



REPUBLIC OF KENYA



Mramba & 3 others v Cannon Assurance (K) Limited (Civil Application E061 of 2024) [2024] KECA 1191 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1191 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E061 OF 2024
AK MURGOR, JA
SEPTEMBER 20, 2024**

BETWEEN

**MWENDA KAHINDI MRAMBA 1ST APPLICANT
CHRISTOPHER CHANGWA KAHINDI (SUING ON BEHALF OF THE ESTATE OF KAHINDI MRAMBA MWENI - DECEASED) 2ND APPLICANT
KAI MRIHE KAI 3RD APPLICANT
HARO MRIHE KAI (SUING ON BEHALF OF THE ESTATE OF CHIHUNGA MRIHE KAI - DECEASED) 4TH APPLICANT**

AND

CANNON ASSURANCE (K) LIMITED RESPONDENT

(An application under sections 3A and 3B of the Appellate Jurisdiction Act, Article 159(2) of the Constitution and rule 4 of the Court of Appeal Rules, 2022)

RULING

1. By Notice of Motion dated 5th June 2024 brought pursuant to sections 3A and 3B of the *Appellate Jurisdiction Act*, Article 159(2) of the *Constitution* and rule 4 of the Court of Appeal Rules, 2022), the applicants seek: (i) leave and or extension of time within which to file and serve their Record of appeal against the Judgment delivered on 29th November 2023 and (ii) the cost of this application be in the cause.
2. The applicant's motion supported by the affidavit sworn by Mwenda Karimi Mramba, Christopher Changawa Kahindi and Haro Mrihe Kai and was brought on grounds that; the time within which the Record of appeal ought to have been filed has since lapsed; that the advocate previously on record Messrs Ruth Rotich & Company Advocates failed, ignored, and neglected to advise and file the Record of appeal promptly upon delivery of the judgment; that failure to file the Record of appeal within



- the stipulated period was not intentional or premeditated but was occasioned solely by failure of their advocates to act expeditiously and file it within time; that the Notice of appeal and the Memorandum of appeal were filed and served on 5th December 2023 against the Judgment; that the firm of Messrs. Tsofwa Mweni Advocates having taken over the conduct of the matter on behalf of the applicants promptly applied for and obtained orders of stay/injunction pending appeal in Civil Application No. E110 of 2023 which was successful; that the delay in filing the Record of appeal is not inordinate having been occasioned solely by the failure and or neglect of the applicants' advocate which mistake should not be visited upon the applicants.
3. It was further submitted that, the appeal is arguable and has overwhelming chances of success, as evident in this Court's ruling for stay/injunction pending appeal in Civil Application No. E110 of 2023; that it is only fair and in the interest of justice that time for filing and serving of the Record of appeal be enlarged; that this Court has wide and unfettering discretion to allow the application in the interest of justice; that the respondent shall not be prejudiced in any way whatsoever should the application be granted.
 4. A Notice of appeal dated 5th December 2023 and a draft Memorandum of appeal raising a raft of grounds were annexed to the application. The applicants' grievances were that, the learned Judge failed to appreciate that the applicants have been in exclusive possession, occupation and utilization of portions of Plot No. Mn/sec.111/13, CR 5692 (the suit plot) for over 60 years or take into consideration the provisions of section 7 of the Law of Limitations Act among other grounds.
 5. The motion was opposed in a replying affidavit sworn by Stewart Mwendwa Mutia, a Farm Manager of the respondent's farm and grounds of opposition dated 1st July 2024 where it was contended that a Notice of appeal dated 5th December 2023 was lodged in the Environment and Land Court at Mombasa on 5th December 2023 and served upon them; that in lodging the Notice of appeal without an accompanying application for the proceedings of the trial Court, the applicants were required to institute the intended appeal within sixty (60) days from the 5th December 2023, that being the 5th March 2024; that having failed to file and serve the record of appeal, the applicants had defaulted in instituting an appeal, as a consequence of which, the Notice of appeal is deemed to have been withdrawn by virtue of rules 85(1) of the Court of Appeal rules.
 6. Furthermore, it was deponed that, the instant application has not met the principles applicable to applications for extension of time; that the reasons advanced by the applicants comprising delay owing to mistake by counsel are unsatisfactory and inexcusable given that the applicants were required to be vigilant in pursuing their appeal; that the applicant ought to seek reinstatement of the Notice of appeal and not extension of time, since the appeal has already lapsed; that the instant application is therefore fatally defective and misconceived, and in the interest of justice and effective administration of this Court's processes, the instant application should be dismissed with costs to the respondent.
 7. Whilst submitting during the hearing of the motion on a virtual platform, Ms. Tsofwa learned counsel for the applicants reiterated the grounds and contents of the affidavit in support, and further stated that the mistake of the advocate previously on record should not be visited upon the applicants, and that no prejudice will be occasioned to the respondent.
 8. On their part Ms. Nzisa, learned counsel for the respondent also reiterated the contents of the replying affidavit and grounds of appeal. Citing the case of *Justus Aloo Ogceka & 6 Others v Kenya Union of Commercial Food and Allied Workers & 2 Others* [2018] eKLR for the proposition that where an applicant has failed to file and serve an application requesting for certified copies of the proceedings, it was imperative for the record to be filed within 60 days from the date the notice of appeal was filed. It



