



**Mlegghwa & another (Suing as the Legal Representatives and Administrators
of the Estate of Samuel Mbogho Mshila) v Duwe (Civil Application
E017 of 2024) [2024] KECA 1159 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1159 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E017 OF 2024
AK MURGOR, JA
SEPTEMBER 20, 2024**

BETWEEN

ALLEN MWADALI MLEGHWA 1ST APPLICANT

STANLEY BARISA MLEGHWA 2ND APPLICANT

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF SAMUEL MBOGHO MSHILA**

AND

GETRUDE SOKO DUWE RESPONDENT

(An application on intended appeal from the judgment of the Environment and Land Court of Kenya at Voi (N. A. Matheka, J.) delivered on 23rd January, 2024 in Voi ELC No. 21 of 2023)

RULING

1. By Notice of Motion dated 16th February 2024 brought pursuant to Order 50 rules 5 of the Civil Procedure Rules 2010, Rules 4, 31,47, sections 3A and 3B of the [Appellate Jurisdiction Act](#), section 59 of the [Interpretation and General Provisions Act](#) and Article 159 (2)(d) of [the Constitution](#) 2010, the applicants seek for: (i) leave as the applicants to file an appeal out of time; (ii) the Notice of appeal filed herewith be deemed to be duly filed upon payment of the requisite fees; (iii) the court be grant such orders as are fair, just and convenient to the parties given the circumstances of this case and (iv) that the costs of this application be in the appeal.
2. The motion is brought on grounds set out on its face and in an affidavit in support sworn by Allen Mwadali Mlegghwa, the 1st applicant in which he contended that proceedings in the trial court were fast tracked and Judgment rendered within a short period after lodgment of appeal in the 1st appellate court; that due to the same reason, the applicants could not mobilize fees to retain counsel and lodge an appeal within the 14 days period prescribed by the rules of this Court; that the parcel known as Chawia/



Wusi-Kaya/1295 (the suit property) comprises family ancestral land where the consensus of all the affected members of the applicants' extended family was required; that it was practically impossible for the applicants' to convene and obtain consensus within the 14 days period; that the delay in filing the intended appeal is neither intentional nor inordinate; that the intended appeal raises triable issues and has a high chance of success; that the applicants have been occupying and residing in the suit property since they were born and it is their ancestral land and that unless leave is granted to the applicants to file the appeal out time, they are apprehensive that they will be evicted and displaced which will render them homeless and the cause of action will be lost irredeemably.

3. Annexed to the application is a copy of the Notice of appeal dated 16th February 2024 and a draft Memorandum of appeal.
4. In response, the respondent filed a replying affidavit in which she deposed that the application is fatally defective as it offends section 77(1) and (6) of the Court of Appeal Rules, 2022; that the Notice of appeal was filed at the Environment and Land Court Registry in Voi, whereas the appeal is before the Court of Appeal at Mombasa, and therefore the Notice of appeal should have been lodged before the Registrar of the Court of Appeal; that the Notice refers to appealing against the whole decision including factual matters which do not lie in this Court, which is only clothed with the jurisdiction of determining matters of law only, considering that the intended appeal is a second appeal; that the memorandum of appeal does not raise any issues of law for consideration by this Court since the decision of the 1st appellate court was well reasoned and this appeal only seeks to frustrate the respondent by denying her the costs of both the lower court and the appeal in the Environment and Land Court; that the instant applications are a delaying tactics, misconceived incompetent, lacking in merit and an abuse of the court process and ought to be dismissed; that she will be greatly prejudiced should these applications be allowed, given that she has already incurred significant legal costs since 2021.
5. The respondent further contended that the applicants have not reasonably explained the delay in filing the defective Notice of appeal; that the intended appeal has no chances of success; that the applicants have not offered to provide any security of costs; that should the court find it reasonable to allow the application, then it should be on condition that the applicant pays the decretal amount owing to the respondent into joint interest earning account in the names of the advocates for the parties.
6. When the application came up for hearing on a virtual platform learned counsel, Mr. Kivindyo for the applicants relied on the written submissions and reiterated the contents of the application and invited the court to consider the decision in Paul Wanjohi Mathenge vs Duncan Gichane Mathenge [2013] eKLR where the Court laid down the principles that govern the exercise of discretion in applications for extension of time and Sokoro Savings And Credit Co-Operative *Society Ltd vs Mwamburi (Civil Application E032 Of 2022)* [20231] KECA 381 (KLR) where the Court held that the interest of justice demands that a party is accorded every reasonable and available opportunity to ventilate their grievances.
7. It was further argued that the 10 days delay was not inordinate, and was occasioned by the need for the appellants to consult on whether or not to lodge an appeal; That no prejudice would be occasioned to the respondent were time to be extended.
8. Learned counsel for the respondent, Ms. Mbaka opposed the application and also relied on written submissions. On the length and reasons for delay it was submitted that the Judgment was delivered on the 23rd of January 2024 and the Notice of appeal was filed on the 16th February 2024, which was 10 days outside the prescribed 14 days specified by the rules of this Court; that there was good reason to explain the delay as the issue that the appeal was fast tracked is a mere excuse; that there is a very low



chance of the appeal succeeding given that the appellant is asking the Court to address issues of facts in a second appeal; that this Court jurisdiction is only on issues of law. The respondent relied on the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR, for the proposition that this Court can only determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered.

