



REPUBLIC OF KENYA



**Maganjo v Gatimu & 6 others (Civil Application 116 of 2020)
[2023] KECA 696 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KECA 696 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 116 OF 2020
J MOHAMMED, JA
MARCH 24, 2023**

BETWEEN

JOSEPH KARIMI MAGANJO APPLICANT

AND

JOSEPH MWANGI GATIMU 1ST RESPONDENT

WACHIRA GATIMU 2ND RESPONDENT

MICHAEL WANJOHI GATIMU 3RD RESPONDENT

GRACE KAGUU KARANI 4TH RESPONDENT

LILIAN WANGITHI GATIMU 5TH RESPONDENT

BENSON KINYUA GATIMU 6TH RESPONDENT

DALMAS MACHARIA GATIMU 7TH RESPONDENT

(An application for extension of time to file record of appeal against the ruling of the ELC at Kerugoya (E.C.Cheronu, J.) dated 5th June, 2020 in ELC Case No. 22 of 2019)

RULING

1. Joseph Karimi Maganjo (the applicant), has vide a notice of motion dated December 9, 2020 invoked the jurisdiction of this Court pursuant to the provisions of Rule 4 of the [Court of Appeal Rules](#) (this Court's Rules) seeking the following orders:
 - a. That the applicant be granted leave to file and serve the record of appeal out of time; and
 - b. that costs of the application be provided.



Joseph Mwangi Gatimu, Wachira Gatimu, Michael Wanjohi Gatimu, Grace Kaguu Karani, Lilian Wangithi Gatimu, Benson Kinyua Gatimu and Dalmas Macharia Gatimu are the 1st to 7th respondents respectively.

2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that; that it is evident that time to lodge and serve the record of appeal has lapsed and so this application is necessary; that time lost is very minimal as explained in the affidavit attached herein; that the intended appeal has very high chances of success as it touches on the question of the Law of Succession and Environment cases; and that all the documents required to file the appeal are ready and no further delay will be occasioned if the orders sought are granted.
3. The applicant deposed that from the receipt of the proceedings, he started putting together his documents including the certified copy of the order and the certificate of delay; that both documents required to be signed by the court; that during the Covid-19 Pandemic following up on the documents was difficult as access to the court registry was limited; that both the certified copy of the order and certificate of delay are vital documents which were signed on October 27, 2020; that according to the certificate of delay the time within which to file the documents was to lapse on December 2, 2020; and that he hurriedly prepared the record of appeal and the same was ready for filing by November 26, 2020.
4. The applicant further deposes that he sought funds to file the record of appeal and the deposit required by the court; and that on December 3, 2020 he was ready to file the record of appeal; and was informed by the Court Registry staff that he had wrongly calculated time and that he was out of time by one day which necessitated him to file the instant application for leave. The applicant deposed that the delay is not inordinate and that the record of appeal is ready for filing; that the respondents will not be prejudiced in anyway if the application is granted; and that his appeal has high chances of success.
5. The applicant filed his written submissions and reiterated the contents of his supporting affidavit.
6. Despite service, none of the respondents filed any response or submissions in opposition to the application.

Determination

7. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's submissions and the law. The principles upon which this court exercises its discretion under Rule 4 of this Court's Rules 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.
8. See *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR where the court laid out some of the considerations to be taken into account in deciding applications of these nature as follows; the length of the delay, the causes of the delay, the possibility of the appeal succeeding and prejudice to be occasioned to the parties.
9. In the instant application, the impugned judgment was delivered on June 5, 2020. The applicant subsequently lodged a notice of appeal on June 15, 2020, which was well within the stipulated timelines whereas the instant motion is dated December 9, 2020. There has therefore been a delay of about six months, 14 days from the date of delivery of the judgment.
10. Regarding the reasons for the delay, the applicant contends that the same was occasioned by the time taken for preparation of certified copies of the proceedings and that he was supplied with the same on



October 2, 2020. I have perused the record and indeed there is a Certificate of Delay dated October 27, 2020 indicating that the proceedings were typed and supplied to the applicant on October 2, 2020. The instant motion is dated December 9, 2020, which is about two months after the applicant received certified copies of the proceedings.

11. From the circumstances of this case, and for the above reasons, I find that the period of delay is not inordinate and is well explained.
12. As to whether the intended appeal has possible chances of success, I am mindful of the fact that I cannot make a definitive finding on this issue sitting as a single judge. However, I have perused the grounds of appeal appearing in the applicant's supporting affidavit and I am satisfied that the applicant has an arguable appeal worthy of consideration by the Court. 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.
13. Regarding prejudice, the respondents have not demonstrated the prejudice that they would suffer if this application were to be allowed and they have not filed any affidavit or written submissions in opposition to the motion.
14. The upshot of the foregoing is that the applicant's motion dated December 9, 2020, is merited and the same is hereby allowed. The applicant shall file and serve the memorandum of appeal and the record of appeal within 45 days from the date of this ruling, failing which these orders shall stand vacated.
15. The costs of this motion shall abide the outcome of the intended appeal.

Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF MARCH, 2023

JAMILA MOHAMMED

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