was submitted that therefore, the appeal has since lapsed as the applicants had failed to file the record within 60 days from the date of filing the Notice of appeal.

9. On whether the appeal has a likelihood of success, counsel submitted that the applicants having failed to produce any evidence identifying the land claimed by way of adverse possession, the appeal was not likely to succeed. Counsel asserted that the respondent has been greatly prejudiced and their rights as enshrined under Article 40 of the *Constitution* infringed given that the matter has been in court for over 8 years.
10. Under rule 4 of the Court of Appeal Rules, 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.”
11. This Court in the case of *Leo Sila Mutiso v 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.”
12. The Judgment appealed against was delivered on 29th November 2023, the Notice of appeal was filed and served on the 5th December 2023, and this application was filed on 5th June 2024. A computation of the period in which the Notice of appeal was filed, shows that it was lodged within the specified timelines.
13. The applicants attribute the reason for delay in filing the Record on their previous counsel whose mistake they allege should not be visited upon them. But a consideration of the Record does not disclose the basis upon which the previous advocates are to be blamed for the delay in lodging the record. There is nothing that shows that the applicants made serious efforts to pursue the filing of the record, and also, no communications between the applicants and their previous advocate were provided to show that it was the advocate’s inadvertence that led to the delay in filing of the record. In the circumstances, I find that the reason for delay has not in any way been explained.
14. Furthermore, in so far as this application seeking to extend time to file the Record of appeal is concerned, I have considered the motion, and find that it does not disclose that the applicants filed a request for proceedings or served a copy on the respondent. As the respondent has submitted, this means that, the applicant is not entitled to exclude the period for preparation of the proceedings, in the computation of time for lodging the record of appeal. Therefore, in accordance with rule 84 of this Court’s rules, the record should have been filed within sixty (60) days from 5th December, 2023 when the Notice was filed, which period has already lapsed. More particularly, there is no evidence that the applicants have to-date filed the Record of appeal.
15. As a consequence, there being no evidence of a letter bespeaking the request for proceedings filed and copied to the respondent on record, and the applicants having failed to file the record of appeal within



the 60 days as by law prescribed or at all, I find that, there is no basis upon which I can extend the time for lodging of the Record of appeal.

16. Having arrived at this conclusion, and given that the Record was not annexed, it becomes difficult to discern the likelihood of success of the appeal, or the prejudice that will be occasioned by either parties.
17. In sum, I decline to exercise my discretion to extend time for filing of the Record of appeal, and accordingly dismiss the motion dated June 5, 2024 with costs to the respondent.

It is so ordered.

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

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

