



REPUBLIC OF KENYA



KENYA LAW
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**Gatimu v Machuru & another (Civil Appeal (Application)
100 of 2021) [2023] KECA 1607 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KECA 1607 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 100 OF 2021
AO MUCHELULE, JA
MAY 31, 2023**

BETWEEN

MOSES WARUI GATIMU APPELLANT

AND

DOUGLAS MWAI MACHURU 1ST RESPONDENT

DANIEL KARIMI WANJOHI 2ND RESPONDENT

(Being an Application for extension of time to file and serve a Memorandum of Appeal and Record of Appeal out of time against the Judgment of the Environment and Land Court of Kenya at Kerugoya (Cherono, J.) dated 20th September, 2019) in E.L. C. Case No. 786 of 2013)

RULING

1. In the Environment and Land Court at Kerugoya, the applicant Moses Warui Gatimu filed Originating Summons dated 1st November 2013 claiming that he had acquired title by adverse possession to 1.40 Ha, (3 1/2 acres) of LR. No. Mwerua/Baricho/1634 and 1635 which were the resultant titles of L.R. Mwerua/Baricho/224, on account of his having entered the land in 1982 and having stayed thereon without interruption, and having undertaken extensive developments on the same parcel. The 1st respondent Douglas Mwai Machuru was the registered owner of L.R. No. Mwerua/Baricho/224. He had caused it to be sub-divided into L.R. No. Mwerua/Baricho/1634 and 1635, and had sold 1635 to the 2nd Respondent Daniel Karimi Wanjohi.
2. In evidence before the superior court, the applicant had stated that his late father had in 1982 entered into agreement to buy 1.40 Ha (3 1/2 acres) from the 1st respondent from L.R. No. Mwerua/Baricho/224. His late father had been shown the portion on which he had settled, and had brought him (the applicant) into the portion. He had thereafter remained on the portion for 31 years, and developed the same without the consent of the respondents.



3. The 1st Respondent's case was that there was no agreement of sale, or otherwise; that the applicant had entered the land with the permission of his late father. He stated that he had entered a verbal lease agreement with the applicant's late father over one acre between 1981 and 1985. He agreed that on 1st September, 2013, he had sold and transferred 1635 to the 2nd respondent.
4. The learned E.C. Cherono, J. heard the case and on 20th September 2019 delivered a judgment dismissing the claim with costs. He found that, if the applicant entered the land subsequent to a sale agreement between his late father and the 1st respondent, the claim of adverse possession was not available as his entry and occupation of the land followed the consent of the owner. The learned Judge discounted the evidence regarding the alleged sale. It was found that, even if there was a sale agreement, the applicant could not enforce it without evidence that he was the legal representative of his late father's estate.
5. The applicant was aggrieved by the decision and on 10th September 2019 lodged a Notice of Appeal to challenge it. By application dated 26th October 2021 he applied for extension of time to deem the Record of Appeal filed on 16th September 2021 to be duly filed. His case was that, following the Notice of Appeal on 11th October 2019 he requested for certified copies of typed proceedings. The same were not supplied until 22nd April 2021. A certificate of delay was issued on 12th August 2021. It meant that the Record of Appeal could not have been filed within sixty(60) days from the lodging of the Notice of Appeal. Further, the applicant stated that he fell out with his previous advocates. He faced challenges acting in person. He subsequently instructed his present advocates who took over the matter on 18th August 2021, had to peruse the proceedings and prepare and file the Memorandum of Appeal and Record of Appeal. The filing was done on 16th September 2021. Of course, they were filed out of time and without leave. It was sought that the filed Record of Appeal be deemed to be duly filed.
6. The applicant's assertion was that the delay had been explained, and sought to be indulged to have time extended to file the appeal. On the question of the merits of the appeal, reference was made to the Memorandum of Appeal whose two salient grounds were that:
 - a. since the sale agreement was not in writing, which offended the law of contract relating to land, the transaction was unlawful and therefore the possession was adverse to the interests of the 1st respondent; and that
 - b. since the sale agreement did not have the blessings of the Land Control Board, it was unlawful and the possession adverse to the interests of the 1st respondent.
7. The respondents were served but did not respond, and did not file written submissions.
8. Counsel for the applicant filed written submissions, and urged the Court to find that the applicant had sufficiently explained the delay, which was not inordinate in the circumstances, and that he had an arguable appeal which should receive the attention of this Court on appeal. Learned counsel made reference to the decisions of this Court in Muchugi Kiragu -v- James Muchugi Kiragu & Another [1998]Eklr; Pothiwalla -v- Kidogo Basi Housing Co-Operative Society Limited & 31 Others [2005] Eklr; and Paul Mwangi Gachuru -v- Gachuru -v- Kamande Nguku [2017] eKLR. The first two decisions reiterated the principles applicable in dealing with the question of extension of time under Rule 4 of the Court of Appeal Rules, and the last decision addressed the law obtaining to a claim based on adverse possession where the sale agreement relied on was void for not being blessed by the consent of the Land Control Board.



9. Rule 4 of the Court of Appeal Rules, 2022 provides as follows: “The Court may, on such terms as may be 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”.

10. I am alive to the fact that the discretion granted under the Rule is unfettered, and has to be judiciously exercised to meet the peculiar facts of the case and to do justice to the parties in question. The delay by the applicant should not be long or inordinate, and has to be reasonably explained. Care should be taken that the respondent will not suffer undue prejudice if the application is allowed. If the application raises any public interest issues, they should be considered along with all the other facts of the case. The intended appeal should raise such grounds that the Court will tentatively say that it has possible chances of success. In which case, it would be unfair to shut out the applicant from appealing the decision in question. Lastly, the Court should bear in mind that matters coming before it have to be dealt with expeditiously, and parties have to obey the statutory timelines that have been set.

11. On the facts of this case, when the notice of appeal was timeously lodged on 30th September 2019 the applicant was under Rule 84 (1) required to lodge the Memorandum of Appeal and Record of Appeal within 60 days. There was delay in getting certified copies of proceedings from the superior court, after he had duly requested. He got the proceedings on 22nd April 2021. He had under the proviso to Rule 84 (1) sixty (60) days to file the Memorandum of Appeal and Record of Appeal. He did not file until 16th September 2021. There was a delay of under three months, counting from the end of the 60 days that the law provided. The delay was not inordinate.

12. I have anxiously considered the reasons given for the delay. The reasons were reasonable, in the circumstances. The intended appeal raises grounds that deserve consideration by this Court. The grounds are not frivolous. There has been no demonstrated prejudice that will be occasioned to the respondents, who, in any case, continue to be the registered owners of the respective parcels of land.

13. I allow the application, and extend time for the applicant to appeal the judgment that the superior court rendered on 20th September 2019. The Memorandum of Appeal and Record of Appeal that were filed on 16th September 2021 and served on 22nd September 2021 shall be deemed to be properly filed and served. I direct that the parties do appear before the Deputy Registrar on a designated date for case management.

14. I make no order as to costs as the application was not defended.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF MAY, 2023.

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

