



REPUBLIC OF KENYA



KENYA LAW
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**Machira v Kabuchwa & another (Civil Application E075 of 2024)
[2024] KECA 1357 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1357 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E075 OF 2024
S OLE KANTAI, JA
OCTOBER 3, 2024
[IN CHAMBERS]**

BETWEEN

JAMES MUHINDI MACHIRA APPLICANT

AND

SYMON NDORIA KABUCHWA 1ST RESPONDENT

EDWARD WAHOME KAGOIYA 2ND RESPONDENT

*(An application for extension of time to file and serve Notice of Appeal
from the Judgment of the Environment and Land Court at Nyeri
(J. O. Olola, J.) dated 9th May, 2024 in E.L.C.A No. 17 of 2021)*

RULING

1. The applicant James Muhindi Machira has by Motion on notice brought under various provisions of law including rule 4 of the *Court of Appeal Rules* applied that I be pleased to grant him leave to file and serve notice of appeal out of time; that notice of appeal filed on 13th June, 2024 and served on 18th June, 2024 be deemed to be duly filed and served. In grounds in support of the Motion and in his supporting affidavit he says that judgment was delivered by the Environment and Land Court ('ELC') at Nyeri (Olola, J.) on 9th May, 2024; that he only learnt of the judgment from his lawyer on 10th June, 2024 when time for filing a notice of appeal had expired; that he wishes to appeal. Further, that both he and his lawyer were absent when judgment was delivered; he filed a notice of appeal out of time and applied for proceedings to enable him appeal; at paragraph 8 of the affidavit:

“ 8. That my intended Appeal is arguable with probability of success as I intend to challenge the Learned Judge’s finding that I had not proved fraud against the



Respondents and that the 1st Respondent had acquired a good title to Land Parcel No. Magutu/Gathehu/1153.”

2. He also says that the respondents will not be prejudiced if I grant the application. He attaches a notice of appeal dated 12th June, 2024 where he intends to appeal against the whole decision and a letter bespeaking proceedings which I note is not copied to the other side.
3. I have seen the judgment delivered on 9th May, 2024 where the applicant’s appeal was dismissed.
4. In a replying affidavit the 2nd respondent Edward Wahome Kagoiya depones, inter alia:
 - “ 4. That the parties were issued with a notice for the delivery of the said judgment via an email sent by the court on 6/5/2024. (Annexed hereto is a copy of the email marked “EWK.1”).
 5. That the said notice was issued to the advocates for the Applicant, whose email address is [particulrs withhled]@gmail.com.”
5. He says that there is no explanation from the applicant for failure of his lawyer to inform him on the delivery of the judgment and that there is no evidence to confirm that the applicant knew of delivery of judgment on 10th June, 2024. He states further that there is no explanation why notice of appeal, filed late, was not served within the time required by our rules; that the applicant did not effect service upon him of the letter requesting for proceedings. He attaches a copy of the email where parties were advised of the date of delivery of judgment which would be done on 10th June, 2024 both virtually and in open court.
6. The principles that apply in an application for extension of time under rule 4 of our rules are well known and were well captured in the case of *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* [1999] 2 EA 231 as follows:

What is the explanation for delay here?

7. The applicant says that he and his lawyer were absent when judgment was delivered on 9th May, 2024 and that he duly came to know of the judgment on 10th June, 2024 when his lawyer informed him about it. I have seen the email dated 6th May, 2024 at 9.50 a.m. informing parties that judgment would be delivered on 10th May, 2024 both virtually and in open court. I have not been told by the applicant that this email was not received by his lawyer. I have not been given any reasonable explanation why the applicant’s lawyer was duly served with that notice but failed to attend court either virtually or physically for delivery of judgment.
8. The letter bespeaking proceedings was not copied to the other side in clear violation of the proviso to rule 84 the *Court of Appeal Rules* where an appellant can only benefit from the proviso where such letter is copied or served on the other side.
9. I am not satisfied in those premises that the applicant is entitled to my exercise of discretion donated by the said rule 4. There is no reasonable explanation for not complying with clear provisions of law. I dismiss the Motion with costs to the 2nd respondent.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2024.

S. ole KANTAI

JUDGE OF APPEAL



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

DEPUTY REGISTRAR

