



**Wanyoike & another v Kamau & another (Miscellaneous Civil Application  
E032 of 2021) [2023] KECA 1017 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KECA 1017 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
MISCELLANEOUS CIVIL APPLICATION E032 OF 2021**

**W KARANJA, JA**

**MARCH 24, 2023**

**BETWEEN**

**PETER WANYOIKE ..... 1<sup>ST</sup> APPLICANT**

**ANTONY WANYOIKE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**THE LAND REGISTRAR, MURANG'A ..... 1<sup>ST</sup> RESPONDENT**

**CYRUS KAMAU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to file an appeal out of time under sections 3A,3B of the Appellate Jurisdiction Act and rule 4 of this court's rules against the decree and judgment of the ELC Court at Murang'a(J.G. Kemei,J) dated 27th June 2019 in Murang'a ELC Case No. 93 of 2017)*

**RULING**

1. Before me is a Notice of Motion dated 20th April, 2021 expressed to be brought under the provisions of sections 3 & 3A of the Appellate Jurisdiction Act and Rule 4 of the Court of Appeal Rules. The applicant seeks leave to file an appeal out of time against the judgment and decree of the Environment and Land Court (ELC) at Murang'a (JG Kemei,J) on July 27, 2019. The application is premised on the grounds that judgment was entered against the applicants herein who were the interested parties in whereby it was held that they had not pleaded nor proved the element on fraud; that there was no reason why the restriction could be left on the land and that the 1<sup>st</sup> respondent was entitled to the enjoyment of his land as provided by law. Aggrieved by the decision, the applicants, through their counsel, filed a Notice of appeal and letter requesting for typed proceedings dated July 2, 2019 and served the same upon the respondents on July 4, 2019.
2. According to counsel for the applicant, there was no response on whether the proceedings were ready for collection and due to the covid-19 pandemic which caused a lock down they only managed to call



the Murang'a registry on the August 17, 2020 when they were informed the proceedings were ready for collection. The said proceedings were collected on the August 19, 2020 and a certificate of delay issued on April 15, 2021. That the intended appeal is arguable and the respondents shall not be prejudiced in any way if leave is granted.

The application is supported by an affidavit of Kabaru Ndegwa learned counsel for the applicants who merely reiterates the grounds on the face of the motion. He further states that the subject matter is in regard to the ancestral land which vested upon the applicants through transmission and that parties had similar titles which issues are arguable before this Court.

Counsel places reliance on this Court's decision in *Vishva Stone Suppliers Company Limited v. RSR Stone [2006 Limited]* [2020] eKLR.

3. The respondents did not file a replying affidavit or submissions in opposition to the motion and so the same is unopposed. That is not to say, however, that the application should be allowed as a matter of course and the Court is still enjoyed to consider the application and determine it on its merits.

I have confirmed that there is a valid Notice of appeal on record which was filed on June 27, 2019 and so although the applicant has not specifically said so, the prayer for extension of time should be one for extension of time to file and serve the record of appeal.

4. The principles guiding the exercise of this jurisdiction under rule 4 of the Court of Appeal Rules are now well settled. Although the said rule does not provide the factors that the Court should consider in an application of this nature this Court has over the years devised appropriate principles. The case of *Leo Sila Mutiso v. Hellen Wangari Mwangi* [199]2EA 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 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.’

5. See also *Nicolas Kiptoo Arap Korir Salat v. IEBC & 7 others* [2014]eKLR I have considered the application before me along with the applicable principles as enunciated in the cases cited above. Have the applicants satisfied the pre-requisites for granting relief under rule 4 of the Court of Appeal rules?

On the length of the delay, I note that the deposition that the applicant filed the Notice of appeal and served the same along with the letter bespeaking the proceedings within the statutory timelines is not controverted.

6. There is a certificate of delay on record issued on August 21, 2020. This, therefore, avails the applicant refuge in the proviso to Rule 84(1) of the Court of Appeal Rules. The applicant had up to October 21, 2020 to file the record of appeal, but this was not done, hence the application before me.

I have calculated a delay of about 6 months from the date on the certificate of delay to the date this application was filed. The delay of 6 months is in my considered view inordinate and no plausible reason has been given for it. Although counsel for the applicant claims to have collected the certificate of delay on April 21, 2021, there is no evidence to that effect or even a feeble attempt to give reasons as to why the certificate was not collected within a reasonable time of it being issued. Has the applicant given any plausible reason for the delay? He blames Covid 19 and the intermittent lock downs, but by August 2020, if there was any lockdown it was partial and all advocates were exempted from travel



restrictions. The above notwithstanding, having read the impugned judgement and the grounds of appeal in the draft memorandum of appeal, I am persuaded that this being a land matter, coupled with the fact that the application is not opposed, the appellants should have their day in court, so that the issues they intend to canvass on appeal are heard and determined with finality.

7. On the degree of prejudice, I am called upon to balance the competing interests of the parties, that is the injustice to the applicants in denying them leave against the prejudice to the respondents in granting leave to file an appeal out of time. There will be no prejudice visited on the respondents if the intended appeal is heard and determined.

Accordingly, I allow the application as prayed and grant the applicants 30 days from the date hereof to file and serve the record of appeal failing which this order shall automatically lapse.

There will be no order on costs as the application was not opposed.

**DATED AND DELIVERED AT NYERI THIS 24<sup>TH</sup> DAY OF MARCH 2023.**

**W.KARANJA**

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**JUDGE OF APPEAL**

