



Munene (Suing as Attorney of the Administrator/ Executor of the Estate of James Flavian Chege Munene - Deceased) v Ebrahim & 8 others (Civil Appeal (Application) 375 of 2019) [2024] KECA 1743 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KECA 1743 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 375 OF 2019
F TUIYOTT, JA
DECEMBER 6, 2024**

BETWEEN

TONY NJOROGE MUNENE (SUING AS ATTORNEY OF THE ADMINISTRATOR/ EXECUTOR OF THE ESTATE OF JAMES FLAVIAN CHEGE MUNENE - DECEASED) APPLICANT

AND

**ESMAIL HAJI EBRAHIM 1ST RESPONDENT
THE NATIONAL LAND COMMISSION 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT
EMRA LIMITED 4TH RESPONDENT
CATHERINE MUTHONI KARUGA 5TH RESPONDENT
JAMES KUNGU KARIUKI 6TH RESPONDENT
MUKAMART ENTERPRISES LTD 7TH RESPONDENT
DEEKEI VENTURES LTD 8TH RESPONDENT
GAMBADO LTD 9TH RESPONDENT**

(Being an application for extension of time to bring an application for leave to dispense with service of an appeal from the Ruling of the Environment and Land Court at Thika (A.O. Angote, J) delivered on 14th June, 2019 in Thika ELC Case No. 512 of 2017)



RULING

1. This Court sees no reason to decline prayer (c) of the unopposed notice of motion dated 3rd October, 2024. In that motion, the applicant seeks orders from this Court to extend time within which to make an application for dispensation of service of the notice of appeal and the record of appeal on the 2nd and 4th respondents and upon grant of that prayer, direction that service on the 2nd and 4th respondents be dispensed with. An alternative prayer, which is prayer (c), is for extension of time to serve the notice of appeal and the record of appeal on the said respondents.
2. The applicant's suit before the Environment and Land Court at *Thika in ELC Case No. 512 of 2017* was dismissed for want of prosecution. He filed an application dated 23rd November, 2018 seeking to set aside the said dismissal but he, once again, suffered bad fortune when, in a ruling dated 14th June, 2019, the superior court dismissed his application. Aggrieved by the ruling, he filed a notice of appeal and record of appeal in accordance to the Rules of this Court. However, he has, to date, not served the said documents upon the 2nd and 4th respondents.
3. The applicant explains his inaction in an affidavit sworn on 3rd October, 2024. Neither the 2nd respondent nor 4th respondent entered appearance, filed any pleadings nor participated in the proceedings before the ELC. He was under the mistaken belief that there was no requirement to involve the two respondents in the appeal owing to their non-participation in the proceedings before the trial court. Further, it was not until the hearing of the appeal on 16th September, 2024 that the applicant realized that the Attorney General, who is the 3rd respondent, did not represent the 2nd respondent.
4. Although duly served with the motion and the hearing notice, none of the respondents has opposed this application. On the part of the applicant, no submissions in support of application were filed.
5. I have considered the said application. The discretion granted to this Court by Rule 4 of the [Court of Appeal Rules](#) when considering an application for extension of time must be exercised judiciously. Extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court. Matters to be considered include: the length of the delay; the explanation for delay; whether there will be prejudice suffered by the respondent if the extension is granted; whether the application is brought without undue delay; public interest in certain instances; and possibly the prospects of the intended appeal. See [Fakir Mohamed v Joseph Mugambi & 2 others](#) [2005] eKLR.
6. The applicant duly filed its notice and record of appeal on time in compliance with Rules 77(2) and 84(1) respectively but if it needed to exclude that the involvement of the two respondents from the appeal, then he should have timeously filed the application contemplated by the proviso to Rule 79(1). The Rule reads:

“79. Service of notice of appeal on persons affected

1. An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.”



7. This appeal is a 2019 appeal and this application is therefore very late in coming, in excess of 4 years. That said, the appeal is yet to be heard and as none of the respondents is either opposed to it or states that he/it will suffer prejudice if extension is granted, then I will allow it. In doing so, this Court excuses the inordinate delay in bringing this application and counsel's initial misapprehension that a Rule 79(1) application was not necessary.
8. I therefore exercise my discretion and allow prayer (c) of the Notice of Motion dated 3rd October, 2024. No order as to costs. The notice of appeal and record of appeal to be served upon the 2nd and 4th respondents within 14 days hereof.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

