



REPUBLIC OF KENYA



KENYA LAW
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**Mutunga v Mutua & another (Civil Application E476 of 2022)
[2023] KECA 237 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 237 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E476 OF 2022
GWN MACHARIA, JA
MARCH 3, 2023**

BETWEEN

KIMEU MUTUNGA APPLICANT

AND

GAUDENSIA MWIKALI MUTUA 1ST RESPONDENT

FRANCIS MUEMA KATIKU 2ND RESPONDENT

(Being an application for extension of time to file an appeal out of time from the Judgment of the High Court of Kenya (M. W. Muigai, J.) dated 22nd November 2022 in Succession Cause No. 77 of 2009)

RULING

1. Before me is the applicant's application dated December 20, 2022 brought pursuant to rules 4, 75 & 77 of the [Court of Appeal Rules, 2022](#) and Article 47 of the [Constitution](#) for orders that; -
 - a. The orders of M W Muigai J made on the November 22, 2022 that land parcel Kalama/ Kiiitini/32 belongs wholly to the deceased and thus is available for distribution and dismissing the applicant's protest be stayed pending further orders of this Court.
 - b. The applicant be granted an extension of time to file and serve the notice of appeal against the whole of the said decision out of time.
 - c. The costs of this application be provided for.
2. The application is supported by the grounds on the face of it and affidavit of the applicant, who avers that he is a creditor to the estate of the deceased having bought a portion of the suit land in 2004 for Kshs 212, 500/-, he paid a deposit of Kshs 41,000/- and later topped up to the tune of Kshs 92,500/-. He took possession and started cultivating the land. To his dismay, the respondents filed Summons



for Confirmation of Grant and ignored his proprietary interest in the land prompting him to file an objection. The High Court dismissed his protest and held that the suit land belonged wholly to the deceased and ordered a refund of part payment of the purchase price of Kshs 41,000/-. Aggrieved, he wished to appeal that decision but faced financial constraints, thus the statutory prescribed time within which to lodge a notice and memorandum of appeal lapsed. He urges that the delay is excusable and the respondents will suffer no prejudice if the time to lodge an appeal is extended. Finally, it is deposed that the prospects of success of the intended appeal are overwhelming and it is in the interest of justice that the application be allowed.

3. The applicant further relies on submissions dated February 7, 2023 by which he posits that the law does not set a maximum or minimum period of delay and all that an applicant requires to demonstrate is that the delay must be satisfactorily explained. That he has been able to explain that the delay is reasonable and excusable being that he is an aged person, without any employment hence, with limited financial resources. He submits that the overriding objective the Court should aim at achieving is to facilitate just, expeditious, proportionate and affordable resolution of justice without due regard to technicalities and, as such, the application is merited and should be allowed as prayed.
4. The respondents did not file a response to the application.
5. I have considered the application, submissions and the law. As the Supreme Court of Kenya stated in [*Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No 16 of 2014\[2014\] eKLR*](#), 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. Similarly, in Leo

Sila Mutiso v Helen Wangari Mwangi [1999] 2 EA p231 the Court held that:

“ the decision whether or not to extend time is discretionary.

The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”

6. In this case, judgment was delivered on the November 22, 2022 and the application is dated December 20, 2022. Under rule 77(2) of the [*Court of Appeal Rules, 2022*](#), the applicant was supposed to file a notice of appeal within 14 days of judgment which means that the last date of filing was December 6, 2022 and 60 days subsequent to that date, file a record of appeal. The explanation given by the applicant is that he faced financial constraints to enable him adequately prepare to file the appeal. The delay in this is case of 2 weeks only which is not inordinate and is therefore inexcusable.
7. As to whether the intended appeal is arguable, no draft memorandum of appeal was annexed to the application. However, the applicant did annex a copy of the impugned judgment. The trial court in its final orders found that “any claim to the title/ownership/use of land and/or any proprietary interest can be ventilated before the Environment & Land Court.” Without expounding on this statement, it is my view that on appeal, this Court may have to consider the extent to which the decision of the learned Judge applied to the dispute at hand. Thus, the applicant ought not to be shut out in pursuit of an appeal.



8. Consequently, I shall exercise my discretion in favour of the applicant. I allow the application dated November 22, 2022 with orders that the applicant is granted leave to file a Notice and Memorandum of Appeal within 7 days of the date of this ruling and a Record of Appeal as well within 60 days of the ruling. Costs of the application shall abide in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

G W NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

