



REPUBLIC OF KENYA



**Moruri & 4 others v Ogwankwa (Civil Application
E055 of 2023) [2024] KECA 874 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KECA 874 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E055 OF 2023
HA OMONDI, JA
JULY 19, 2024**

BETWEEN

**MAUTI MORURI 1ST APPLICANT
BENJAMIN BETERA NYARURI 2ND APPLICANT
KENYATTA MORURUKI 3RD APPLICANT
DENNIS ALLOYS 4TH APPLICANT
DISHION ONSERIO 5TH APPLICANT**

AND

CYRUS ANYONA OGWANKWA RESPONDENT

*(Being an application for extension of time to file records of appeal
out of time in an intended appeal from the Judgment and Decree at
Kisii (Munyao, J.) dated 22nd February 2023 in ELC No. 75 of 2017)*

RULING

1. By a Notice of Motion dated 16th May 2023, brought under rule 4 of the Court of Appeal Rules, and supported by an affidavit of even date sworn by Mauti Moruri, the 1st applicant, on behalf of the other applicants, this Court is urged to extend time within which to file the record of appeal, on grounds that the applicant applied for, and received certified copies of proceedings and judgment and decree when time had expired, i.e. on 24th February 2023; and the notice of appeal was filed in time on the 24th day of February 2023.



2. In the supporting affidavit, the applicants explain that:

“the mistake in filing the record of appeal was occasioned by failure to obtain certified decree late, that is out of the stipulated period under the law”.

The letter bespeaking the proceedings is dated 23rd February 2023 and received by the court on 24th February 2023; and the decree was supplied on 4th May 2023. This is reiterated in the applicant’s written submissions.

3. The respondent had sued the applicants in Kisii Environment and Land Court (ELC) case No 75 of 2017 seeking cancellation of title; eviction of all applicants from the suit property; and costs of the suit with interest. The learned judge granted orders in favour of the respondent allowing cancellation of the titles; the land do revert to the original title and be subjected to succession in the usual manner; and the applicants were given 90 days to give vacant possession, in default, they would be evicted within 90 days period. The applicants were also barred from excavating or wasting the suit property in any manner. This is the decision the applicants wish to appeal against.
4. The respondent did not file a replying affidavit, but in the written submissions, he argues that extension of time cannot be presumed to be an absolute right; that the applicant’s explanation that the delay was as a result of delay in typed proceedings being availed, is not supported by a certificate of delay that would ordinarily be issued by the Deputy Registrar of the relevant court, in the event of such delay. Drawing from rule 88 of the *Court of Appeal Rules*, the respondent submits that the applicant could easily have filed an incomplete record of appeal, then invoke the aforementioned rule to file a supplementary record; that the applicants have not demonstrated a single step they took towards filing the record of appeal in a timely manner, when they realized they were running out of time; nor have they shown that they have an arguable appeal.
5. Rule 4 of the *Court of Appeal Rules* gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso v Rose Wangari Mwangi* Civil Application No Nai. 255/97 (unreported) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka v Waruguru Kithaki & 2 others* (2013) eKLR. I acknowledge that indeed, the Supreme Court of Kenya in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR set down the guiding principles to consider in the exercise of discretion. One other consideration included in the case of *Julius Kamau Kithaka v Waruguru Kithaki & 2 others* (2013) eKLR (*supra*) is whether prima facie the intended Appeal/Appeal has chances of success or is a mere frivolity. Rule 84 provides as follows:

84.

- (1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged:
- a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:



Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent. (highlighted and underlined for emphasis)

6. Whereas the applicants moved with haste to file the notice of appeal, there appears to have been some lagging in filing the record of appeal, and whereas it is a fact that in many instances typed copies of proceedings are not always ready within the desired time, the argument that the registry was to blame cannot hold because, under the proviso to Rule 84 (1) aforesaid, an appellant is afforded some reprieve in so far as computation of time is concerned, if there was delay in preparation of the proceedings upon making a written request for the proceedings. This means that, the computation of the 60 day window within which the appellants should lodge the record of appeal would stand suspended during the typing of proceedings provided the appellant serves the letter bespeaking proceedings upon the court and the respondent. A certificate of delay is usually issued in such cases, specifying the time taken for the proceedings to be typed, for purposes of exclusion of the same during computation.
7. Having failed to pursue a certificate of delay, it is too late for the respondent to visit blame on the registry for his own misapprehension of the Rules. The record of appeal is thus inexcusably filed out of time, contrary to the proviso to rule 84 of the *Court of Appeal Rules 2022*.
8. Drawing from Rule 77 (now rule 79 of *Court of Appeal Rules*, the respondent submit that the applicants have been on a non-compliance spree, pointing out that the notice of appeal was also served outside the required period.

Rule 79. (1) An intended appellant shall, before or within seven days after lodging notice of appeal under Rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.

9. I need not say more, the applicants cannot be redeemed, there is too much non-compliance it is inexcusable. The application thus lacks merit, and is dismissed with costs to the respondent.

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

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

