



REPUBLIC OF KENYA



KENYA LAW
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**Gatura v Robert & another (Civil Appeal E461 of 2022)
[2023] KECA 195 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 195 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E461 OF 2022
KI LAIBUTA, JA
FEBRUARY 17, 2023**

BETWEEN

MICHAEL KARUKU GATURA APPLICANT

AND

STEPHEN NGUGI ROBERT 1ST RESPONDENT

NJOKI KAGECHE 2ND RESPONDENT

(Being an application for extension of time to file an Appeal and lodge a Record of Appeal out of time from the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (M. D. Mwangi, J.) delivered on 27th January 2022 in E.L.C No 735 of 2020)

RULING

1. By a notice of motion dated April 12, 2022 supported by his affidavit sworn on April 12, 2022, the applicant, Michael Karuku Gatura, seeks extension of time to file an appeal out of time on the grounds that the impugned judgment was delivered on January 27, 2022 by the Environment and Land Court at Nairobi (ELC) Case No 735 of 2016; that he was aggrieved by the judgment and decree of MD Mwangi, J and wishes to lodge an appeal; that he lodged his notice of appeal on February 18, 2022 (7 days after the period allowed under this *court's Rules*); that he applied for certified copies of the proceedings on February 16, 2022 and the same were supplied to him on March 25, 2022; that delay in filing the appeal was attributable to the time taken by the court to supply the certified copies of the proceedings; that he has an arguable appeal with a probability of success as appears from his draft memorandum of appeal dated April 12, 2022; and that the respondent will not suffer any prejudice if time is extended to file the record of appeal.
2. The 2nd respondent, Njoki Kageche, filed her replying affidavit sworn on January 25, 2023 opposing the applicant's motion on the grounds that the applicant, who was duly represented by counsel, failed to file and serve his notice of appeal within the requisite 14 days; that no satisfactory reason has been



given for the delay in filing the record of appeal since March 25, 2022 when he was supplied with certified copies of the proceedings and judgment; that the High Court matter which the applicant prefers an appeal is a non-starter as it was *subjudice*, having been the subject of an earlier case in HCCC No 1664 of 1977, which was determined in 1983; that title to the suit property was awarded to the 2nd respondent in 1988; that the applicant's appeal is without merit; that she has been in occupation of the suit property since 1964; and that the applicant should deposit security for costs in the sum of Kshs 500,000 in the event that he is granted extension of time to appeal.

3. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under rule 4. The court held that "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."
4. Notably, the applicant's motion for extension of time was filed only 18 days after the applicant obtained certified copies of the proceedings and judgment. However, the record before me does not include a certificate of delay to aid in proper computation of the time allowed to approach the court on appeal. The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR also lends clarity to the issue of the court's jurisdiction in determination of applications made under rule 4. In principle, the discretion is unfettered. In its celebrated 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."

5. The impugned judgment and decree of the High Court of Kenya at Nairobi (MD Mwangi, J) dated January 27, 2022 is unequivocal as to the state of the affairs relating to the land dispute whose determination is now challenged on appeal. Having carefully considered the applicant's motion, the grounds on which it is anchored, the affidavits in support thereof and in reply, the impugned judgment and decree, there is no doubt in my mind that the dispute has been the subject of final determination as far back as 1983 in Nairobi HCCC No 1664 of 1977. Accordingly, the intended appeal can only be a replay of what would be tantamount to abuse of the court process. In my considered view, it is not arguable. In the circumstances, I need not test the applicant's motion on the remaining guiding principles for grant of orders under rule 4 of this *court's Rules*. Suffice it to say that granting such orders would unduly prejudice the respondents who have been in possession of the suit property since 1964 and a replacement title issued to the 2nd respondent in 1988 under a court order that has never been challenged. In view of the foregoing, the applicant's motion fails and is hereby dismissed with costs to the 2nd respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

