [2024] KECA 669 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KECA 669 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E415 OF 2023
LA ACHODE, JA
JUNE 14, 2024
[IN CHAMBERS]**

BETWEEN

MARY WAMBUI KIMUHU APPLICANT

AND

**RUTH THEDDESIA NGOBI (ADMINISTRATOR IN THE ESTATE OF
RICHARD MOSES NGOBI (DCD) 1ST RESPONDENT**

KIRAGUMUTIROKI KINGORI 2ND RESPONDENT

*(Being an Application for extension of time to lodge a Notice of Appeal
against the Ruling and Order of the Environment and Land Court at Nairobi
(Mogeni J.) delivered on 7th June 2023. in NAI ELC Case No. E294 of 2022)*

RULING

1. The subject of this ruling is a Notice of Motion dated 18th August 2023 brought by Mary Wambui Kimuhu the applicant, under Section 3A and 3B of *Civil Procedure Act*, Rules 4, 41 and 42 of the *Court of Appeal Rules*, 2022. She is seeking for orders of extension of time within which she may file a Notice of Appeal against the Ruling and Decree of Environment and Land Court, Hon. Mogeni J, delivered on 7th June 2023, in Nairobi ELC No. E294 of 222. Further that the costs be in the cause.
2. In the grounds of the application as are to be found on the face thereof, the applicant indicates that she is dissatisfied with the ruling of 7th June 2023, in ELC Case No. E294 of 2022 and intends to appeal. She avers that the delay to lodge the Notice of Appeal was due to her advanced age and ill health, which hindered her from giving timely instructions to her advocates to file the appeal. She states that the intended appeal has merit and good chances of success.



3. The origin of this application is a suit that the applicant and the respondents had before the High Court in Civil Suit (OS) No. 9 of 2011, which was dismissed with costs against the appellant. The costs were taxed and certified by the Deputy Registrar on 28th April 2023 at Ksh. 737,093. The applicant filed a new suit in the Environment and Land Court (ELC), against the Respondents regarding the land LR No. 330/681, which was the suit property in the Civil Suit (OS) No.9 of 2011.
4. The respondents filed a Notice of Motion in the ELC suit seeking orders that the court do stay the suit pending payment of the costs awarded by the High Court to the respondents. Alternatively, that the appellant be ordered to furnish security for costs in the sum of Kshs. 5,542,317.22, pending taxation of their bill of cost dated 22nd November 2022 and that the payment be made within 14 days of the order. In default, the appellant's suit be struck out with costs to the respondents. The Notice of Motion was allowed and the suit was stayed pending payment of the taxed costs. The applicant was aggrieved with the ruling of the court and intends to appeal, hence this application.
5. This application is opposed by a Replying Affidavit sworn on 5th October 2023 by Ruth Theddesia Ngobi on behalf of both Respondents. She avers that the applicant instituted High Court Civil Suit No. 9 of 2011 challenging the sale of LR No. 330/681 Nairobi, to her late husband Richard Moses Ngobi, by the applicant's late husband, Gabriel Kimuhu Wahinya. The suit was dismissed in its entirety in a ruling dated 27th July 2018 with cost to the respondents.
6. On 22nd November 2022, the respondents' advocates filed a party-party bill of costs in the Suit for a sum of Ksh. 5,542,317.22 which the Deputy Registrar taxed at Ksh. 737,093. The applicant did not file a Reference against the taxation by the Deputy Registrar. She filed a fresh suit in the ELC challenging the sale of LR No. 330/681 to the 1st respondent's husband (deceased).
7. The respondents depose that their application dated 23rd November 2023 seeking stay of the suit in ELC until the costs due to them were realized, was allowed on 7th June 2023. The applicant had neither appealed against the order granting the costs of the suit, nor settled the said costs and had therefore, approached the court with unclean hands having breached Order 25 Rule 4 of the *Civil Procedure Rules*.
8. The respondents aver that the applicant has no arguable appeal; that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party; that this application was filed of 78 days from the delivery of the ruling; and, that counsel could have sought instructions from the applicant, or through the daughter (Alice Njeri Kimuhu) to proceed to lodge Notice of Appeal within 14 days of the ruling. The respondents aver that the applicant did not provide evidence of the effort she made despite illness, or evidence of illness which they say is an excuse to escape responsibility.
9. The respondents depose that the applicant was not keen on approaching the court and was only triggered by the demand letter of 8th August 2023 seeking settlement of the respondents' party-party costs. That the applicant neither appealed against the order of the High Court, nor filed a reference against the decision of the Taxing Master thus, the taxed cost is final. They aver that the application is vexatious, lacks merit, is an abuse of the court process and will continue to greatly prejudice the respondents should this Court grant extension of time.
10. Parties filed written submissions in this application. The applicant filed hers through the firm of Theuri Wesonga & Company Advocates dated 9th October 2023 and reiterated the contents of the Notice of Motion and the provisions of Rule 4 of the *Court of Appeal Rules*, 2022. She relied on this Court's decision in *Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission and 7 Others* [2015] eKLR which outlined the considerations for extension of time.



