



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwathe v Mwabogo (Civil Application E024 of 2024)
[2024] KECA 1481 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1481 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E024 OF 2024
P NYAMWEYA, JA
OCTOBER 25, 2024**

BETWEEN

RAPHAEL KAIMENYI MWATHE APPLICANT

AND

JOHN CHONGA MWABOGO RESPONDENT

(An application for leave to file an appeal out time against the Ruling of the Environment and Land Court at Malindi (E.K. Makori J.) delivered on 14th December 2023 in ELC Miscellaneous Application No. 43 of 2022)

RULING

1. Raphael Kaimenyi Mwathe, the Applicant herein, is by an application dated 6th August 2024, seeking orders that the time limited for filing and serving of a Notice of Appeal be appropriately extended; the Notice of Appeal dated 6th August 2024 be deemed as properly filed; the Record of Appeal be filed within such extended time; and the costs of the application be provided for. The application is supported by an affidavit sworn on even date by Applicant.
2. The Applicant deponed that on 14th December 2023, the Malindi Environment and Land Court (E. Makori J.) delivered a ruling in ELC Miscellaneous Civil Application No. 43 of 2022 with respect of the Applicant's application dated 19th September 2022 in the absence of the parties, and a copy of the ruling was not sent to the parties electronically as ordered by the Court. The Applicant asserted that knowledge of the delivery of the ruling came to light on 24th June 2023, when the Applicant's counsel was trying to map the matter in the e-filing portal, prompting a request for certified copies of the proceedings and judgment, which were supplied on 6th July 2024. The Applicant is aggrieved with the ruling and intends to appeal, has accordingly filed a Notice of Appeal, and is awaiting leave for it to be deemed as properly on record.



3. Furthermore, that the proposed appeal raised serious triable issues with overwhelming chances of success. The Applicant in this respect explained that his application dated 19th September 2022 was seeking leave to appeal against a judgment delivered by the trial Court in Kilifi SPMCC No. 116 of 2018 without notice to parties, which delivery was communicated to the parties after almost three months. In addition, that there will be no prejudice suffered by any party if the application is allowed, and the Applicant, will suffer irreparable loss and damage as he will be rendered homeless since the dispute was in respect of his portion of the land on plot No. 10/Group II/ Mavueni (Title CR) No LT 16 Folio 87, File 3049.
4. The Applicant annexed the pleadings and ruling in ELC Miscellaneous Civil Application No. 43 of 2022, the pleadings filed and judgment delivered in Kilifi SPMCC No.116 of 2018, the draft memorandum of appeal and the Notice of Appeal dated 6th August 2024. Kenga & Company Advocates, the Applicant's advocates on record, filed written submissions dated 12th September 2024 in which the events that occurred from the time the judgment was delivered by the trial court on 9th March, 2022 to the filing of the instant application were explained,. The advocates submitted that the reasons given for the delay in filing the application in the ELC were explained and overlooked by the learned Judge in the impugned ruling. Various judicaly authorities were cited and relied on in this respect.
5. In response, John Chonga Mwambogo, the Respondent herein, filed a replying affidavit he swore on 17th September 2024, wherein he deponed, while citing the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commissions & 7 others [2014] eKLR which set out the consideration to guide the Court in exercising its discretion in cases of this nature, that the Applicant's excuses for the delay did not hold water since no certificate of Delay was on record. According to the Respondent, the judgment in Kilifi SPMCC No. 116 of 2018 was delivered on 9th March 2022 yet the Applicant filed an application seeking for leave to appeal the same on 19th September 2022 instead filing a Notice of Appeal within 14 days upon receipt, and thereafter filing a certificate of delay.
6. Therefore, that the application was an afterthought and without due regard for the law. Furthermore, in granting leave, the court has to balance the competing interests of the applicant with those of the respondent, as stated in MIS Portreizt Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997. The Respondent's advocates on record, Onyango Onunga Advocates, filed written submissions dated 18th September 2024 in which the averments made in the replying affidavit were reiterated, while citing the applicable laws.
7. I have considered the pleadings and submissions filed by the Applicant's and Respondent's counsel. The principles governing the exercise of the discretion to extend time under Rule 4 of the Court of Appeal Rules were well stated in the case of Leo Sila Mutiso vs Rose Hellen Wangare Mwangi, Civil Application No. Nai 255 of 1997 (ur) as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay; secondly, 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”.
8. Rule 77(2) of the Court of Appeal Rules of 2022 in this respect requires that a Notice of Appeal is lodged within fourteen days of the decision intended to be appealed against. It needs to be emphasised



at the outset that this application concerns the delay in filing an appeal from the ruling dated 14th December 2023 delivered by the ELC. It is not in dispute that the Applicant did not file a Notice of appeal within the required timelines, and the relevant period of delay that requires to be explained is the one between the delivery of the impugned ruling on 14th December 2023, and the date of lodging of this application on 6th August 2024. The Applicants have explained that the delay was caused by the fact that the ruling was delivered in the absence of the parties, and a copy of the ruling was not sent to the parties. In addition, that after becoming aware of the ruling, the Applicant's counsel sought certified copies of the ruling and proceedings which were availed on 6th July 2024.

9. These facts are not contested by the Respondent. The relevant delay that therefore needs to be explained is the period from 6th July 2024 when the Applicant was seized of the ruling and proceedings, and the filing of this application and of the Notice of Appeal on 6th August 2024. I am of the view that the one month it took to file this application is not inordinate in the circumstances. I therefore find the reasons for the delay to be sufficient and adequate, and that the delay was in the circumstances excusable.
10. On the chances of the intended appeal succeeding, all that I need to be persuaded at this stage is that the Applicants have demonstrated the existence of plausible grounds of appeal and not their merit. The counsel for the Applicant in this respect availed a draft memorandum of appeal, in which the main ground is that the trial Court erred with respect to the description of the land that was the subject matter of the suit and which the Applicant was in possession of, which in my view requires further argument and consideration.
11. I therefore find that the Applicant merits the exercise of this Court's discretion for the above stated reasons. I accordingly allow the Applicant's Notice of Motion application dated 6th August 2024, on the terms that the Applicant is granted extension of time to file and serve a Notice of Appeal against the ruling delivered by E. Makori J. on 14th December 2023 in ELC Miscellaneous Civil Application No. 43 of 2022, and the Notice of Appeal dated 6th August 2024 is deemed to be properly filed and on record. There shall be no order as to the costs of the application.
12. Orders accordingly.

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

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

