



REPUBLIC OF KENYA



**Ndung'u & another v Gathii (Civil Application E090 of 2024)
[2024] KECA 1454 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1454 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E090 OF 2024
S OLE KANTAI, JA
OCTOBER 18, 2024**

BETWEEN

JOSEPH NYAGA NDUNG'U 1ST APPLICANT

MUGO NDUNG'U 2ND APPLICANT

AND

FRANCIS NGUNGI GATHII RESPONDENT

*(An application to appeal out of time from the Judgment and Decree
of the Environment and Land Court at Kerugoya (J. M. Mutungi,
J.) dated 27th October, 2023 in E.L.C. Appeal No. 11 of 2022)*

RULING

1. The applicants Joseph Nyaga Ndungu and Mugo Ndungu have moved the Court in a motion on notice said to be brought under rules 4, 5 (2)(b) and 47 of the Court of Appeal Rules, 2022 and all enabling provisions of law in the main:

“That this Honourable Court be pleased to the Applicant (sic) an extension of time of 21 days to file Notice of Appeal.”
2. They say in grounds in support of the Motion and in a supporting affidavit of the 2nd applicant Mugo Ndungu the judgment was delivered on 12th October, 2024 (we haven't reached this date in the calendar!) by Environment and Land Court “ELC” at Kerugoya; that they are aggrieved by that judgment and intend to appeal; that they instructed a lawyer to file an appeal and even paid the lawyer



fees but were surprised to learn that no appeal had been filed after they were served with an eviction order; that:

“The Applicant pleads with the court to grant them time extension as the delay was occasioned by failure of the advocates to act on instructions...”

3. Further, that the judgment of Mutungi, J. in Kerugoya ELC Appeal No.11 of 2022 arose from a judgment in Kerugoya Chief Magistrate’s ELC No. 76 of 2016; that after instructing a named law firm the applicants did on several occasions follow up on instructions to appeal but no appeal had been filed; they were served with an eviction notice in September, 2024; their appeal was dismissed. The applicants depone that the dispute in the courts below involved a parcel of land which they (the applicants) have occupied since 1960 with their families; they give a long history of how an original parcel of land mutated into many other parcels of land which were transferred legally or otherwise to various persons. They cite many frustrations by lawyers in the course of time stating for instance:

30: That should the above been prosecuted before the Judge I would have a chance in the case but my advocates failed me.

31. That it is for these reasons that I pray the court to grant me a chance to be heard on an equal and fair ground.”

4. They say that they rely on attached notice of appeal and draft Memorandum of Appeal. They have also attached judgment of ELC at Kerugoya delivered on 12th October, 2023 where the appeal was dismissed; judgment of the Chief Magistrate where the plaintiff’s case succeeded and the applicants were ordered to be evicted from the suit land. They have attached a draft Memorandum of Appeal where 14 grounds of appeal are set out. I have looked at those grounds.

5. In a replying affidavit the respondent Francis Ngugi Gathii opposes the application stating that the applicants were present when judgment was delivered by ELC but did not appeal on time as required; that the applicants application for stay pending appeal had been dismissed by the Magistrates’ Court; that the applicants filed a suit at the Magistrate’s Court at Gichugu being PM ELCC No. E010 of 2024 which is pending in that court and the applicants did not disclose this as they filed the present application and that the application before me is an abuse of the process of the Court.

6. There is a supplementary affidavit by the applicant which does not add much value to what they had stated in the motion and supporting affidavit.

7. The principles that apply in an application for extension of time were well summarized in the oft-cited case of Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2 EA 231 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well stated 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. I note that judgment of ELC was delivered on 12th October, 2023. The application before me is dated 20th September, 2024, about 11 months after judgment was delivered. The applicants state that they instructed their then lawyer on record to appeal the judgment; that they all along believed that an appeal had been filed and were surprised to learn that no appeal had been filed. They found this out when they were served with an eviction notice which prompted them to engage another lawyer to resolve



the situation. I think that this is a reasonable explanation for the delay which in the circumstances I do not consider inordinate.

9. I have looked at draft Memorandum of Appeal and considering that it is a second appeal I have my doubts on the possibility of the same succeeding considering that only issues of law can be raised. This, however, is a secondary consideration when dealing with an application for leave to extend time.
10. I am satisfied on the whole that the application are deserving of my exercise of discretion in their favour. I allow the Motion. Let Notice of Appeal be lodged within fourteen (14) days and appeal be filed fourteen (14) days, thereafter. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NYERI THIS 18TH DAY OF OCTOBER, 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

