



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sigilai v Mugambi (Civil Application E034 of 2022)  
[2023] KECA 637 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 637 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E034 OF 2022  
J MOHAMMED, JA  
FEBRUARY 3, 2023**

**BETWEEN**

**DORCAS KARAMBU SIGILAI ..... APPLICANT**

**AND**

**STEPHEN KITHINJI MUGAMBI ..... RESPONDENT**

*(An application for extension of time to file a memorandum of appeal  
against the judgment of the Environment and Land Court at Meru  
(C.K. Nzili J.) dated 24th November, 2021 in ELCA No E015 of 2020)*

**RULING**

1. In the notice of motion dated May 9, 2022, which is expressed to be brought under Rule 4 of the [Court of Appeal Rules](#), the applicant, Dorcas Karambu Sigilai, seeks orders in the main:
  - a. That this Court be pleased to extend the time limited for filing the memorandum of appeal and that the memorandum of appeal filed herein be deemed as duly filed; and
  - b. That costs be in the cause.Stephen Kithinji Mugambi is the respondent herein.
2. The application is supported by an affidavit sworn on even date by the applicant, to which two letters dated December 6, 2021 and January 31, 2022 bespeaking proceedings and a certificate of delay dated March 10, 2022 were attached, as well as the impugned judgment. The applicant explained that the delay in lodging the appeal within time was occasioned by the delay in obtaining the certified copies of the proceedings which were requested for on December 6, 2021 but the same were availed on April 13, 2022. The applicant further deponed that her advocates have since obtained the typed proceedings



and a certificate of delay to enable her file the appeal. Further, that the appeal is merited and has a high chance of success.

3. The respondent opposed the application and filed a replying affidavit. It is the respondent's case that the instant application is brought in bad faith and is an abuse of the court process; that the applicant has not explained the delay and has not availed evidence that she paid the requisite deposit fees for the proceedings; that the applicant failed to take action until January 31, 2022; and that the Court has no way of ascertaining that the intended appeal is arguable with high chances of success as she has not attached any memorandum of appeal.

### Submissions

4. Both the applicant and the respondent filed their written submissions rehashing the contents of the notice of motion and affidavits.

### Determination

5. The substantive issue for my determination is that of extension of time to file a memorandum of appeal. My discretion as a single Judge to extend time under Rule 4 is unfettered and must be exercised judiciously. The factors that govern the exercise of the discretion to extend time under the said Rule were well stated in the case of *Leo Sila Mutiso v Hellen Wangari Mwangi [1990] 2 EA 231* as being the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is granted. Similar factors were also stated by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Salat vs IEBC [2013] eKLR*.
6. 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.



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.
7. In this case, the impugned judgment was delivered on November 24, 2021. The notice of appeal was lodged on December 6, 2021 being 14 days from the date of the delivery of judgment. The certified copies of proceedings were supplied to the applicant on March 9, 2022. From the record, counsel for the applicant obtained the certificate of delay on April 13, 2022. The instant application was filed on May 9, 2022.
8. The reasons proffered for delay is that there was a delay in obtaining the typed proceedings. I find that in the circumstances the delay is not inordinate and has been satisfactorily explained.
9. As regards the chances of success of the intended appeal, as a single Judge, I cannot determine definitively the merits of the intended appeal. In *Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No 227 of 2015* this Court stated as follows:

' This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word 'possibly.'
10. This Court stated in *Miriam Wangui Kimani & another v Marigi Gacheba Macharia [2009] eKLR* as follows:

' As for the merits of the intended appeal, there is no obligation for a single Judge to embark on any substantial discussion, since that is the province of the full court. There will be cases however when (possibly) as stated in the authority cited above, that consideration will be made to prevent frivolous appeals from being filed. This is not one of them as I consider that the issues raised are substantial ones in law. Finally, it is not disputed that the matter involves land, although that, per se, is not a compelling reason to allow the application, but the respondent is in possession of the land and the only prejudice he may suffer is to await the final determination of the intended appeal, thus restricting his unhindered use of the land. I think in the interests of justice the applicant ought to be allowed to agitate the issues of law relating to the intended appeal.'
11. Further, as stated by this Court in *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR*:

' It is appreciated no draft memorandum of appeal is annexed. That default notwithstanding the principle of law set out above on this issue indicates clearly that in the absence of a draft memorandum of appeal the Court can gauge the arguability of an intended appeal from other supportive evidence.'
12. 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 vs 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.'

13. 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 May 9, 2022 is allowed as prayed.
14. Accordingly, I make the following orders:
  - a. That leave is hereby granted to the applicant to file and serve the record of appeal and memorandum of appeal within thirty (30) days from the date hereof;
  - b. Costs of this application to abide the outcome of the intended appeal.

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

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

