



**Gituma & another v Manene & another (Being Sued as the Legal
Representatives of the Estate of Manene Tumanga) (Civil Application
E093 of 2024) [2024] KECA 1627 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1627 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E093 OF 2024
A ALI-ARONI, JA
NOVEMBER 7, 2024**

BETWEEN

DAVID MUNENE GITUMA 1ST APPLICANT

JAMES KINOTI KIRINYA 2ND APPLICANT

AND

IBRAHIM MUTEA MANENE 1ST RESPONDENT

JUDAH MUNGATIA MANENE 2ND RESPONDENT

**BEING SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
MANENE TUMANGA**

*(An application for leave to file a notice of appeal and record of appeal
out of time from the Ruling of the Environment and Land Court at Meru
(Nzili, J.) delivered on 20th March 2024 in ELC Case No. E017 of 2022)*

RULING

1. Before the court is a notice of motion dated 30th September 2024 brought under Order 42 rule 6 of the Civil Procedure Rules 2010, Rule 5(2)(b) of the Court of Appeal Rules, Section 1A, 1B, 3, 3A of the *Civil Procedure Act*, Sections 68 and 69 of the *Land Registration Act* 2012 seeking for a host of prayers including; extension of time to file an appeal out of time against the ruling of 20th March 2023; the draft notice of appeal be deemed as duly filed; an order of inhibition to issue against any dealing with the land subject matter pending hearing and determination of the appeal; an order of injunction barring the respondents, their agents, and assigns from entering, or in any way interfering with the applicants' or their families peaceful occupation and utilization of the property subject matter; and an order staying the proceedings in Githongo PM Court Succession Cause No. 58 of 2018.



2. The application is predicated on the grounds on the face of the application stating that: the applicants are aggrieved by the ruling delivered on 20th March 2024 dismissing their application where they had sought orders dismissing their suit be set aside and for the matter to proceed to full hearing; that the applicants had instructed their counsel on record at the material time to file additional documents which he failed to do; the applicants have always attended court even when their then counsel failed to appear; they have been keen to prosecute the suit; and blame squarely lies with the previous counsel.
3. The application is further supported by the affidavit of the 1st applicant, David Munene Gituma, sworn on his behalf, and that of the 2nd applicant, wherein he deposes that there has been litigation concerning the land subject matter in PM Court Succession Cause No. 58 of 2018 (In the Estate of Manene Tumanga alias Manene Timanga (deceased), where the respondents filed summons for rectification of grant and sought to have the property included and be deemed as forming part of the deceased's estate in the said succession cause, for purposed of distribution even though the said parcel of land was subject to litigation in Meru ELC No. E017 of 2022 (David Munene & Another vs. Ibrahim Mutea Imanene & Another) and which matter was dismissed on 4th October 2023 for non-compliance with court orders; the applicants and other family members reside on the locus in quo and shall be rendered destitute if the orders sought are not granted; the respondents have initiated the subdivision of the subject matter with a view of uprooting the applicants and other beneficiaries where they have resided all their lives despite judgment from other courts indicating that they do not have any entitlement in the subject parcel of land; the delay in filing the notice of appeal or appeal itself was occasioned by the counsel previously on record for and on behalf of the applicants; distribution of the said L.R. No. Abothuguchi/Mariene/597 shall greatly prejudice the applicants since the respondents are eager to disinherit them; the applicants have undertaken massive developments on the ground which are in danger of being destroyed by the respondents; the applicants have demonstrated from the onset that they are intending to appeal against the ruling and have filed a draft notice of appeal, draft memorandum of appeal and have requested for typed proceedings.
4. The application is opposed by way of a replying affidavit of the 1st respondent, Ibrahim Mutea Manene, sworn on 24th October 2024, which is sworn on his behalf and that of his co-administrator, Judah Mungatia Manene wherein he admits the existence of PM Court Succession Cause No. 58 of 2018 and deposes that in the said cause the applicants' father, one Kiriinya alias Imanene Ituma filed a protest; and ELC Case No. 1 of 2020, wherein the court stayed the distribution of the property subject matter pending the hearing and determination of the said case; that the said case was dismissed on 26th September 2022; and that upon dismissal of the suit, the applicants did not file any appeal; a year later on 31st October 2022 the applicants filed Meru ELC Case No. E017 of 2022 (OS), they also filed an application seeking prohibitory orders which application was dismissed on 18th January 2023 and they were ordered to comply with Order 11 of the Civil Procedure Rules and list the case for hearing; the applicants failed to comply with the said order and instead filed an application dated 25th May 2023 seeking leave to file additional documents; the court ordered the applicants to comply with the court order within 21 days and in default the suit would stand dismissed for non-compliance; that the applicants failed to comply with the court ruling and the suit was dismissed on 2nd November 2023; the applicants thereafter changed advocates and filed the application dated 4th December 2023 seeking to set aside the said dismissal order; the applicants' application to reinstate the suit was dismissed on 20th March 2024 and despite having been represented by M/S OMK Advocates they did not file an appeal or seek a review; they waited until the month of September 2024 when they filed the instant application; that the delay of about six (6) months has not been explained and despite the applicants having been represented by various counsel, the applicants' current counsel has not sought leave of the court to act for the applicants and no explanation has been offered for the omission.



