



REPUBLIC OF KENYA



KENYA LAW
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Namu (Legal representative to Estate of Namu Njanguru) v Njeru (Civil Application 84 of 2020) [2023] KECA 695 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KECA 695 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 84 OF 2020
J MOHAMMED, JA
MARCH 24, 2023**

BETWEEN

JEREMIAH NJUE NAMU (LEGAL REPRESENTATIVE TO ESTATE OF NAMU NJANGURU) APPLICANT

AND

DANSON NYAGA NJERU RESPONDENT

(Being an application for extension of time to file notice of appeal out of time from the judgment of the Environment and Land Court in Embu (Y. M. Angima, J.) delivered on 12th March 2022)

RULING

1. Before me is a notice of motion dated September 2, 2020 expressed to be brought pursuant to rules 4 and 5 of the *Court of Appeal Rules*, 2010 and in which Jeremiah Njue Namu, the legal representative to the Estate of Namu Njanguru (the applicant) seeks orders in the main that:
 - a. The Court be pleased to extend time within which the applicant will lodge a notice of appeal against the judgment of the Environment and Land Court (ELC) (Y. M. Angima, J.) which was delivered on March 12, 2020 in ELC No. 43 of 2019;
 - b. that thereafter the Court be pleased to order stay of execution of the said judgement and a prohibition order to issue against LR Mbeere/mbita/994 (the suit property) pending the hearing and determination of the appeal pursuant to grant of order a above.
 - c. Costs of this application be borne by the respondent.
Danson Nyaga Njeru is the respondent herein.
2. The application is based on the grounds inter alia:
 - a. The notice of appeal filed in the ELC was apparently rejected as having been filed out of time;



- b. The delay in filing the record of appeal is sufficiently explained in the annexed affidavit;
 - c. The applicant has a good appeal with high chances of success; and
 - d. Unless stay of execution is ordered and prohibition issued, the applicant will suffer irreparable damages and if appeal eventually succeeds, it will be rendered nugatory.
3. In support of the application is an affidavit sworn by the applicant on even date. His case is that the impugned judgment was delivered on March 12, 2020 and he prepared a notice of appeal on the same date but when he presented it for filing it could not be received due to the outbreak of Covid-19 Pandemic and that due to the conflicting directives by the Chief Justice including one to the effect that time bound pleadings time will stop running, he was not able to file the notice of appeal until May 18, 2020 when scaling up of court operations commenced; and that the Deputy Registrar endorsed the notice of appeal on June 5, 2020. The applicant asserted that he has a good appeal with high chances of success .
 4. The respondent has opposed the application through a replying affidavit dated December 1, 2022. The respondent depones that the application dated September 1, 2020 is bad in law, misconceived without merit, frivolous and an abuse of the court process; that the applicant has not produced any evidence to show that he was denied a chance to file his notice of appeal on grounds that the registry was not receiving hard copies and has not stated the date when he attempted to file the same physically; that the applicant has not stated why he could not file or lodge the notice of appeal virtually or through email from the month of March, 2020 to May 18, 2020 when he alleges to have done so; and that he has not attached copies of receipt to prove filing of the same; that the applicant's appeal is devoid of high chances of success as there is no memorandum of appeal; that the appellant will suffer immense prejudice if the orders sought are granted as the respondent has been in occupation of the suit property since 2005; that the suit property has already been transferred to the respondent and it is only fair and just for the respondent to be allowed to enjoy the fruits of the judgment delivered in his favour.
 5. Both parties have filed their submissions in which they rehash their affidavits.

Determination

6. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law. The principles upon which this court exercises its discretion under rule 4 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.
7. The application seeks an order for extension of time and an order of stay of execution. An application for stay of execution under rule 5(2)(b) of this [Court's Rules](#) is heard and determined by a three (3) Judge bench. Accordingly, as a single Judge, I will proceed to determine the application under rule 4 which is an application which is heard and determined by a single Judge.
8. The discretion that I am called to exercise in the determination of this application is provided under rule 4 of the [Court of Appeal Rules](#) which provides as follows:

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a



reference in these Rules to any such time shall be construed as a reference to that time as extended.”

9. Rule 4 of the *Court of Appeal Rules* does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving an objective decision in the circumstances of each case. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters as follows:

“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: first 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.” [Emphasis supplied].

10. The issues I am called upon to consider are both discretionary and non- exhaustive as was explained in the case of *Fakir Mohammed v Joseph Mugambi & 2 others* [2005] eKLR where the court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”

11. The substantial reason given by the applicant for the delay in filing the appeal was due to the Court Registry refusal to receive his hard copy notice of appeal on March 12, 2020 due to the Covid-19 pandemic. The judgment sought to be appealed against was delivered on March 12, 2020 which date the applicant was well aware of; that he was only able to file the same on May 18, 2020 and that the same was endorsed by the Deputy Registrar on June 5, 2020. It is notable that the appellant does not state how he succeeded in filing the notice of appeal either as a hard copy or electronically and the steps he took from March 12, 2020 to May 18, 2020 when he states that notice of appeal was rejected by the registry due to the Covid-19 pandemic. This period of delay has not been well explained. The applicant became aware of the judgment on March 12, 2020 and no necessary steps of obtaining certified copies of the proceedings and judgment have been indicated to have been taken. There is no plausible explanation for the delay, save that the covid-19 pandemic prevented the applicant from filing the notice of appeal timeously. The instant application dated September 2, 2020, is brought seven months from the date the applicant admits knowledge of the judgment. In the circumstances, I find the delay to be inordinate and not sufficiently explained.

12. As regards the success of the intended appeal, the applicant contends that the appeal has overwhelming chances of success. However, I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where 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.”

13. On prejudice, counsel for the respondent submitted that the respondent will be highly prejudiced if the orders sought are granted as the suit property has already been transferred in favour of the respondent.
14. From the circumstances of the instant application, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso (supra)*.
15. Accordingly, I find no merit in the notice of motion dated September 2, 2020 and dismiss it with costs to the respondent.

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