9. Counsel further submits that the respondent has already suffered loss and damage for the illegal occupation and invited the court to consider *Leo Sila Mutiso vs. Hellen Wangari Mwangi* [1999] 2 EA 231 on the degree of prejudice to the respondent if the application is granted. And relying on the decision in the case of *Charles Wahome Gethi vs Angela Wairimu Gethi* [2008] eKLR it was submitted that, it is not enough for the applicant's to state that they live or reside on the suit land and that they will suffer substantial loss; that the applicants must go further and show the substantial loss that they stand to suffer were the respondent to execute the decree against them.
10. The applicants filed a suit against the respondent where they claim that the respondent's deceased husband Albert Duwe who was a Tanzanian national illegally settled on the suit property during the lifetime of their late father and a dispute arose concerning the said occupation; that the respondent fraudulently and illegally caused the title of the suit property to be registered in her name which deprived the applicants of their inheritance. They therefore sought an order declaring the Estate of the late Samuel Mbogho Mshila as the legal owner of the suit property; and an order cancels the name of the respondent's name from the title and registration of the late Samuel Mbogho Mshila as the proprietor thereof.
11. The respondent stated in her defence and counterclaim that she is the legal owner of the suit property having acquired it through transmission as the widow and administrator of the estate of Albert Duwe, the initial registered owner of the suit property; that the suit property was not ancestral land belonging to the estate of Samuel Mbogho Mshila, but community grazing land; that her late husband acquired the suit property after complying with the due process of land adjudication and registration was effected with no dispute filed during the process. In her counterclaim, she urged the court to restrain the applicants from trespassing onto the suit property and cultivating the same which was depriving her of loss of usage of about an acre of the suit property.
12. The trial magistrate entered judgment in favour of the respondent, which decision was upheld by the 1st appellate court on appeal. The applicants seek to appeal that decision, and in this application, they are seeking to have time extended for the Notice of appeal to be deemed as properly filed.
13. Under rule 4 of the Court of Appeal Rules, 2022 this Court has jurisdiction to extend time in a matter such as this in the following terms:

“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 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.”
14. This Court in the case of *Leo Sila Mutiso vs Hellen Wangari Mwangi* [1999] 2 EA 231 set out the principles to be applied in exercise of its discretion in determination of any application under rule 4 thus:

“...the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the



delay; second, the reason 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.”

15. Indeed, the Judgment sought to be appealed against was delivered on the 23rd of January 2024 and the Notice of appeal was filed on the 16th February 2024 which is 10 days outside the prescribed period of 14 days.
16. According to the applicants, the delay was occasioned by the expeditious hearing and determination of the appeal in the Environment and Land Court; that thereafter, they were unable to mobilize fees to retain counsel and lodge appeal within the 14 days period. It was also averred that they were not able to convene and obtain the members consent to proceed and file an appeal.
17. Regarding the delay in instructing counsel on account of their being impecunious, this Court has variously stated that this is not a ground for extending time. In the case of Francis Mwai Karani vs Robert Mwai Karani [2007] eKLR, it was stated that:

“I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application.’
18. This position was reiterated by this Court in Lucas Mwita Machera & another vs Gati Maroa Wangera & another [2017] eKLR where this Court dismissed a similar application on the basis that the applicant failed to establish that he had financial constraints.
19. In the instant case, save for stating that they had no money to instruct an advocate, the applicants have not adduced any evidence of their impecuniousness, or the demands for payment of the legal fees made by their counsel prior to the filing of the Notice of appeal, for which they were unable to pay. As a consequence, the foregoing cannot be relied upon to explain the delay in lodging the Notice of appeal.
20. Regarding the assertion that they required consensus of the family, the applicants have not told the Court what rendered a family meeting impossible, or how many members were required to meet to form a consensus. Further the record discloses that the applicants have alleged that they reside together on the land and are apprehensive about being evicted. If that be the case, there ought not to have been any difficulty in the relevant family members convening to agree on the lodging of an appeal.
21. In view of the above, I am not persuaded that the applicants have placed any material before me on the basis of which I can exercise my discretion.
22. Regarding the likelihood of success of the intended appeal, I have considered the memorandum and grounds of appeal, and it is apparent that the applicants have focused on matters of fact that are not within the remit of this Court for consideration on a second appeal. For this reason, I find that the chances of success of an appeal are not altogether assured.
23. As to whether the respondent will be prejudiced if the application is allowed, unlike the applicants, the respondent has demonstrated the extent of the prejudice she is likely to suffer in the event that the Applicants occupy the suit property and cultivate it which would occasion her loss, and deprive her of the usage of the suit property.
24. Having carefully considered this application, I decline to exercise my discretion to extend time for filing of the Notice of appeal. Accordingly, this application fails and is hereby dismissed with costs to the respondent.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024

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

Signed

Deputy Registrar

A. K. MURGOR

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JUDGE OF APPEAL

