



**Mulei v Njoroge & another (Civil Appeal (Application)
E414 of 2022) [2023] KECA 857 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 857 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E414 OF 2022
HM OKWENGU, JA
JULY 7, 2023**

BETWEEN

GRACE JOHN MULEI APPLICANT

AND

BENARD NG'ANG'A NJOROGE 1ST RESPONDENT

GABRIEL MBUGUA NJAGI 2ND RESPONDENT

(An application for extension of time to file a Memorandum of Appeal and Record of Appeal from the Judgment and orders of the Environment and Land Court at Machakos (Nyukuri, J.) made on the 4th of May 2022 in ELC Cause No. 372 of 1994)

RULING

1. Through a motion dated October 28, 2022, the applicant, Grace John Mulei (Grace) seeks orders of extension of time limited for filing a memorandum of appeal and consequently, time extended for filing the record of appeal.
2. The applicant wishes to appeal against the judgment of the Environment and Land Court (ELC) delivered on May 4, 2022, granting the respondents possession of a parcel of land measuring 5 acres within Plot No 26 Kitanga Settlement Scheme (herein the suit property), and eviction therefrom of the applicant, and any other person claiming under the applicant's perceived title. The applicant filed a notice of appeal on May 17, 2022 and served the same on the respondents' advocates. She has sworn an affidavit in which she deposes that she applied for typed proceedings on May 30, 2022 and followed up with the Deputy Registrar until October 4, 2022, when she obtained a certified copy of proceedings. However, being a widow of advanced age, she was under financial constraint and could not raise the needed legal fees and filing fees.
3. The applicant maintains that she has an arguable appeal with high chances of success; and that the delay in filing the appeal was not deliberate or intended to obstruct the course of justice but was occasioned



- by the delay in obtaining the proceedings. She urges the Court to exercise its discretion in her favour and extend time to file the record of appeal. She pleads that unlike the respondent who will not suffer any prejudice, she stands to suffer substantial prejudice if the orders sought are not granted.
4. In opposing the motion, the 1st respondent has filed a replying affidavit stating that the motion is misconceived, frivolous, bad in law, and an abuse of court process as there is no substantive appeal to be considered by this Court. This is because the applicant failed to file and serve the notice of appeal within the stipulated statutory period of seven days, and also the notice of appeal was filed in the lower court instead of this Court. In addition, the 1st respondent states that the motion should not be allowed as the applicant did not present a duly filed memorandum of appeal.
 5. The respondents argue that although the applicant claims to have obtained the typed proceedings after expiry of 60 days, no certificate of delay has been produced; that the application is intended to defeat the cause of justice by denying the respondent the fruits of his judgment; and that the applicant will not suffer prejudice if the orders sought are not granted because a similar application is pending before the trial court.
 6. In response to the replying affidavit, the applicant has filed a supplementary affidavit explaining that she filed a draft memorandum of appeal alongside the notice of motion, and that she has an arguable appeal. She denies having filed any other application that is pending before the superior court, and states that the application that is pending before the trial court was filed by objectors who claim interest in 6.5 acres forming part of the suit property that measures 70 acres.
 7. The applicant has filed written submissions reiterating the grounds stated in support of the motion, the supporting affidavit and the supplementary affidavit. She relies on *Ngei vs Kibe & another* (Civil Appeal (Application) E359 of 2021) [2021] KECA 243 (KLR), in which this Court reiterated that Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to extend time for the doing of any act authorized or required by the Rules.
 8. The applicant also refers to *Leo Sila Mutiso vs Hellen Wangari Mwangi* 1999 2EA 231, for the matters which the Court should take into account in deciding whether to grant an extension of time. She maintains that a draft memorandum of appeal dated October 28, 2022 listing 7 grounds of appeal was availed to the Court as well as the judgment of the trial court. The applicant maintains that his intended appeal is arguable and that no prejudice will be occasioned to the respondent since the applicant had paid the full purchase price for the suit property to the respondents' father Samuel Njoroge Ng'ang'a, and the applicant has never taken possession of the suit property nor has the respondent refunded the consideration that was paid.
 9. The applicant reiterates that she lodged her notice of appeal in time and complied with Rule 77, 78 and 79 of the *Court of Appeal Rules* but was unable to file the record of appeal within time, because she had not received the typed copies of proceedings. The applicant pleads that she has been keen to file the appeal despite the delay and that the delay has been explained and is not inordinate.
 10. I have carefully considered the motion, the affidavit in support and in reply, as well as the written submissions filed by the applicant. This Court has discretion under Rule 4 of the *Court of Appeal Rules* to extend time. That rule provides as follows:

“The Court may on such terms as it thinks 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...”



11. It is now well settled that the matters which this Court may take into account in deciding whether to grant an extension of time includes; the length of the delay, the reason for the delay, and the degree of prejudice that the respondent may suffer if the application is granted; (*Leo Sila Mutiso vs Hellen Wangari Mwangi (supra)*). In this case, the judgment, subject of the intended ruling was delivered on May 4, 2022. The applicant filed a notice of appeal on May 17, 2022. Under Rule 75(2) of the [Court of Appeal Rules 2010](#), the notice was required to be filed within 14 days from date of judgment and the applicant's notice having been filed on the 13th day after the delivery of the Judgment, it was filed within time. The record of appeal was required under Rule 82(1) of the [Court of Appeal Rules 2010](#) to be lodged within 60 days. As at the time of filing the applicant's motion, that is October 28, 2022, it was about 5½ months from the date of filing the notice of appeal.
12. The applicant has given two main reasons for the delay being; the time taken to supply her with certified copies of the proceedings, and the difficulties she encountered in raising money for the legal fees and the Court fees. The applicant has given copies of letters indicating that she made a request for typed proceedings and judgment on May 30, 2022, but did not receive copies of the proceedings and judgment until October 4, 2022. However, the applicant has not availed a copy of a certificate of delay duly signed by the Registrar of the Court nor has she given any explanation for that failure. In the circumstances, the applicant has not met the requirement of the proviso to Rule 82 of the [Court of Appeal Rules 2010](#) as she has not produced evidence indicating that she served a copy of the request for proceedings upon the respondent, nor has she produced a certificate of delay duly signed by the Registrar of the Court.
13. Further, although the applicant explains that she was unable to raise money for the legal fees and the Court fees because of her age and financial circumstances, nothing has been laid before this Court to confirm her age or financial circumstances. The judgment of the trial court was in favour of the respondents and it cannot be said that the respondents will not be prejudiced by the delay as the delay will obviously prevent them from freely enjoying the fruits of their judgment.
14. For the above reasons, I find that the applicant has not met the threshold to enable this Court exercise its discretion in her favour. Accordingly, the application is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