11. The applicant also relied on *Athuman Nusura Juma v Afwa Mohammed Ramadhan*, CA No. 277 of 2015 to urge that the intended appeal should be allowed as it has merit and the respondents have not stated that the extension will result in prejudice to them. The applicant refers to the case of *Aniel Olukoba Wamabi v Benson Omurma & 2 Others* [2003] eKLR to urge that her illness was an excusable reason for delay and that the delay was not inordinate. She submits that granting her extension of time to file the Notice of Appeal is a way to promote fairness and natural justice.
12. The respondents filed their submissions dated 6th October 2023 through the firm of Tripleoklaw Advocates LLP and reiterated the contents of their replying affidavit and the provisions of Rule 4.
4. They also relied on *Nicholas Kiptoo Arap Salat (supra)* for the outline of the considerations for extension of time; The *Kenya Anti-Corruption Commission v Ketan Somaia & 9 Others* [2022] eKLR to fault the applicant's counsel for not reaching out to her for instructions to lodge the Notice of Appeal; and *Mwangi v Kenya Airways Ltd* [2003] KLR 486 to urge the Court to consider the chances of the intended appeal succeeding. It is their view that the delay was inordinate and that intended appeal is frivolous.
13. This Court has the discretion to determine this matter by virtue of Rule 4 of the *Court of Appeal Rules, 2022* which provides as follows:

“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.”

14. Some of the considerations which guide the Court in the exercise of this discretion were stated in *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others* [2018] eKLR, thus:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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”.

This then, is an outline of the factors for consideration by the Court before allowing an application for extension of time to file an appeal.

15. On whether the length of the delay was inordinate or excusable, the ruling sought to be appealed against was delivered on the 7th June 2023. The application as stated in the Replying Affidavit was filed on 25th August 2023, about 78 days later. Rule 77 of the *Court of Appeal rules 2022*, dictates that a Notice of Appeal shall be filed within 14 days from the date of the ruling the appellant intends to appeal against. However, more important is the reason assigned for the delay.



16. The applicant stated that she was ill due to the cold weather and was unable to instruct an advocate. The Supreme Court stated in Nicholas Kiptoo Arap Salat (*supra*) that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

17. I note first, that the applicant has not presented before this Court any evidence to demonstrate the extent of the illness that prevented her from instructing her counsel. This she could have done by phone, or through her daughter (Alice Njeri Kimuhu), without traveling to physically visit them. Secondly, the applicant was represented and her counsel having knowledge of the law, ought to have followed up with the client to get instructions. See The Kenya Anti-Corruption Commission v Ketan Somaia & 9 Others [2022] eKLR.

18. Having not demonstrated the severity of the illness, I find that this reason is not a reasonable excuse for the applicant’s delay in filing the Notice of Appeal. It would appear that she lost interest in the matter and was only spurred into action by the demand letter from the respondents.

19. On the arguability of the intended appeal the applicant has not attached a draft of the memorandum of appeal to indicate the grounds she intends to raise on appeal. However, in the attached Notice of Appeal, she states that she intends to challenge the decision of the ELC which ordered her to pay the costs due to the respondents, while staying the suit she instituted. In Athuman Nusura Juma v Afwa Mohamed Ramadban [2016] eKLR this Court held 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”.

20. It is trite that an arguable appeal is not necessarily one that must succeed. It is also not the place of a single judge to determine conclusively whether the intended appeal is arguable. However, it is noteworthy that the applicant did not challenge the order of the High Court in granting costs to the respondent, or the decision of the Tax Master. I say no more on this issue lest I embarrass the bench that may be seized of it, should this appeal live to see the light of day.

21. Lastly the respondents submit that they stand to suffer prejudice due to the time it has taken to recover their costs, while the applicants submit that the respondents have not demonstrated how they will be prejudiced by the extension of time. I have considered the rival arguments in order to balance the competing interests of the respondents who have the right to enjoy the fruits of their judgement on the one hand, and the applicant who should be accorded reasonable opportunity to address her grievances on appeal. I am satisfied that the interest of justice tilts in favour of the applicant in the circumstances of this case.

In the premise, I find that the Notice of Motion dated 18th August 2023 is lacking in merit and is dismissed with costs to the respondents.

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

L. ACHODE

JUDGE COURT OF APPEAL.



I certify that this is a true copy of the original
signed

DEPUTY REGISTRAR

