



REPUBLIC OF KENYA



KENYA LAW
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Malicho & 2 others v National Land Commission & 2 others (Civil Application E019 of 2021) [2023] KECA 694 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KECA 694 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E019 OF 2021
J MOHAMMED, JA
MARCH 24, 2023**

BETWEEN

**ISACKO PIUS MALICHO 1ST APPLICANT
MARY LUKA LEMERELLE 2ND APPLICANT
PETER LETIYON LEITORO 3RD APPLICANT**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
MARSABIT PASTORS FELLOWSHIP 3RD RESPONDENT**

*(An application for extension of time to file record of appeal
against the ruling of the Environment and Land Court at Meru
(E.C.Cheronu, J.) dated 3rd June 2019 in ELC JR Appl No. 27 of 2017)*

RULING

1. Isacko Pius Malicho, Mary Luka Lemerelle and Peter Letiyon Leitoro (the applicants), have *vide* a notice of motion dated March 8, 2021 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 time for filing the record of appeal be enlarged and leave to file the record of appeal out of time be granted;
 - b. that the record of appeal be deemed to have been filed within time; and
 - c. that the costs of this application abide with the result of the intended appeal or be dealt with as the justice of the case shall seem to require.



National Land Commission, Chief Land Registrar and Marsabit Pastors Fellowship are the 1st to 3rd respondents herein.

2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Gilbert Nyamweya, learned counsel for the applicant who deposed inter alia that: the applicants are dissatisfied with the judgment of the Environment and Land Court (ELC) (E. C Cheron, J) and wish to appeal against it; that on behalf of the applicants his firm filed a notice of appeal on June 6, 2019 and applied for certified copies of proceedings and judgment through a letter dated June 6, 2019; that even though the record of appeal was ready for filing in March, 2020, the time for filing the record of appeal lapsed; and the reasons for the delay is that the first case of Covid-19 was reported on March 13, 2020 and court operations were scaled down; that the applicant's intended appeal is grounded on arguable grounds of appeal as evidenced in the draft memorandum of appeal; and that the appeal will not occasion prejudice to the respondents.
3. The applicants filed his written submissions and reiterated the contents of the supporting affidavit.
4. Despite service, none of the respondents filed any response or submissions in opposition to the application.

Determination

5. The discretion granted to this court by rule 4 of the this court's rules when considering an application for extension of time must be exercised judiciously. The party seeking extension of time must have a good explanation for the delay, demonstrate that the delay is not inordinate and that the respondent will not suffer prejudice if an extension of time is granted and, possibly, that the intended appeal has good prospects of success. See *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR).
6. The institution of an appeal is provided for under rule 82 of the 2010 rules (now rule 84):-

“ 84. 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, outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
7. The impugned judgment was delivered on June 3, 2019 and a notice of appeal duly lodged in the ELC on June 6, 2019. The appeal was required to be filed sixty (60) days of the latter date. However, as the applicants bespoke proceedings on June 6, 2019, pursuant to the proviso to rule 84, he would benefit from the freeze placed on the time required for preparation and delivery of proceedings in computing the time within which the appeal ought to be instituted.
8. There is no certificate of delay attached by the applicants for purposes of working out the period to be excluded in computing the time within which the appeal ought to have been instituted. It is evident that the instant application, filed on March 8, 2021 was filed about one year, four months from the date of delivery of the impugned judgment. That said, and because counsel has tried to explain the delay on the covid-19 pandemic, there is no other plausible explanation offered as to when the proceedings were obtained as there is no certificate of delay attached.
9. This is a matter which originated in the ELC court where judgment was entered in favour of the respondents about three (3) years, eight months ago. In the circumstances, the respondents are likely to suffer prejudice if the applicants’ motion is granted.
10. In the circumstances, I find that the applicants have not laid any proper basis for this court to exercise its discretion in their favour. I, therefore, dismiss the notice of motion dated March 8, 2021 with costs.

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