5. The 1st respondent further avers that they have valid court orders; there are no reasonable grounds to deny them the fruits of their lawfully obtained orders; though the applicants were represented by various counsel, they too had the duty to follow the matter, since the case did not belong to the advocates; the application is unmerited and should be rejected with costs.
6. The applicants' learned counsel filed submissions dated 23rd October 2024, wherein he submitted that it cannot be said that the applicants absconded their duty as litigants as they had a counsel acting for them; the applicants always appeared in court as and when required; a good example is when they were condemned to pay costs to their adversaries on 15th May 2023, even though it was their counsel who was absent they duly paid; the way the matter was prosecuted and the lack of compliance with court directives was occasioned by counsel; they are laymen and relied on their then counsel; their explanation is plausible and sufficient as non-compliance with the court directives was as a fault of the counsel who had the conduct of the matter; the applicants cannot be blamed and they profusely apologize to the court. In support learned counsel place reliance on the case of Sokoro Savings and Credit Co-operative Society Limited vs. Mwamburi [2023] KECA 381 (KLR), where the court found that an application for extension of time had merit in a case where the delay was due to the mistake of counsel and where the court granted the applicant leave to file and serve a notice of appeal within 7 days from the date of delivery of the said ruling.
7. In opposition the respondents' learned counsel filed submissions dated 24th October 2024 and urged that; as demonstrated by the replying affidavit, the issues being raised by the applicants were not raised before the superior court for determination; the applicants are guilty of inordinate delay and they have not adequately explained the reason for the delay as they were ably represented by an advocate; that the ruling was delivered on 28th March 2024 and the application was filed on 30th August 2024, a delay of about 6 months; that there is no appeal on record.
8. The learned counsel further submits that the application before the court amounts to an abuse of the court process since the extension of time to appeal is not a right of a party but is only available to a deserving party and the applicants have not demonstrated that burden; that the interests of both parties should be considered by the court; there are no reasons to deny the respondents, the fruits of the court orders; that the applicants are indolent litigants and they intend to delay justice at the detriment of the respondents who had been denied the fruits of their lawfully obtained orders for a long time.
9. I have considered the application, the affidavit in support, the replying affidavit, and the submissions filed by the parties. To start with the application is jumbled up with both single-judge matters and matters for hearing by a full bench. However, in the interest of justice, I will consider what falls within the jurisdiction of a single judge which is on the issue of extension of time. Should the applicants be successful they will have to file a fresh application with the other prayers being sought which as a matter of necessity must be heard by a full bench.
10. The issue therefore for hearing and determination before me as a single judge is whether the applicants deserves the order of extension to file an appeal out of time. Rule 4 of this Court's Rules allow the court to exercise discretion to extend the time limited by the rules for doing any act authorized or required by the rules. This Court in the case of Leo Sila Mutiso vs. Helen Wangari Mwangi [1999] 2 EA set out the principles to be applied in the exercise of its discretion in the determination of any application under Rule 4. The court stated:

“the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”

Further the case of *Fakir Mohammed vs. Joseph Mugambi & 2 Others* [2005] eKLR lends clarity to the court’s jurisdiction in the determination of applications made under Rule 4. In its decision, the court observed:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”

11. The main explanation given by the applicants for the delay in filing their appeal on time is that their counsel did not act as instructed; further, they contend that failure to comply with the court’s directive leading to the dismissal of the suit was because of the counsel’s inadvertence. Further even after the dismissal counsel did not advise them hence the delay in taking further steps being lay persons. The issue of counsel’s conduct of matters before the court is moot. It is a subject that has been discussed by this Court variously. It is common ground that a litigant ought not to be punished by the misdeed of counsel.

12. Having stated the above the biggest challenge facing the applicants from the respondents is the aspect of the delay of 6 months in taking steps after their case was dismissed. Although there is no maximum or minimum period of delay set out under the law, the reason(s) for the delay must be plausible. To this end, this Court in the case of *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

13. The discretion donated to this Court by Rule 4 of this Court’s Rules is unfettered and as I exercise the same, I am minded that I should not do so whimsically or capriciously but based on the peculiar circumstances of the case, considering the cause of the delay, the period involved, the possible prejudice if any likely to be suffered by the other side and balancing the interest of both sides; where one party has an order that favours them and the other has a constitutional right to pursue an appeal, including the need to conclude cases timeously.

14. In the case of *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019* this Court expounded that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure



timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”(emphasis added)

15. The applicants have explained that the delay was occasioned by a counsel who did not act timeously and did not candidly inform them of his inaction, and that when they discovered the inaction on the part of the counsel they employed their current counsel. The delay being complained about is 6 months. I find that the explanation given is plausible, and the prejudice likely to be suffered by the respondents does not outweigh the need for the applicants to agitate their dispute fully, the matter as it were relates to the emotive issue of land. In balancing the interests of both parties I am inclined to allow the application to enable the applicants to argue their appeal.
16. I, therefore, direct and order that the notice of appeal be filed and served within the next 7 days, and the record of appeal be filed and served within the next 45 days of the date hereof. The other prayers, fall by the wayside, as they cannot be dealt with by a single judge. The applicants be at liberty to move the court afresh for the other prayers.
17. The costs of the application do abide by the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF NOVEMBER, 2024.

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

Deputy Registrar

