



**Ngei v Mwatu (Suing as the legal representative and on behalf of the Estate of Mwatu Mutune alias Mwatu Waita Nguyo) & another (Civil Application E155 of 2021) [2023] KECA 101 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 101 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E155 OF 2021  
HM OKWENGU, JA  
FEBRUARY 3, 2023**

**BETWEEN**

**MUTUKU NGEI ..... APPLICANT**

**AND**

**JULIUS MAKENZI MWATU (SUING AS THE LEGAL REPRESENTATIVE AND ON BEHALF OF THE ESTATE OF MWATU MUTUNE ALIAS MWATU WAITA NGUYO) ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT MUTYANGO MUSAU ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time within which to lodge an appeal against the Judgment of the Environment and Land Court at Machakos (Angote, J) delivered on 30th July 2021 in ELC No. 75 of 2008)*

**RULING**

1. By a notice of motion dated April 25, 2022 brought under Rules 3 and 4 of the Court of Appeal Rules 2010, sections 3 and 3A of the *Appellate Jurisdiction Act*, and Article 159 (2)(b) of the *Constitution*, the applicant Mutuku Ngei, seeks in the main an order for extension of time within which to file an appeal against the judgment of the Environment and Land Court (ELC) at Machakos (Angote, J) delivered on July 30, 2020. The applicant is aggrieved by the judgment in which a suit he had filed claiming to have purchased from Mwatu Waita Nguyo (deceased), land known as Muputi/Kiima-Kimwe/700 (the suit property), was dismissed.
2. The applicant contends that the judgment was delivered on July 30, 2020 without any notice having been given to him or his advocate, and that they only learnt of the delivery of the judgment on September 3, 2020 and consequently filed an application before the trial court seeking leave to extend time within which to file and lodge the notice of appeal, but the application was rejected by the trial



court for want of jurisdiction through a ruling delivered on March 15, 2022. The applicant has availed a memorandum of appeal contending that he has a good appeal and therefore urges the Court to exercise its discretion in his favour.

3. The applicant has filed written submissions in which he has cited various decisions of the Court, urging that the Court has wide discretionary powers to extend time and that he has demonstrated sufficient reason for the grant of the orders sought. Relying on *Andrew Kiplagat Chemalingo vs Paul Kipkorir Kibet* [2018] eKLR, and *Liberato Kivanga Manga vs Prime Bank Limited* [2021] eKLR, the applicant urged that he had satisfactorily explained the delay. He added that he has a meritorious appeal and that no prejudice will be caused to the 2<sup>nd</sup> respondent who is in occupation of the suit property.
4. The respondents did not file any written submissions but opposed the applicant's motion through a replying affidavit sworn by the 2<sup>nd</sup> respondent, Robert Mutyango Musau. The respondents maintain that the applicant is being economical with the truth, and has not proffered concrete reasons for the delay, or demonstrated that he has an arguable appeal. The respondents maintain that the trial court issued a notice for delivery of the judgment and the email was copied to the applicant's advocate. That the applicant's intended appeal is defeated by the doctrine of laches, and equity cannot therefore aid him in his indolence, and that the applicant has not disclosed any substantial injustice that he would suffer. On the other hand, the respondents maintain that they will be prejudice by being kept from enjoying the fruits of a valid judgment.
5. I have considered the application. As provided under Rule 4 of the *Court of Appeal Rules*, 2022, this Court has the discretion to extend time for the doing of any act authorized or required by the Rules. In *Mutiso vs Mwangi* [1999] 2EA 231, this Court held that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: firstly, the length of the delay; secondly, 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.”

6. The Supreme Court has also laid down the principles to be considered in the exercise of discretion to extend time for filing an appeal, in *Nicholas Kiptoo arap Salat vs Independent electoral and Boundaries Commission & 7 Others* [2014] eKLR as follows:
  - “1. Extension of time was not a right of a party. It was an equitable remedy that was only available to the deserving party at the discretion of the Court;
  2. A party who sought for extension of time has the burden of laying a basis to the satisfaction of the Court;
  3. Whether the Court ought to exercise the discretion to extend time was a consideration to be made on a case to case basis;
  4. Whether there was a reasonable reason for the delay which ought to be explained to the satisfaction of the Court;
  5. Whether there would be any prejudice suffered by the respondents if the extension was granted;
  6. Whether the application had been brought without undue delay;



7. Whether in certain cases like election petition, public interest ought to be a consideration for extending time.”

7. The applicant has explained that judgment was delivered on July 30, 2020 without notification to them. To counter this, the respondents have availed an email which was copied to the applicant’s advocate on July 22, 2020, indicating that the judgment would be delivered on July 30, 2020. The applicant’s advocate has not filed any affidavit in response to the respondents’ replying affidavit denying having received the notice or that the email address used to forward the notice, does not belong to him. An affidavit sworn in support of the motion by Philip Musya who claims to be the advocate having conduct of the matter, only made a genera denial, that no notice was forwarded to him.
8. In light of the clear evidence provided by the respondents, I find that the applicant’s advocate was indeed served with the notice informing him of the judgment to be delivered on July 30, 2020. The explanation given by the advocate for failure to attend court for delivery of the judgment is therefore not plausible, nor has the applicant satisfied this Court that he had a good reason for not filing the appeal within the period provided.
9. In its submissions, the applicant’s advocate stated that the hearing notice purportedly forwarded to it on July 22, 2020, never reached the advocate. This denial was not reinforced by an affidavit sworn by the advocate but, Esther Ndulu Mutuku, who is the applicant’s appointed attorney who has been coordinating with the advocate swore an affidavit in which she deposed from information given to her that the notice never reached the advocate. The applicant contends that they came to know of the judgment on September 3, 2020, and filed the application for extension of time to lodge a notice of appeal in the High Court on Sepetmber 23, 2020. The applicant has not explained why it took almost two weeks to file the application. The applicant admits the delay in filing their application before this Court, but maintains that there was a good reason for the delay, the matter having been delayed further by the High Court, which took almost two years before dismissing the applicant’s motion for extension of time.
10. I have considered the application, the affidavits in support and in reply, and the applicant’s submissions. It is evident that there was a delay in filing the application for extension of time, as the notice of appeal ought to have been filed within 14 days from July 30, 2020. The applicant only took action on September 23, 2020, when they filed an application in the High Court. This was a delay of 40 days. After the application in the High Court was dismissed on March 15, 2022, the applicant moved to this Court on April 25, 2022, which means there was another 40 days’ delay. The applicant has not given any reason for the delay.
11. As stated by the Supreme Court a person seeking extension of time has the burden of laying a basis for the extension of time, to the satisfaction of the Court. It matters not that the applicant may have a good appeal if he has not satisfied the Court that he has good reasons, for having not exercised his right in time. I find that this is not an appropriate case for this Court to exercise its discretion in the applicant’s favour. The applicant’s motion is accordingly dismissed.

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

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

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



*Signed*

**DEPUTY REGISTRAR**

