



**Mauda v Muruya & another (Civil Application E128 of 2022)
[2023] KECA 728 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 728 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E128 OF 2022
F TUIYOTT, JA
JUNE 9, 2023**

BETWEEN

SIMON OKWARA MAUDA APPLICANT

AND

JOHN KADULI BARAZA 1ST RESPONDENT

ENOCK MUSANI MURUYA 2ND RESPONDENT

(Being an Application for extension of time from the judgment of the Environment and Land Court of Kenya at Busia (A. Omollo, J) dated 4th August, 2022 in ELC Case No. 71 of 2016)

RULING

1. Simon Okwara Mauda (the Applicant) was the plaintiff in Busia Environment and Land Court Civil Suit 71 of 2016 in which a judgment delivered on August 4, 2022 aggrieves him.
2. He is desirous of preferring an appeal against that decision but is in breach of the timelines set by Rule 77(2) of the *Court of Appeal Rules*, 2022:
 - “(2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”
3. He is now before this Court seeking extension of time for purposes of filing his notice of appeal out of time. The applicant states that judgment in the Superior Court below was delivered via email and he was not aware of the delivery and because he was indisposed, he could not adequately instruct his advocate to pursue the appeal. The applicant contends that the judgment has prejudiced him as it takes away 6 acres of land comprised in No. South Teso/Amukura/1743.



4. John Kasuli Baraza and Enock Musani Muruya (the respondents) resist the application but did not file any replying affidavit. The respondents respond by way of submissions in which they make arguments in law but also purport to set out certain facts. I am afraid that submissions are not a way of presenting evidence and this Court will ignore matters of “evidence” that the submissions purport to raise.
5. The respondents submit that the applicant has not explained the delay of 1 month and 24 days, deducting 14 days of his right to file the notice of appeal. Further, that extension of time is discretionary and not a gift to a dishonest applicant.
6. In addition, that an applicant must show the weight of his case so that the Court can determine whether it is a waste of its time to extend time. In a bid to demonstrate the unworthiness of the intended appeal, the respondents state that the applicant had admitted selling 6 acres of his land to one Wechuli Kochwa who in turn sold that land to the respondents. That the applicant’s contention that Wechuli had not completed paying the purchase was disproved when Wechuli produced evidence showing that he had settled the balance in 1996. It is also argued that the applicant only has himself to blame for failing to join Wechuli as a party to the suit before the ELC.
7. The power to extend time granted by Rule 4 of the *Rules* of this Court is discretionary. The power is to be exercised judiciously and guided by consideration of factors that have long been settled by this Court. They include; the length of delay, the reason for delay, the degree of prejudice to the respondent if the application is granted, whether the matter raises issues of public importance and, possibly, whether the intended appeal has chances of success.
8. The applicant has placed before this court a medical discharge summary chit showing he was admitted at Teso North Sub-County Hospital from August 1, 2022 to August 22, 2022. This evidence is not controverted and I believe it. There is therefore a plausible reason for the applicant not acting until August 22, 2022. As judgment was delivered on August 4, 2022, the applicant had upto August 18, 2022 to file the appeal and the failure to do so on time is well explained.
9. There is however the time between August 22, 2022 and October 28, 2022 when the present application for extension of time was filed. The inaction during this period has not been explained. Yet because it is a delay of 66 days, I will excuse it as it is not inordinate. In doing so I note that the respondents, who did not present any evidence in opposition to the present application, have not demonstrated that extension of time will prejudice them.
10. Regarding whether the intended appeal is arguable, I have looked at the draft memorandum of appeal that is attached to the application. In it the applicant impugns the judgment of the Superior court for finding in favour of the respondent in the absence of a written nor verbal contract. While the court hearing the appeal will make the call as to whether there is merit in this argument, I am not prepared to say that it is frivolous.
11. Ultimately I allow the application dated November 25, 2022 but with no order as to costs. The applicant shall file and serve a notice of Appeal within the 14 days hereof and thereafter file and serve a record of appeal within 60 days of this ruling.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR.

