



**Mayon (Suing as legal representative of the Estate of Saginoi Ole Ndetukak
aka Sagindi Ole Ndenruka - Deceased) v Mutonyi & 3 others (Civil
Application E520 of 2023) [2024] KECA 985 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 985 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E520 OF 2023
S OLE KANTAI, JA
JULY 26, 2024**

BETWEEN

**JOSEPH SILEMI MAYON (SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF SAGINOI OLE NDETUKAK AKA SAGINDI OLE NDENRUKA -
DECEASED) APPLICANT**

AND

ISAIAH MUTONYI 1ST RESPONDENT

ISAAC GATHUNGU WANJOHI 2ND RESPONDENT

**HELLEN SEKATO (SUED AS LEGAL REPRESENTATIVE OF JOHN
EKANI) 3RD RESPONDENT**

DISTRICT LAND REGISTRAR KAJIADO 4TH RESPONDENT

*(An application for leave to extend time to file record of appeal out of time in an
appeal proffered against whole Judgment and Decree in Environment and Land
Court at Kajiado (Gicheru, J.) dated 13th October, 2022 in ELC Case No. 756 of 2017.)*

RULING

1. In the Motion brought under rule 4 of the Court of Appeal Rules amongst other provisions of law the applicant Joseph Silemi Mayon (Suing as legal representative of the Estate of Saginoi Ole Ndetukak also known as Sagindi Ole Ndentuka – Deceased) prays in the main that I extend time for filing Record of Appeal against the judgment and decree of Gicheru, J. in Kajiado Environment and Land Court (‘ELC’) Case No. 756 of 2017 dated 13th October, 2022. In grounds in support of the Motion and in an affidavit by the applicant it is said amongst other things that time allowed for lodging an appeal has lapsed; that if time is not extended the appeal or intended appeal will be improperly before court; that the reason for not filing appeal on time was occasioned by the applicants’ inability to obtain



proceedings on time from ELC; that the appeal has high chances of success; that the respondent will not suffer prejudice if I allow the application and that the application has been brought timeously without delay. It is deponed in affidavit in support of the Motion that Notice of Appeal was lodged on 17th October, 2022 which was duly served on the respondents from the judgment delivered on 13th October, 2022; that a letter bespeaking proceedings was issued on 17th October, 2022 and paid for and was served on the respondents; that there were follow ups on the proceedings which were ready on 19th October, 2023 and were collected that day; that upon request a Certificate of Delay was sent by the Registrar of ELC on 7th November, 2023 by email; that by the time of receipt of proceedings time for lodging a record of appeal had lapsed; that the appeal is merited with high chances of success.

2. Attached to the Motion is judgment of ELC, Notice of Appeal dated 17th October, 2022 lodged with the Registrar of that Court, letter bespeaking proceedings and other letters, Certificate of Delay and Draft Memorandum of Appeal where 11 grounds of Appeal are set out.
3. There is a replying affidavit of Peter Gacheru Ng'ang'a, a lawyer, who practices as Gacheru Ng'ang'a & Co., Advocates, on record for the 2nd respondent. He depones to matters which he says he is authorized to do by his client and says that the Motion is incompetent; that Notice of Appeal was filed, lodged and served on time as required by the rules; he accepts that letter requesting for proceedings was done on time and was served as required; that under rule 82(1) the Court of Appeal Rules time for filing a Record of Appeal started to run on 18th October, 2023 when Certificate of Delay was issued by ELC; that by the time of filing the application for leave to extend time on 7th November, 2023 the applicant was within time for filing record of appeal and the application is unnecessary. I have also seen an affidavit of Gibson Kamau Kuria, SC, the lawyer whose firm is on record for the 1st respondent. He says that the application is misconceived and should be dismissed with costs. Counsel repeats events that followed delivery of judgment and states that under rule 84 of the Court of Appeal rules an appeal should have been lodged within 60 days from when Notice of Appeal was lodged; that the rules excluded the period when proceedings were being prepared; that Certificate of Delay shows that preparation of proceedings took between 24th October, 2022 to 18th October, 2023 and the applicant has 60 days from the latter date to file Record of Appeal; that the Court has no jurisdiction to grant the application which in counsel's view is premature or misconceived; that the applicant has not raised any arguable point in grounds of appeal.
4. I have seen written submissions filed in support or opposition to the Motion.
5. This is yet another day when I have to deal with an application for leave to extend time to do an act as prescribed by the rules where the opposite side says that such leave is not necessary at all as the applicant was within time when it filed the application to extend time.
6. The applicant here asks me for leave to extend time for lodging a Record of Appel against a judgment delivered on 13th October, 2022. It is common ground that the applicant lodged and served a Notice of Appeal in accordance with the rules and also applied for proceedings within time and copied the application to the other side. Certificate of Delay issued by ELC shows that proceedings were ready for collection on 18th October, 2023 which date, the respondents submit, was the relevant day when time for lodging Record of Appeal started to run and such record should have been lodged within 60 days of that date.
7. The respondents remind me that rule 84 excludes time necessary for preparation for a copy of the proceedings from the time stipulated for filing an appeal. I agree.



- 8. The Motion before me is dated 7th November, 2023 which was well within time stipulated for lodging a Record of Appeal after Certificate of Delay was issued on 18th October 2023. So it may not have been necessary to move this Court with the present application.
- 9. But has anything been lost by any party by the applicant moving the court the way he has? I do not think so. The applicants' legal advisors chose, probably out of an abundance of caution, to ask for time extension seeing that proceedings were received from ELC over a year after the date of judgment. They decided that they required an extension of time to lodge a Record of Appeal in those circumstances. I am reminded of the words of wisdom by Madan, JA. which held true and still hold true today in *Belinda Murai & 9 others v Amos Wainaina* [1979] eKLR:
- 10. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politically referred to as erring, in their interpretation of law and adoption of a legal point of view which Courts of appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interest of justice."
- 11. And in *Lee G.Muthoga v Habib Zurich Finance (K) Limited & Another* Civil Application No. 236 of 2009 (UR):

It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight."
- 12. I am enjoined by article 159 of the *Constitution of Kenya, 2010* to do substantive justice to the parties and not be tied by giving undue regard to procedural technicalities. As I have said nobody has lost by my having to entertain the application.
- 13. I allow the Motion dated 7th November, 2023 by ordering that Record of Appeal, if not filed, be lodged within 14 days of today. If already filed it will be deemed as duly filed. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 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

