



Maina & another (Suing as Personal Representatives of the Estate of Tapnyobii C. Maina - Deceased) v Keino & 2 others (Civil Application E044 of 2024) [2024] KECA 837 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KECA 837 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E044 OF 2024**

**JW LESSIT, JA
JULY 19, 2024**

BETWEEN

**KIPKOECH ARAP MAINA 1ST APPLICANT
AUGUSTINE KIMUTAI KOECH 2ND APPLICANT
SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF TAPNYOBII
C. MAINA - DECEASED**

AND

**PAUL KIPKETER KEINO 1ST RESPONDENT
THE CHIEF LAND REGISTRAR 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT**

(Being an application for extension of time to lodge an appeal out of time from the Judgment and Order of the Environment and Land Court at Kericho (Oundo, J.) dated 25th January 2024 in ELC Case No. 50 of 2019)

RULING

1. Before this Court is an application dated 22nd April 2024 brought by the applicants pursuant to section 3(2), 3A and 3B of the *Appellate Jurisdiction Act* and Rule 4 of the Court of Appeal Rules 2022 seeking, *inter alia*, orders that this Court be pleased to grant leave to the applicants to file the substantive appeal out of time against the decision of Oundo, J. in the ELC Case No. 50 of 2019; this Court be pleased to extend time for filing an appeal from the judgment and order of Oundo, J. in Kericho ELC No. 50 of 2019; and upon granting the said orders, this Court do provide timelines for filing the appeal.
2. In the impugned judgment of 25th January 2024 the learned judge ordered for cancellation of the registration of the applicant as the sole proprietor of a land known as LR. No. Kericho/Emkwen



- (Kapkures)/290 ('suit land') and for the register to be restored to the position it was before rectification. (The impugned judgment is not on record.)
3. The application is supported by the grounds set out on the face of the application together with those found in the supporting affidavit of Kipkoech Arap Maina ('Kipkoech') sworn on the even date.
 4. The applicants attribute the delay in filing their substantive appeal to their previous advocate on record. The applicants aver that whereas they had issued instructions to their previous advocate to file an appeal against the impugned judgment, the advocate filed their notice of appeal on time that is on 8th February 2024 but failed to file the substantive appeal within the sixty (60) days as required by law which lapsed on 8th April 2024 and this was only discovered when Kipkoech visited the advocate's office after the advocate failed to communicate with them on the progress of their appeal.
 5. The applicants aver that they immediately visited Kericho Law Courts and followed up with the judgment and proceedings and thereafter instructed their current advocate on record to proceed with the needful. The applicants aver that the mistake of their previous advocate should not be visited upon them. In addition, that the delay is not inordinate and the reasons for such delay are excusable.
 6. The applicants further aver that the delay in bringing the instant application is not inordinate as the delay period is 17 days.
 7. The applicants also aver that they have an arguable appeal with good prospects of success as the intended appeal raises issues of ownership of the suit land which ought to be determined by this Court.
 8. Lastly the applicants aver that the respondent will not be prejudiced if they are granted an extension as the respondents will have a right to respond and participate in the hearing of the appeal furthermore, if there is any prejudice, the same can be compensated by way of costs unlike the applicants who will run an imminent risk as the respondents shall proceed to execute the impugned judgment.
 9. The 1st respondent has filed a replying affidavit dated 10th July 2024 in which he opposes the application for extension of time. His contention is that the applicant did not demonstrate diligence in following on his appeal. Further, that the applicant averred that upon a visit to his former advocates on 23rd April 2024 he discovered that the appeal had not been filed, yet the same was filed the day before the said visit. The 1st respondent averred that the application was an attempt to delay the conclusion of the matter.
 10. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to "... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act ...," on such terms as it thinks just.
 11. In *Muchungi Kiragu v James Muchungi Kiragu & Another* [1998] eKLR the Court had this to say:

"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 the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it."
 12. I have considered the application. I find that the applicant has satisfactorily explained the reason for the delay in filing his record of appeal. The delay is not inordinate being only 14 days. Further, I am of the considered view that allowing time for the applicant to pursue his desire to pursue the intended appeal would not unduly prejudice the Respondents. The respondents have not demonstrated any prejudice they stand to suffer if this application is allowed.



13. The upshot is that the application dated 22nd April 2024 is allowed on the following terms:

1. Leave be and is hereby granted to the applicant to lodge his appeal out of time.
2. The applicant do file its Record of Appeal within 14 days from the date hereof and serve the same within 21 days from the date of filing of the appeal;
3. Costs of this application be costs in the appeal.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF JULY, 2024.

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

