



REPUBLIC OF KENYA



KENYA LAW
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**Rono & another v Keino & another (Civil Application E012 of 2024)
[2024] KECA 1300 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1300 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E012 OF 2024
MA WARSAME, JA
SEPTEMBER 20, 2024**

BETWEEN

EMILY JEBOR RONO 1ST APPLICANT

ANDREW KOSKEI 2ND APPLICANT

AND

JOEL K KEINO 1ST RESPONDENT

ESTHER JEPTANUI LAGAT 2ND RESPONDENT

(An application for extension of time to file a notice of appeal, lodge and serve the record of appeal against the judgment of the High Court at Eldoret (Githinji, J.) dated 30th April 2020 in Succession Cause No. 201 of 2009)

RULING

1. The 1st applicant filed an application for revocation of grant in the High Court dated 29th September 2011 seeking to revoke the grant issued to the respondents on 30th November 2009 for the estate of the late Kichwen Lagat Anwotot. In essence, the applicants who are the daughter in law and grandson of the deceased's first wife(also deceased), objected to the 1st respondent (who is the deceased's second wife), having a portion of land in Nandi/Chemuswo/530.
2. On 30th April 2020, Githinji J. dismissed that application and held that the applicants had failed to establish sufficient grounds under Section 76 of the Law of Succession Act, which would warrant revocation or annulment of the grant. Consequently, the Court found that the deceased had two houses and two parcels of land: Nandi/Chemuswo/530(the suit property) and Nandi/Chemuswo/531 and he sold 3acres of the suit property so that the houses could each live on equal parcels. He later moved with the 1st respondent's family to Nandi/Chemuswo/520 to avoid quarrels between the houses and the owner of Nandi/Chemuswo/520 was to relocate to the suit property.



- The deceased had therefore made a good and fair arrangement of how he intended his family to live during his lifetime, and the distribution in place was fair. The court opined that it was sad that the 1st respondent being a wife to the deceased had been ‘disinherited’ by the applicants who were occupying both properties and had colluded to chase away even the purchasers.
3. Aggrieved by that ruling, the applicant has filed the instant motion before me, dated 15th March 2024 seeking to extend the time to file the notice of appeal and record of appeal out of time.
 4. The threshold for this court to exercise its discretion under Rule 4 remains the same. The applicants must lay a strong foundation for the exercise of this court’s discretion in their favour, provide relevant reasons for the entire period of delay, show that the delay is not inordinate, show that the intended appeal is arguable, the degree of prejudice to be suffered if at all, among others, if the application is allowed. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1977] eKLR.
 5. The application, which is supported by the replying affidavit of the 2nd applicant is premised on the grounds that;
 - a. the notice of appeal was lodged on 11th May 2020 by the 2nd applicant upon the failure of his former advocates, Ms. Mwinamo, Lugonzo & Advocates to do so.
 - b. He instructed his former advocates to file the record of appeal and even wrote a letter to enquire whether the appeal was filed, but there was no response.
 - c. In 2021, they were served with a Plaint and Summons to enter appearance in Kapsabet ELC Case No. 967 of 2021 seeking to evict them from the suit property, and on 30th November 2023 and the court entered judgment in favour of the respondents.
 - d. On 12th March 2024, he visited the registry to ascertain whether the appeal had been filed and the answer was in the negative.
 - e. Their appeal is arguable and the delay was due to the unprofessional conduct of their erstwhile advocates and the mistake of the advocate should not be visited upon an innocent litigant.
 - f. Any unlawful change in character of the suit property resulting from the trespass by respondents and their agents shall affect them tremendously.
 - g. Their adverse interest in terms of Section 28(h) and 62 of the *Land Registration Act* on the suit property will be compromised unless the Court restrains the respondents and their agents from forcefully entering the said land and causing acts of trespass.
 - h. No prejudice will be suffered by the respondents.
 6. I have considered the application, the applicants’ supporting affidavit and the law. The application has two prayers on its face; one is the prayer to extend the time to file a notice of appeal; and the second is a prayer to extend the time for filing and serving the record of appeal.
 7. It is not in dispute that the Court delivered its Judgment on 30th April 2020 and that a notice of appeal was timeously filed on 11th May 2020. Consequently, the prayer seeking extension of time to file a notice of appeal out of time is futile. as this Court cannot extend time to file a notice of appeal where there is a valid notice on record
 8. As for the second prayer, it is common ground that an appellant must file the Record of Appeal within 60 days of lodging the Notice of Appeal. As such, the record ought to have been filed by 10th July 2020. The delay herein is 3 years and 8 months. The reason for delay has been attributed to inaction by the applicant’s former Advocates.



9. The second applicant alleges that he wrote to the advocates to inquire if the appeal was filed but the letter did not elicit any response. I have perused the letter in question dated 7th May 2020 which is handwritten and contrary to the 2nd applicant's assertions, the letter enquired about the delivery of the judgment and not the filing of the record of appeal as claimed. Furthermore, the letter does not indicate or show receipt of the same by the Advocate. It is not enough to simply to accuse the advocate of failure to act as if there is no duty on the clients to diligently pursue their matter. A party who is vigilant about his or her case must demonstrate that they were keen to pursue their case.
10. In my view, the delay of three years and eight months is inordinate and has not been sufficiently explained. The picture painted by the applicants is of litigants who failed to pursue their appeal for almost four years and were only roused from slumber when the court in Kapsabet ELC Case No. 967 of 2021 issued adverse orders, evicting them from the suit property on 30th November 2023.
11. As for the likely prejudice to be suffered, I am not convinced that the applicants will suffer more prejudice than the respondents should I fail to grant the orders sought. In any event, any further issues challenging the ownership and possession of the suit property can be ventilated by the applicants in their intended appeal in ELC Case No. 967 of 2021.
12. Taking into totality all the circumstances in this case, I find that the applicants have not demonstrated and satisfied the twin principles for consideration in the exercise of my unfettered discretion under Rule 4 of this Court's Rules. Accordingly, the application is dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH 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

