



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lubandi v Karanja & 2 others (Civil Application E081 of 2022)  
[2023] KECA 46 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 46 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E081 OF 2022  
F TUIYOTT, JA  
FEBRUARY 3, 2023**

**BETWEEN**

**ATANAS B. A. LUBANDI ..... APPLICANT**

**AND**

**JOHN GATHUU KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**PASCHAL MANYURU JUMA ..... 2<sup>ND</sup> RESPONDENT**

**JOSEPHINE NERIMA MANYURU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time to file an Appeal from the judgment of the Environment & Land Court of Kenya at Busia (A. Omollo, J) dated 21st July, 2020 in Busia ELC Case No 86 of 2015)*

**RULING**

- [1] The applicant herein being dissatisfied with the decision of the Environment and Land Court in Busia dated 21<sup>st</sup> July, 2020, filed a notice of appeal dated 22<sup>nd</sup> July, 2020 under rule 75 of the Court of Appeal Rules (now rule 77 of the Court of Appeal Rules 2022 (the rules)) at the Environment and Land Court at Busia. The applicant also, via a letter dated 21<sup>st</sup> July, 2020, sought certified copies of the proceedings and the judgment.
- [2] The applicant however did not take any further steps towards instituting the appeal in the time prescribed and now moves this Court through a Notice of Motion dated 14<sup>th</sup> April, 2022 for grant of extension of time to file an appeal against the said judgment.
- [3] In the affidavit sworn on 14<sup>th</sup> April, 2022 by John Mahaga Maganga, an attorney of the applicant by virtue of a power of attorney dated 26<sup>th</sup> August 2015, he explains that the certified proceedings were ready for collection on 27<sup>th</sup> July, 2020 and were collected on 14<sup>th</sup> August, 2020 since the registry did not notify them that the same were ready for collection. He further depones that he changed his advocates



by consent and the new advocates immediately after proceeded to prepare the record of appeal which was filed in this Court on 28<sup>th</sup> September, 2020 vide Civil Appeal No. 56 of 2020 which was only five days late of the date for filing the appeal. That the respondents however filed an application to have the said appeal struck off for being filed out of time and on 12<sup>th</sup> April, 2022 the said appeal was struck off by this Court. He contends that the delay was caused by an inadvertent mistake and seeks this court's indulgence on extending the time to appeal.

[4] The application is opposed by the replying affidavit of Joseph Vitalis Juma sworn on 9<sup>th</sup> September, 2022. He is the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' advocate and swears the affidavit on their behalf as both respondents are out of the Country. He deposes that he filed an application to strike out the appeal before this Court and the same was struck out with costs on 12<sup>th</sup> April, 2022. He further deposes that the applicant made an application for leave to appeal out of time and the same was withdrawn on 12<sup>th</sup> May, 2022 which was communicated to them via the Deputy Registrar's letter of even date. He contends that no explanation has been put forward as to why the applicant did not appeal in good time and neither has he obtained a certificate of delay confirming the alleged delay. That, similarly, the letter requesting for the copies of the proceedings was never served upon his firm. He further contends that the excuses raised by the applicant in this application were raised before the 3- judge bench that heard the application for striking out the appeal. In addition, he contends that the applicant has not explained why he only filed the appeal after the sister-in-law who had given him the power of attorney to sell the land had died despite being aware of the sale before her death.

[5] The 1<sup>st</sup> respondent has not put in any response to the application.

[6] The parties have filed submissions which reiterate the contents of their respective affidavits.

[7] Rule 82(now rule 84) makes provision for institution of appeals and reads: -

“(1) Subject to rule 118, 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.

(3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.”



- [8] The applicant depones that his appeal was struck out due to late filing without leave of the court. He contends that the appeal was only filed five days late which was not inordinate. It would seem that this is the second time the applicant has sought for leave to appeal out of time as he made another application for leave to appeal out of time which was withdrawn on 12<sup>th</sup> May, 2022 as evidenced from the letter dated 12<sup>th</sup> May, 2022 by the Deputy Registrar.
- [9] A party is entitled to withdraw an application and file a similar one and there may be good cause to do so and there is no begrudging the applicant for withdrawing the earlier application and filing the present one. I also think that a five-day delay in filing the appeal is not inordinate. What is of concern, however, is that the applicant does not explain why it took him about 21 months, from the date when the late appeal was filed on 28<sup>th</sup> September 2020, to bring the present application. Is it that he had not realized that the appeal was out of time and only came to learn of it when the application for striking out was filed? Is it that the earlier application for leave to file the appeal out of time was filed more timeously and that explains this very late application? Unfortunately for the applicant, it is not for this Court to surmise the answers and I must reach a conclusion that the long delay is not explained at all. The applicant has himself to blame for not addressing this crucial aspect and his application falls far short of satisfying the considerations upon which this Court will exercise its discretion in favour of extending time. See the decision in *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi*– Civil Application No. Nai 251 of 1997.
- [10] Ultimately, the application dated 14<sup>th</sup> April, 2022 is dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**DATED AND DELIVERED IN KISUMU THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*SIGNED*

**DEPUTY REGISTRAR**

