



**Kirochi (Suing as legal representative of Kemunto Kirochi - Deceased) v Nyachani & 2 others
(Civil Application E070 of 2024) [2024] KECA 1462 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1462 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E070 OF 2024
JM NGUGI, JA
OCTOBER 25, 2024**

BETWEEN

**JOHN ONKUNDI KIROCHI (SUING AS LEGAL REPRESENTATIVE OF
KEMUNTO KIROCHI - DECEASED) APPLICANT**

AND

JOHN NYACHANI 1ST RESPONDENT

ONDIEKI NYACHANI 2ND RESPONDENT

RICHARD OMWANDO NYACHANI 3RD RESPONDENT

*(Being an Application for Extension of Time which to file a Notice and Record of Appeal
Out of Time in an Intended Appeal from the Ruling of the Environment and Land
Court at Kisii, (Munyao, J.) dated 23rd April, 2024 in ELC Case No. 438 of 2014)*

RULING

1. The applicant and the respondents have been embroiled in what appears to be a boundary dispute between two former parcels of lands. I say “former” because the respondents’ parcel was subsequently subdivided and no longer exists as a single piece.
2. The applicant originated the suit in the Environment and Land Court (ELC), Kisii seeking certain reliefs. The suit culminated in a Mediation Agreement which was adopted as an order of the court. It would seem that the parties disagree on the import of the Mediation Agreement. The applicant moved the ELC for certain orders which he believes were for the execution of the Mediation Agreement as adopted by the court. The respondents resisted the motion.
3. In a ruling dated and delivered on 23rd April, 2024, the ELC (Musau, J.) dismissed the applicant’s motion. The applicant is dissatisfied with that ruling which he believes is not faithful to the orders of



the court in adopting the Mediation Agreement. The applicant is desirous of appealing to this Court against that ruling.

4. However, the applicant was tardy in perfecting his right of appeal. As aforesaid, the ruling was delivered on 23rd April, 2024. The applicant had fourteen days from that day to file his Notice of Appeal. He failed to do so. The present application, dated 23rd May, 2024, seeks for extension of time to file a Notice of Appeal.
5. The application is supported by the applicant's affidavit sworn on 23rd May, 2024. In it, he explains that he instructed his lawyer to request for a certified copy of the ruling for appeal purposes, and that the lawyer did that on 2nd May, 2024. However, the certified copy of the ruling was not availed to them until 20th May, 2024. He explains that this was the cause of the delay in filing the Notice of Appeal. He urges the Court to exercise its discretion to extend time noting that the dispute involves land and it would be best for the issues to be settled once and for all.
6. The application is opposed. There is a replying affidavit by the 1st respondent sworn on 27th June, 2024 on his own behalf as well as on behalf of the other two co-respondents. It complains, first, that the applicant has not disclosed all documents to the Court. In particular, he laments that the applicant failed to attach a Draft Memorandum of Appeal as well as the respondents' pleadings respecting the motion which was determined in the impugned ruling of 22nd April, 2024.
7. Both in the replying affidavit as well as in their written submissions similarly dated 27th June, 2024, the respondents also complain that the applicant has not adequately explained the cause of the delay; and that his intended appeal is not arguable. They argue that the application simply continues the applicant's pattern to delay the finalization of the dispute. They rely on *Tbuita Mwangi v Kenya Airways* [2003] eKLR, a decision of the High Court, and *Mombasa County Government v Kenya Ferry Services & 2 Others* [2019] KESC 50 (KLR), a decision by the Supreme Court.
8. 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.”
9. 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.”
10. In the present case, the delay is about seventeen (17) days late. This is definitely not inordinate. The reason for the delay seems, frankly, to be disingenuous considering that the applicant was represented by counsel and ought to know that one does not need certified copy of the impugned ruling in order to file a Notice of Appeal. However, the dispute is about land – and it is important, within reason, that



parties are given an opportunity to pursue their grievances on land to the highest level permissible. I do not think a delay of seventeen (17) days should drive the applicant from the seat of justice in a matter concerning land in the circumstances of this case.

11. Consequently, I will allow the application dated May 22, 2024 and permit the applicant to file and serve a Notice of Appeal within seven (7) days of the date hereof.
12. Costs will be in the appeal.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

