



REPUBLIC OF KENYA



KENYA LAW
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**Kiurire v Kimani (Civil Application E001 of 2022)
[2023] KECA 638 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 638 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E001 OF 2022
J MOHAMMED, JA
FEBRUARY 3, 2023**

BETWEEN

SOPHIA WAMBUI KIURIRE APPLICANT

AND

BEATRICE WANGARI KIMANI RESPONDENT

(Being an application for extension of time to file and serve Record of Appeal out of time from the judgment of the Environment & Land Court of Kenya at Muranga (J.G.Kemei, J) dated 14th September, 2021 in ELC CASE NO. 42 OF 2021 (OS)

RULING

Background

1. Before me is a notice of motion dated January 3, 2022 expressed to be brought pursuant to Rule 4 of the Court of Appeal Rules and in which Sophia Wambui Kiurire (the applicant) seeks orders in the main:-
 - a. That the applicant be granted leave to appeal out of time against the judgment and decree of the Environment & Land Court (ELC) (J.G Kemei, J.) delivered on September 14, 2021 in the ELC at Murang'a in E.L.C NO. 42 of 2021 (O.S);
 - b. That upon grant of leave to appeal out of time, the notice of appeal and memorandum of appeal annexed hereto be deemed as duly filed and served;
 - c. That the court be pleased to stay execution of the said judgment pending the hearing and determination of the application inter partes;
 - d. Such further or other orders be made as are just and expedient for purposes of facilitating justice to the applicant; and
 - e. That the costs of this application be provided for.



Beatrice Wangari Kimani is the respondent herein.

2. In support of the application is an affidavit sworn by the applicant of even date. Her case is that the impugned judgment was delivered on September 14, 2021 and immediately thereafter, on September 24, 2021, she filed a notice of appeal; and that the same was duly served upon counsel for the respondent on October 7, 2021.
3. It was further deponed that thereafter the applicant vide a letter dated October 11, 2021 requested for certified copies of proceedings to enable her lodge an appeal against the the judgment and the decree of the court; that she paid the requisite fees on October 26, 2021; that on November 8, 2021 they were served with a copy of the notice of address for service for the respondent; and that the time taken by the court to prepare and supply the certified copies of proceedings was from October 26, 2021 to December 8, 2021 which was a total of 44 days.
4. It was further deponed that the applicant's advocate was notified on December 9, 2021 that the certified copies of proceedings were ready; that on December 15, 2021 the respondent served the applicant with a notice of taxation of costs together with a copy of a bill of costs dated December 17, 2021 indicating that a bill of costs/accounts dated November 11, 2021 would be taxed on February 7, 2022.
5. Further, that on December 23, 2021 the applicant's counsel were notified that the decree which was issued on December 23, 2021 was ready for collection; that the time allowed for filing an appeal had lapsed; that a Certificate of Delay was issued on January 3, 2022 by the Deputy Registrar of the E.LC Court, Murang'a.
6. The respondent filed a replying affidavit dated January 14, 2022 opposing the application. She deponed that there is nothing to stay since no execution can proceed before the costs are taxed; that no leave has been sought to execute the decree before such taxation; that this court is not the right forum for the applicant to lodge a complaint regarding being served with a bill of costs; that her advocates have duly advised her that the averments by the applicant regarding the time to appeal are misplaced and misguided; and that it is only fair and in the interest of justice that this application be dismissed with costs.
7. The respondent filed submissions rehashing the contents of her affidavit.

Determination

8. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicants and respondents' submissions, the cited authorities and the law. The principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion the court should do so judiciously. See *Fakir Mohamed v. Joseph Mugambi & 2 others* C.A. NO. NAI. 332 of 2004 where the court laid out some of the considerations to be taken into account by the court in deciding applications of these nature as follows; the length of the delay, the reasons for the delay, the possibility of the appeal succeeding and the prejudice to be occasioned to the parties.
9. The applicant has sought leave to file the record of appeal out of time and also a stay of execution of the impugned judgment. An application for stay of execution under Rule 5(2)(b) of this *Court's Rules* is heard and determined by a three (3) Judge bench. Accordingly, as a single Judge, I will proceed to determine the application under Rule which is an application which is heard and determined by a single Judge.



10. In the instant case, and as regards the length of the delay, the impugned judgment was delivered on September 14, 2021. The applicant filed a notice of appeal on September 30, 2021 and a letter bespeaking the proceedings on October 11, 2021. The proceedings were ready on December 8, 2021 and as per the certificate of delay issued on December 23, 2021, it took 44 days to prepare the said proceedings. The instant application was subsequently filed on January 3, 2022.
11. A notice of appeal ought to be filed in accordance with the provisions of rule 75 of this *Court's Rules* (now rule 77) which provides:
 75. Notice of appeal
 1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
 2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal. [Emphasis supplied].
12. According to the applicant, the notice of appeal was filed within the above prescribed timelines. From the notice of appeal annexed in the instant application, I note that the notice of appeal is dated September 24, 2021 but was lodged in court on September 30, 2021 which was a day after the prescribed timeline.
13. On the explanation for the delay in filing the record of appeal, I find that the applicant has demonstrated that she was not indolent in pursuing the appeal. Counsel for the applicant wrote a letter bespeaking proceedings on October 11, 2021 and the same were availed on December 9, 2021 as indicated in the certificate of delay issued by the court and dated December 23, 2021. The instant application was filed on January 3, 2022.
14. The court should act judiciously balance the interests of both parties.

On the one hand the applicant has a right to appeal, while the respondent has a right to enjoy the fruits of the judgment. Striking a balance between the two interests, I find that in view of the explanation given for the delay and the fact that in the circumstances, there has not been inordinate delay or indolence on the applicants' part, the applicant should be given an opportunity to pursue her appeal.
15. After carefully considering this application, I find that the explanation given on the delay is plausible and I find that the application has merit. On arguability, the applicant submitted that she has an arguable appeal on the grounds inter alia, whether the respondent's claim of adverse possession over land parcel Number Loc. 8 Matharite/652 (the suit property) was proved to the required standard. Without going into the merits of the appeal as this will be determined by the full bench which will be seized of this appeal, I am satisfied that the intended appeal is arguable. In *Muchugi Kiragu v James Muchugi Kiragu & another* Civil Application No. NAI. 356 of 1996, this court had the following to say as regards this court's discretion under Rule 4:

“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the court may think just. Within this context, this court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.” (Emphasis supplied).



16. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the judgment of the ELC and is desirous of appealing against the said judgment out of time. In the case of *Richard Nchapi Leiyagu v IEBC & 2 others*, Civil Appeal No 18 of 2013, this court expressed itself as follows:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

17. From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in *Leo Sila Mutiso (supra)*. The upshot is that the notice of motion dated January 3, 2022 is allowed as prayed is allowed in the following terms:

- a. That the notice of appeal filed on September 30, 2021 be deemed as duly filed.
- b. That the time within which to file and serve the memorandum of appeal and record of appeal is enlarged.
- c. That the applicant has sixty (60) days to file and serve the memorandum of appeal and record of appeal from the date of this ruling.
- d. The costs of this application to abide the outcome of the intended appeal.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF FEBRUARY, 2023.

JAMILA MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

