



REPUBLIC OF KENYA



Maasay & another v Nawangas suing as legal representative of Estate of James Laton Konchellah & 2 others (Civil Application E028 of 2024) [2024] KECA 815 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KECA 815 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E028 OF 2024
HA OMONDI, JA
JULY 5, 2024**

BETWEEN

PETER NDIWA MAASAY 1ST APPLICANT

RUTH ACHIENG MBOYA 2ND APPLICANT

AND

**KAKUI LEMASHO NAWANGAS SUING AS LEGAL REPRESENTATIVE OF
ESTATE OF JAMES LATON KONCHELLAH 1ST RESPONDENT**

JOSIAH KIPKEMOI RUTTOH 2ND RESPONDENT

RODAH TIPIS 3RD RESPONDENT

*(eing an application for extension of time to file and serve an appeal
from of the judgment of the Environmental and Land Court at Kilgoris
(E. Washe, J.) dated 23rd January, 2024 in Case (OS) No. E005 of 2023)*

RULING

1. The Notice of motion dated 1st March 2024 brought pursuant to Rule 4 Court of [Appeal Rules](#), 2010 seeks that leave be granted to the applicants to file the appeal against the judgement of the Environment and Land Court (ELC) in Kilgoris ELC (OS) No E005 of 2023, (Mutwana, J.) delivered on 23rd January 2024, and costs be in the cause. The application is supported by a certificate and a supporting affidavit of even date as the application.
2. The applicants had filed a suit against the respondent in Kilgoris ELC No. E005 of 2023, whereupon a preliminary objection was raised regarding the court's jurisdiction in the matter. By the ruling delivered on 23rd January 2023, in the presence of the advocates of the respective parties, the preliminary objection was sustained. After the delivery of judgment, the applicant's counsel sought to appeal against the said ruling, but the said prayer was not granted.



3. The said ruling was based on no compliance with section 37 & 38 of *Limitation of Actions Act*, where the advocate for the applicant sought to produce documents but was denied by the judge; on 14th February the judge addressed the parties virtually on production of the said documents, and the suit was struck out. This meant that ruling in this matter had already been delivered on 23rd January 2024 so by the time the court was addressing parties on 14th February the time to file an appeal had already lapsed.
4. The application is opposed vide a Replying Affidavit dated 21st March 2024 by the 1st respondent who says there is no pending suit against which to peg an appeal, as the suit was struck out.
5. In the written submissions, the applicants maintain that the trial court's decision was based on whim, and was capricious; and the court took draconian decision which adversely affected two other properties.
6. That the 1st respondent raised a preliminary objection dated 11th October 2023 and a ruling dated 23rd January 2024 upholding the Preliminary Objection was delivered. However, on 14th February 2024 the trial court went ahead to strike out the suit, which decision has not been appealed against. The respondents fault the application, saying applicants seem to want to appeal on the ruling of 23rd January 2024, whereas there are currently no proceedings going on, the trial court having struck out the suit; and the intended appeal is already nugatory by virtue of the fact that the claim was struck out and no appeal has been preferred by the applicants.
7. Has the applicant met the prerequisites for granting relief under rule 4 of the *Court of Appeal Rules*? 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 vs 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.
8. M'Inoti, J, had this to say concerning Rule 4 in *Imperial Bank (IR) & Anor vs Alnashir Popat and Others* Civil Appeal (Application) 395/2017 "A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show 'sufficient reason' why discretion should be exercised in his favor. After an amendment in 1985 that 'sufficient stricture' was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor."
9. Discretion also depends on circumstances of each case as per *Mongira & Another v Makori & Another* [2005] eKLR The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR sets down these principles as follows: -
 - i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
 - iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.



- iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
- v. Whether there will be any prejudice suffered by the respondent if extension is granted.
- vi. Whether the application has been brought without undue delay.
- vii. Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of Julius Kamau Kitheka (supra) is whether prima facie the intended Appeal/Appeal has chances of success or is a mere frivolity.

10. The applicant in my view has not in any way tried to explain the delay in filing the appeal. Looking at the pleadings, it comes out clearly that the trial judge had determined a preliminary objection on 23rd January 2024 in favor of the respondents. The trial judge, later on 14th February 2024, as a result of the ruling on the preliminary objection went on to strike out the suit. I concur with the respondent that the applicants cannot appeal on the ruling as regards to the preliminary objection at this point as there is no suit in existence. Maybe the applicants should consider appealing against the decision striking out the suit, then this court may deal with all the issues including the outcome of the preliminary objection.
11. On the issue of whether or not the Intended Appeal has no chance of success. This Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of *Athuman Nasura Juma v Afwa Mohammed Ramadhan* CA 227/15 “... this Court has to be careful to ensure that the intended appeal has merit or not is not an issue to be determined with finality by a single judge.

It is this court’s considered view, the Applicant has not met and satisfied the principles set out for this court to exercise its discretion in his favor and grant the extension.

The application before this court lacks merit and is dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024.

H. A. OMONDI

JUDGE OF APPEAL

