



**Imbisi v Kakamega & 2 others (Civil Application E033 of 2024)  
[2024] KECA 1205 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1205 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E033 OF 2024  
JM NGUGI, JA  
SEPTEMBER 20, 2024**

**BETWEEN**

**ADRIANO MUHADACHI IMBISI ..... APPLICANT**

**AND**

**LAND REGISTRAR, KAKAMEGA ..... 1<sup>ST</sup> RESPONDENT**

**PETER SHIKUNZI AKHURA ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for enlargement of time for the appellant to file application for stay execution, Notice of Appeal and Memorandum of Appeal against the Judgment of the Environment and Land Court at Kakamega (Obungo, J.), dated 31st January, 2024 in ELC Case No. 372 of 2013)*

**RULING**

1. In a suit based on fraud, the applicant approached the Environment and Law Court in Kakamega ELC Case No. 372 of 2013 seeking for cancellation of the 1<sup>st</sup> respondent as the proprietor of the parcel of land known as Idakho/Shivakala/2146 (hereinafter, "Subject Property") and for orders that it be registered in his name. On the other hand, the 1<sup>st</sup> respondent filed at Kakamega Chief Magistrate's Court, Suit No. CMELC 926 of 2018 in which the applicant was named as the defendant. The principal prayers sought in the latter suit were for the eviction of the applicant from the Suit Property; mesne profits; and an order for permanent injunction restraining the applicant from interfering with the Suit Property.
2. The two suits were consolidated and heard by the Environment and Land Court. In a judgment dated 31<sup>st</sup> January, 2024, the learned trial judge (Ohungo, J.) dismissed the applicant's suit in its entirety and allowed the principal prayers in the 1<sup>st</sup> respondent's suit save for the prayer for mesne profits.



3. The applicant is aggrieved by the judgment of the Environment and Land Court. However, he was, by his own admission, late in filing the Notice of Appeal and Memorandum of Appeal. The present application is meant to, among others, cure that lapse. The application, dated 8<sup>th</sup> March, 2024, seeks the following prayers:
  - i. That this application be certified urgent and heard ex-parte for stay of execution in the first instance.
  - ii. That the Hon. Judge be pleased to enlarge time for the appellant to file this application for stay of execution, Notice of Appeal, and Memorandum of Appeal.
  - iii. That on granting of prayer (ii) above, there be stay of execution of the judgment/decree of the Hon. Judge in ELC Case No. 372 of 2013 Kakamega by the respondent, his agents, employees, relatives and/or any other claiming through him pending the hearing of the application inter-partes.
  - iv. That there be stay of execution of the judgment/decree in Kakamega ELC Case No. 372 of 2013 by the respondent, his agents, employees, relatives and/or any other claiming through him pending the hearing and final determination of the appeal.
  - v. That costs be provided for.
4. It is readily obvious that the application is, to the knowledge of the applicant's advocate, an impermissibly omnibus one. I say so because the advocate has explicitly addressed the issue in the submissions filed in support of the application. The advocate urges the Court to invoke Article 159(2) (c) of *the Constitution* to not only cure the procedural mess but to grant the prayers as sought.
5. No response to the application was filed. I was satisfied that the application was duly served on the respondents. Despite the lack of responses, I must begin by observing that the omnibus nature of the application is not merely a technical error, it rises to the level of procedural impropriety respecting the prayers for stay of execution. This is because that prayer, under Rule 5(2)(b) of the *Court of Appeal Rules*, can only be heard by a bench of three judges. On the contrary, the prayer for extension of time, which must precede the prayer for stay of execution, can only be heard by a single judge. While I do not condone the advocate's seemingly cavalier attitude towards rules of procedure and even substantive rules (he, for example, copiously cites Order 42 of the *Civil Procedure Rules* which have no application to this Court), in the interest of substantive fairness to his client, I elected to consider the only prayer that is properly before me as a single judge: the prayer for extension of time.
6. As aforesaid, the application is unopposed. However, I still must satisfy myself that it meets the threshold under our Rules. This Court is empowered to grant extension of time under Rule 4 of the *Court of Appeal Rules* which provides that:

“The Court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”



7. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

8. In the present case, the applicant admits that he was aware of the judgment that was delivered on 31<sup>st</sup> January, 2024. However, he says that he was unable to appeal it immediately because he was financially constrained. He says he is elderly and does not have ready financial resources. He further says that he approached his lawyer to file the present application as soon as he could; and that the delay is not inordinate. Finally, he says that he has an arguable appeal and has attached a Draft Memorandum of Appeal in a bid to demonstrate that. In his supporting affidavit, he depones that the Subject Property is his ancestral land and has been living on it for the last fifty (50) years. He pleads with the Court to grant him an opportunity to have his appeal heard on its merits.

9. As aforesaid, the impugned judgment was delivered on 31<sup>st</sup> January, 2024. The present application was filed on 8<sup>th</sup> March, 2024. The Notice of Appeal should have been filed by 13<sup>th</sup> February, 2024. This makes the delay barely twenty-three days. It is not an inordinate delay. From the uncontested reasons – that the applicant was financially constrained and needed to gather financial resources to instruct the advocate – the reasons for the delay are also excusable. Finally, given the subject matter at stake – ancestral land on which the applicant says he has been in possession and occupation for the last fifty (50) years, it is the Court’s policy, whenever possible, to determine such cases on their substantive merits.

10. I am, therefore, inclined to exercise the discretion granted by Rule 4 of the Court of Appeal Rules to extend time to the applicant to file and serve a Notice of Appeal out of time. He shall do so within seven (7) days of today. The other prayers in the application are declined for the reasons given above.

11. There will be no order as to costs since the application was not contested.

12. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

