



REPUBLIC OF KENYA



**Kisoso v Kimatet & Totona (Sued as Legal Representatives of Kiporot Ole Totona) & 3 others
(Civil Application E084 of 2024) [2024] KECA 1337 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1337 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E084 OF 2024
MA WARSAME, JA
SEPTEMBER 27, 2024**

BETWEEN

PRISCILLA JERUTO KISOSO APPLICANT

AND

**LETEMA TOTONA KIMATET , FREDRICK TOYONGO TOTONA (SUED AS
LEGAL REPRESENTATIVES OF KIPOROT OLE TOTONA) . 1ST RESPONDENT**

TUNGO TOTONA 2ND RESPONDENT

LEDEMA TOTONA 3RD RESPONDENT

RONALD TOTONA 4TH RESPONDENT

(An application for leave to file and serve a notice of appeal and record of appeal out of time in an intended appeal against the judgment of the Environment and land Court at Nakuru (Njoroge, J.) dated 21st February, 2024 in Nakuru ELC Cause No. 267 of 2017)

RULING

1. The applicant, Priscilla Jeruto, filed Nakuru ELC Case No. 267 of 2017 before the Environment and Land Court seeking interalia; to evict the respondents from Land Parcel No. Lembus/chemogoch/10. The respondents filed their defence and filed a counterclaim seeking interalia, to be declared the registered owners of the suit property.
2. During the hearing of the suit, the applicant's advocates made an application for all the defendants in the suit to be struck out except the applicant for want of service. Sila, J. allowed the application and upon a request for review of that decision by the respondents, he acceded to the request and extended the time to serve other defendants in the counterclaim on condition that the respondents surrender the suit property to the applicant, deposit Kshs.1,000,000.00 as security and pay throwaway costs of Kshs.250,000.00.



3. Aggrieved, the respondents herein filed Civil Appeal 117 of 2017 but no stay orders were obtained before the ELC pending the appeal. The matter proceeded before Ohungo, J. culminating in a judgment by Njoroge, J. delivered on 19th January, 2023 partially allowing the applicant's claim and dismissing the respondent's counterclaim.
4. Unknown to the court (and the parties allegedly) Civil Appeal 117 of 2017 was determined in the respondent's favour wherein the court set aside the ruling by Sila, J. on the ground that the set conditions which went to the heart of the suit were too harsh. The court reinstated the respondents' counterclaim and ordered that it be served on the named defendants within 10 days and that the matter be heard de novo before another judge other than Sila, J.
5. This Court ruling prompted the respondents to seek a review of the judgment of Njoroge, J. delivered on 19th January 2023. On 24th February, 2024. The learned Judge allowed the application for review on account of the discovery of the orders made by the Court of Appeal, set aside his judgment of 19th January 2023 and ordered that the matter be heard de novo with all the parties in the counterclaim on board.
6. This ruling is the subject of the application now before me dated 22nd August, 2024 which seeks to file an appeal out of time. It appears that in a similar turn of events, the parties were unaware that the ruling was delivered.
7. The applicant who is aggrieved by the said ruling, has on the face of the application as supported by her affidavit dated 22nd August, 2024 blamed the delay in filing the appeal entirely on the court for failing to issue a notice of delivery of the ruling after Njoroge, J. was transferred to Malindi. she contends that the respondents had failed to comply with the 10 day timeline to serve the counterclaim and had filed an application for extension of time which was dismissed by Achode, JA for being overtaken by events in view of the trial courts judgment of 19th January, 2023 and that this decision was affirmed by a full bench of this court upon referral by way of a reference. Lastly, she contended that her appeal had high chances of success and that the application was brought without delay, and it was in the interests of justice that the application be allowed.
8. In opposition to the application, the respondents have filed a replying affidavit dated 11th September, 2024 sworn by Letema Totona who avers that they delay of 6 months from 21st February, 2024 to 20th August, 2024 when the notice of appeal was filed has not been explained, that the Court of Appeal judgment remains valid and has not been set aside by way of review or appeal to the Supreme Court. Consequently, the intended appeal has no chances of success, that the applicant was not diligent in following up the matter and that the learned Judge returned the file to the Nakuru Environment and Land Court registry and it was therefore available for perusal.
9. I have considered the motion, the affidavits and authorities on record, the submissions of both counsel, and the issue for determination is whether the application is deserving of the orders sought.
10. Whether or not the order for extension of time should be granted lies entirely in my unfettered discretion. That discretion must however be judicially exercised. The guiding principles have been stated in *Fakir Mohamed vs. Joseph Mugambi & two Others*, Civil application No. Nai. 332/04; thus: -

“The exercise of this Court's discretion under rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of actors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted,



the effect of the delay on public administration, the importance of compliance with time limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustively factors. ”

11. I have keenly examined the affidavit in support of the application and note that the applicant became aware of the judgment on 9th August, 2024 when the respondents’ advocates served them with a copy of the judgment. The respondents themselves were only made aware of the judgment on 9th July, 2024 as they tried to forward a letter and their list of authorities to the court. The delay in filing this application was therefore about 13 days.
12. As correctly emphasised by the respondents, there is no explanation at all about what the applicant was doing between 9th August, 2024 and 22nd August, 2024. Nonetheless, I have had the opportunity to peruse the draft memorandum of appeal and find that whether the orders of the Court of appeal were alive or dead at the time of implementation by the learned judge of the ELC is question for consideration by this Court on appeal. While the respondents seek enforce statutory timelines upon the applicant, this Court cannot shut its eyes to the impact if any of the respondents’ compliance or lack thereof with the timelines given by this Court in Civil Appeal 117 of 2017, an issue which the respondents have neither confirmed nor denied in their elaborate submissions. Consequently, I find that the arguable appeal.
13. Even though the record betrays a lack of expedition on the part of the applicant on following up on the fate of the ruling, I find that in light of the circumstances of this case the delay in filing the instant application is not inordinate and has been sufficiently explained.
14. The inevitable result is that the motion before me is allowed with costs to the respondents. I therefore extend the time to file and serve the notice of appeal and record of appeal and direct the applicant to file the notice of appeal within 14 days of this ruling.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

