



**Maina & another (Suing as personal representatives of the Estate of Tapnyobii C Maina - Deceased v Keino (Civil Application E083 of 2024) [2024] KECA 1636 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1636 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E083 OF 2024  
PM GACHOKA, JA  
NOVEMBER 15, 2024**

**BETWEEN**

**KIPKOECH ARAP MAINA AND AUGUSTINE KIMUTAI KOECH (SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF TAPNYOBII C MAINA - DECEASED) ..... APPLICANT**

**AND**

**PAUL KIPETER KEINO ..... RESPONDENT**

*(An application for leave to file a notice of appeal out of time from the judgment and decree of the Environment and Land Court at Kericho (M.C. Oundo, J.) delivered on 25th January 2024 in)*

**RULING**

1. In its Notice of Motion dated 11<sup>th</sup> August 2024, the applicant seeks leave of this Court to file an appeal and an application for stay of execution out of time against the judgment and decree of the Kericho Environment and Land Court (ELC) (M.C. Oundo, J.) delivered on 25<sup>th</sup> January 2024. That time be extended to admit the notice of appeal dated 8<sup>th</sup> February 2024 and file the record of appeal. The application is hinged on the provisions of sections 3 (2), 3A and 3B of the [Appellate Jurisdiction Act](#) and rule 4 of the [Court of Appeal Rules](#).
2. The application is premised on the grounds on the face of the Motion and the supporting affidavit of Augustine Kimutai Koech, a co-administrator of the estate of the deceased. The facts as espoused in the application are that by judgment of the trial court dated 25<sup>th</sup> January 2024, the learned judge cancelled the registration of the applicant as proprietor of all that parcel of land namely L.R. no. Kericho/Emkwen(Kapkures)/290. Resultantly, the ownership was restored to the position it was before the order for rectification.
3. Dissatisfied, the applicant instructed its advocates to file an appeal. However, it was not executed within the stipulated time. In the circumstances, the applicant filed Nakuru Civil Application no.



E044 of 2024. In its ruling dated 19<sup>th</sup> July 2024, this Court (Lesiit, J.) directed the applicant to file its record of appeal within 14 days and serve the same within 21 days. According to the applicant, the ruling was delivered via online platform and the link shared to the applicant's erstwhile advocates. That the ruling was furnished to the applicant's current advocates via registered email address: gideonkoech30@gmail.com on 6<sup>th</sup> August 2024 and was thus unable to comply with the Court's directions within those timelines.

4. The applicant contended that the judgment was oppressive and it stood to suffer substantial loss if the orders sought were not granted. That the mistake of not complying with the orders of 19<sup>th</sup> July 2024 was due to the Court registry's delay in forwarding the ruling and was thus excusable. In fact, it moved with speed upon obtaining the judgment. It urged that it was in the interest of justice that the application be allowed as prayed.
5. The application is opposed by the 1<sup>st</sup> respondent. He filed a replying affidavit sworn on 23<sup>rd</sup> September 2024. Summarizing the facts giving rise to the present application, the 1<sup>st</sup> respondent urged this Court to dismiss the application with costs on account of the following: contrary to the applicant's assertions, the applicant was notified of the ruling through its advocates' registered email address namely gideon@solonkalaw.com; it is this said email in which the applicant was served with directions and hearing notices; the application is res judicata and is an abuse of the process of the Court; the applicant is not deserving of the prayers sought as it is indolent and not diligent; and the applicant was wrong for blaming the Court for its non-compliance. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents did not file any pleadings before this Court.
6. The application was canvassed by way of written submissions. In its written submissions dated 3<sup>rd</sup> October 2024, the applicant relied on grounds in support of its application praying that it be allowed. Noticeably, the applicant submitted that the email address namely gideon@solonkalaw.com did not belong to its advocates maintaining that the Court's registry miscommunicated during the entire duration the application was pending. Finally, it was untenable to prepare a record of appeal within two days upon receipt of the ruling. The 1<sup>st</sup> respondent on its part filed his written submissions dated 31<sup>st</sup> October 2024.

He relied on the contents of his replying affidavit to urge this Court to dismiss the application in its entirety with costs.

7. I have considered the application, the affidavit in support and the annexures thereto. I have also considered the replying affidavit opposing the application together with its annexure. The discretion to extend time under rule 4 of this Court's Rules is wide and unfettered. It is for this reason that discretion must be exercised judiciously. In establishing whether or not to grant extension of time, the Court is called upon to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted [See *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA].
8. Turning to the present application, I must first comment on the applicant's submissions not captured in the grounds in support of the application or in the supporting affidavit. It is trite that a party cannot use submissions to introduce new issues or grounds not captured in the pleadings. For this reason, this Court will not consider any submissions made outside the scope of the application and are hereby disregarded.
9. I also observe that the applicant did not dispute that the email used by the court did not belong to his advocate but only complained that the email was sent late. The applicant apportions blame on the Court registry for serving its advocates with the ruling only on 6<sup>th</sup> August 2024. A perusal of the



applicant's annexures reveal that indeed on 6<sup>th</sup> August 2024, gideonkoech30@gmail.com received a copy of the ruling delivered on 19<sup>th</sup> July 2024. It is however also noticeable from the 1<sup>st</sup> respondent's annexures that the email address namely gideon@solonkalaw.com received this ruling on 19<sup>th</sup> July 2024. Previously, this email informed parties concerning pre-trial directions on 28<sup>th</sup> June 2024, 10<sup>th</sup> July 2024 and 11<sup>th</sup> July 2024.

10. In this Court's opinion, I fail to understand why the applicant only raised this issue after the fact. If indeed the only official address of the applicant was gideonkoech30@gmail.com, why didn't they have this issue resolved on 12<sup>th</sup> July 2024 when it purportedly received the Court's email? After, it was its application that was being canvassed and it was incumbent upon it to follow up on its progress.
11. Having said that, the only issue for me to determine is whether the applicant has given reasons that would convince me to exercise my discretion in its favor. Whereas it is not in doubt that the ruling of the single judge was sent to the parties by email, the applicant disputes that it received it on 19<sup>th</sup> July and insists that it only received the ruling on 6<sup>th</sup> August 2024. From the annexures, it is clear that one person is not truthful and most likely it is the applicant. However, since this issue cannot be ascertained with certainty, the scale of justice tilts in favor of allowing the applicant to have his day in court. The applicant lodged this application within 5 days from 6<sup>th</sup> August 2024, the date that he was allegedly notified.
12. This being an emotive issue of land, I am more persuaded to exercise my discretion in favor of the applicant. Accordingly, I allow the application and admit the applicant's notice of appeal dated 8<sup>th</sup> February 2024 out of time. Further, the applicant shall file and serve the record of appeal within the next 7 days. As regards costs, each party shall bear its own costs.

**DATED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M. GACHOKA C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

