



Sanare & 9 others (Suing as the representative of Oldonyo-Nyokie Group Ranch) v Ministry of Internal Security & another (Civil Application E129 of 2024) [2024] KECA 1220 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1220 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E129 OF 2024
GV ODUNGA, JA
SEPTEMBER 20, 2024**

BETWEEN

**JOSEPH SAKAYA SANARE 1ST APPLICANT
MUINYA TENKE 2ND APPLICANT
JOSEPHAT K KATEMBO 3RD APPLICANT
ELIUD PURSSAREN SNAKAIRE 4TH APPLICANT
JAMES SUMAILI SANKAIRE 5TH APPLICANT
LETIA KOYIA MELIKI 6TH APPLICANT
PHILIP LESHAO MASIKONTE 7TH APPLICANT
LEMANTA NTIAKI 8TH APPLICANT
LONKOI NANTIRE 9TH APPLICANT
PETERO LEKUMUK OTUI 10TH APPLICANT
SUING AS THE REPRESENTATIVE OF OLDONYO-NYOKIE GROUP RANCH**

AND

**MINISTRY OF INTERNAL SECURITY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

(Pending an Appeal from the Judgment of the Environment and Land Court at Kajiado (M. N. Gicheru, J) dated 25th May 2023 in ELC No. 230 of 2017)



RULING

1. The applicants moved this court by a Motion on Notice dated 20th March 2024 seeking that the time limited for the Applicant to serve the Respondent with the Notice of Appeal be enlarged or extended to allow the serving of the same within such time as court shall direct.
2. According to the applicants, they filed their Notice of Appeal against the Judgment of the Environment and Land Court at Kajiado (M. N. Gicheru, J) dated 25th May 2023 in ELC No. 230 of 2017 on 6th June, 2023 but it not was until 12th March, 2024 that the Notice of Appeal together with the Decree were duly executed by the Registrar of the High Court and released. They aver that their focus was in obtaining the proceedings which were ready on 27th February, 2024 but forgot to serve the Notice of Appeal upon the Respondent. They aver that the failure to serve the Notice of Appeal by their advocate was inadvertent and such an oversight ought not to be visited upon them. They aver that the intended appeal has a good chance of succeeding if they are allowed to serve the Notice of Appeal. They aver that the Intended Respondents who are in possession of the suit property are unlikely to suffer any prejudice if the application is allowed.
3. The applicants also filed their written submissions in support of the application which was unopposed.
4. I have considered the application, affidavit in support of the application and the submissions.
5. Under rule 4 of the *Court of Appeal Rules*, the Court has unfettered discretion when considering such an application although like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. It is now established that in deciding whether or not to exercise the discretion the factors that the Court takes into account include: the period of the delay; the reasons for such a delay; (possibly) whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and if the respondent will be unduly prejudiced if the application were to be granted.
6. Those principles were restated by Waki, JA in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors 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 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 exhaustive factors: See *Mutiso v Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
7. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the



respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

8. In this case, the factual averments are not disputed. In the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor* [2014] eKLR it was appreciated that:

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

9. From that authority, it is clear that the litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. All the surrounding circumstances, including the reason for the delay must be considered by the Court.

10. According to the applicant, they filed their Notice of Appeal within time but due to inadvertence on the part of their advocates, the same was not served within the prescribed time. In those circumstances, I am satisfied that the delay is not inordinate and the reasons advanced for the delay are also satisfactory.

11. Since there is no allegation of any prejudice that is likely to be occasioned to the respondent if the application is allowed, on the authority of *Touring Cars (K) Ltd & Anor v Ashok Kumar N. Mankanji* Civil Application No. 78 of 1998 and *Grindlays Bank International (K) & Another v George Barbour* Civil Application No. Nai. 257 of 1995 and as it is not shown that there is fraud or intention to overreach I find merit in this Motion which I grant. Accordingly, time within which to serve the Notice of Appeal is extended with a further period of 7 days from the date of the delivery of this ruling.

12. There will be no order as to the costs of this application.

13. It is so ordered.

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

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

