



REPUBLIC OF KENYA



**KENYA LAW**  
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**Said v Abdulsheikh & 2 others (Civil Application E053 of 2022)  
[2023] KECA 257 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 257 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E053 OF 2022  
SG KAIRU, JA  
MARCH 17, 2023**

**BETWEEN**

**SWALEH OMAR SAID ..... APPLICANT**

**AND**

**KHALID SALIM ABDULSHEIKH ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**FIRST COMMUNITY BANK LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for leave to file a record of appeal out of time  
against the judgment of the Environment and Land Court at Mombasa  
(Munyao Sila, J.) delivered on 7th June 2022 in ELC Case No. 347 of 2017.)*

**RULING**

1. In his application dated August 19, 2022, the applicant, Swaleh Omar Said, seeks an order that the Court be pleased to grant him leave to file a record of appeal out of time.
2. In a judgment delivered on June 7, 2022, the Environment and Land Court (ELC) at Mombasa rejected and dismissed the applicant's claim that he is the rightful proprietor of properties known as Mombasa Block XXIX/76 and Mombasa Block XVII/136 and declined to cancel transfers of the said properties in favour of Khalid Salim Abdulsheikh, the 1<sup>st</sup> respondent. In the same judgment, the ELC allowed the 1<sup>st</sup> respondent's counterclaim and ordered the applicant to give vacant possession of the properties within 30 days and in default the 1<sup>st</sup> respondent to be at liberty to evict the applicant in accordance with the law.
3. The applicant is aggrieved by that judgment. By a letter dated the same day the judgment was delivered, namely June 7, 2022, the applicant's advocates promptly applied to the Deputy Registrar of the ELC for copies of typed and certified proceedings. A copy of that letter was copied to the advocates for the



respondents. The following day, on June 8, 2022, the applicant filed a notice of appeal and the same was served on the respondents. However, although the record of appeal was apparently ready for filing on August 5, 2022, the same was not filed.

4. According to the applicant, the record of appeal was entrusted on one Karisa Dunda for purposes of filing in court. In an affidavit sworn on 19<sup>th</sup> August 2022, Karisa Dunda, clerk in the firm of J. K. Mwarandu & Co Advocates who have the conduct of the matter on behalf of the applicant deposes that he received the record of appeal on Friday August 5, 2022 and assumed that there was still time to file and proceeded to the Court registry for that purpose on the following Monday August 8, 2022 only to be informed at the registry that the 60 days had lapsed on August 5, 2022.
5. Learned counsel Mr. Munguro holding brief for Mr. Mwarandu learned counsel for the applicant in urging the court to extend time submitted that the delay involved is three days; that the present application was promptly filed on August 19, 2022 and the intended appeal is arguable as demonstrated in the draft memorandum of appeal and that this is a matter deserving of the exercise of the court's discretion; that an explanation has been given for the delay; and that any prejudice to the respondents, and none has been shown, can be compensated by an award of costs.
6. Mr. Okanga, learned counsel for the 1<sup>st</sup> respondent who was supported in opposing the application by Mr. Wafula, learned counsel for the 2<sup>nd</sup> respondent and Mr. E. Makuto, learned counsel for the 3<sup>rd</sup> respondent submitted that the 60 days within which to file the record of appeal lapsed and there is a delay of 3 days; that in accordance with rule 83 of the *Court of Appeal Rules*, the appeal should be deemed as withdrawn; that contrary to claims that a record of appeal had been prepared, what is exhibited is a draft memorandum of appeal. Mr. Makuto added that there should have been an invoice and court receipt to demonstrate that the record of appeal was filed, and there is no proof of filing. It was submitted that the test for the exercise of the Court's discretion as explained by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs. Independent and Boundaries Commission & 7 others* [2014] eKLR has not been met.
7. I have considered the application, the affidavits and the submissions. The legal standard against which the Court considers applications of this nature is set out in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR where the Supreme Court expressed that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.
8. Similarly, in *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR Waki, J.A stated that:

“The exercise of this court's discretion under rule 4... 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, (possibly) 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 factors: See *Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR)*, *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika*



M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”

9. In effect, the unfettered discretion conferred on the Court under rule 4 of the Court of Appeal Rules must be exercised judicially and each case must be considered on its own facts.
10. In the present case, the impugned judgment was delivered on June 7, 2022. The notice of appeal was promptly filed on June 8, 2022. The memorandum and record of appeal were required to be lodged within 60 days from the date of lodging the notice of appeal. June 8, 2022 being excluded for purposes of computation of time, time began to run on June 9, 2022 and consequently 60 days lapsed on Sunday August 7, 2022 (an excluded day under rule 3) and so the memorandum and record of appeal should have been filed by Monday August 8, 2022.
11. The information given to applicant’s advocates clerk Karisa Dunda on 8<sup>th</sup> August 2022 at the court registry was therefore incorrect and based on mis-computation of time. In any event, the applicant’s advocates moved with speed and the following day filed the present. I am satisfied with the explanation offered on behalf of the applicant.
12. As regards the complaint by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the applicant has not exhibited the court invoice and receipt relating to the filing of the record of appeal, I understand the applicant to say that the record was not filed the clerk having been informed at the registry that he was out of time. It is implicit in the prayer for an order for leave to file the record out of time, that the record was not filed.
13. Based on the foregoing, I allow the application. Leave is granted to the applicant to file and serve his record of appeal within 15 days from the date of delivery of this Ruling.
14. Costs of the application shall abide the outcome of the appeal.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

