



REPUBLIC OF KENYA



**Laaru v Laaru (Civil Application E005 of 2022)
[2023] KECA 680 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 680 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E005 OF 2022
J MOHAMMED, JA
FEBRUARY 3, 2023**

BETWEEN

PETER KAIGERA LAARU APPLICANT

AND

JULIUS KAILIKIA LAARU RESPONDENT

(Being an Application for leave to file an appeal out of time, from the judgment of the Environment and Land Court at Meru(L. N. Mbugua, J.) dated 21st May, 2020 InELC Appeal No. 32 of 2019)

RULING

Background

1. The applicant, Peter Kaigera Laaru, has filed a notice of motion dated January 25, 2022 expressed to be brought under Rule 4 of the [Court of Appeal Rules](#), seeking the following orders in the main;
 - a) That the applicant herein be granted leave to file an appeal out of time against the judgment of the Environment and Land Court, (ELC) (LN Mbugua, J) delivered on May 21, 2020 at Meru;
 - b) That the notice of appeal and the draft memorandum of appeal annexed to the notice of motion be deemed as duly filed and served;
 - c) That there be stay of the judgment delivered on 21st May 2020 at Meru;
 - d) That the judgment delivered on May 21, 2020 be set aside pending the hearing and determination of the intended appeal; and
 - e) That the costs of this application be provided for.

Joseph Kailikia Laaru is the respondent herein.



2. The application is based on 4 grounds on the face of it. In his supporting affidavit dated January 25, 2022 and a Supplementary affidavit dated September 28, 2022, the applicant deponed that he became aware that the impugned judgment was delivered on May 21, 2020 at Meru; that the said judgment was delivered through email in view of the Covid-19 Pandemic; that neither he nor his advocate received the notice of delivery of the judgment; that his advocates were not able to file the record of appeal within the stipulated time despite having lodged a notice of appeal dated July 19, 2020; that he was informed that notice of the said judgment was sent to the wrong email address; and that he was able to obtain orders on October 6, 2022 granting him leave to appeal out of time.
3. The applicant further deponed that the delivery of the said judgment was brought to his attention by parties from his village who informed him that the respondent had informed them that the applicant would pay him heavy costs of the suit since he had won the case.
4. In opposing the appeal, the respondent filed a replying affidavit and deponed that the applicant has not given any reasonable explanation why he failed to file the intended appeal within the prescribed period; that it is untrue that the applicant and his advocate were not aware of the date when the impugned judgment was delivered; that the delivery date of the judgment was given in open court in the presence of all the parties and their advocates; that the impugned judgment has already been executed and the suit property has been subdivided in accordance with the orders of the impugned judgment and he therefore stands to suffer great prejudice if the orders sought herein are granted.

Determination

5. The applicant and the respondent filed their written submissions rehashing the contents of their respective affidavits.
6. 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 4 which is an application which is heard and determined by a single Judge.
7. What is before me is an application for extension of time pursuant to Rule 4 of the *Rules* of this Court which grants a single judge unfettered discretion on whether or not to extend time. In the exercise of the discretion I am guided by the well settled principles which have been stated times without number by this Court. In *Leo Sila Mutiso v Hellen Wangari Mwangi* [1990] 2 EA 231 this Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons 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.”

8. The provisions of Rule 75 (now Rule 77) of this Court's *rules* succinctly provide on the procedure for lodging a notice of appeal:

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.
9. Similarly, Rule 82 (now Rule 84) makes provision for institution of appeals and reads:
- “ 82. Institution of appeals
- (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
- (a) a memorandum of appeal, in quadruplicate;
- (b) the record of appeal, in quadruplicate;
- (c) the prescribed fee; and
- (d) security for the costs of the appeal.
- Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule
- (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.
- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.”
10. The applicant has not adhered to either of these provisions. The notice of appeal ought to have been lodged on or before June 4, 2020 being 14 days from the date of the judgment of May 21, 2020. The instant application was filed on January 25, 2022. It is therefore brought more than 1 year, 8 months after the date that the impugned judgment was delivered. This period is in the circumstances inordinate.
11. The reasons proffered for the delay are equally unsatisfactory. I note that there is a letter dated June 17, 2020 from the applicant’s advocates addressed to the Deputy Registrar, Meru Law Court received on June 18, 2020 requesting to be supplied with a copy of the judgment via email. I am not persuaded that this delay can be attributed to the challenges associated with the Covid-19 pandemic as it was not demonstrated that the court registry was closed and not accessible. Indeed, the court registry was accessible as the said letter was received by the said registry on June 18, 2020 and the applicant’s advocates could have easily obtained the copy of the judgment on the said date and moved with haste to file the application for leave to file the memorandum of appeal and record of appeal out of time.
12. The applicant contends that he has an arguable appeal on the ground inter alia whether the suit property is held in trust. 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.”

13. 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.”

14. From the circumstances of the instant application, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso (supra)*.
15. Accordingly, I find no merit in the notice of motion dated January 25, 2022 and dismiss it with costs to the respondent.

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

