



**Nderi v National Land Commission & 3 others (Civil Application
E422 of 2022) [2023] KECA 862 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 862 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E422 OF 2022
HM OKWENGU, JA
JULY 7, 2023**

BETWEEN

RAPHAEL MUSYOKI NDERI APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF LANDS 2ND RESPONDENT

**ABDULKARIM SALEH MUHSIN T/A ANDULBASIT SALEH
MUSHIN 3RD RESPONDENT**

REGIONAL CONTAINERS FREIGHTS 4TH RESPONDENT

*(An application under Rules 3, 4, and 77 of the Court of Appeal Rules 2022,
seeking extension of time within which to file and serve the notice of appeal against
the Judgment and Order of the Environment and Land Court at Machakos
(Angote J) delivered on 30th October 2020 in JR Misc. Application No. 7 of 2019)*

RULING

1. By a notice of motion dated November 15, 2022, brought under Rules 3, 4, and 77 of the [Court of Appeal Rules](#) 2022, the applicant Raphael Musyoki Ndeti, seeks an order extending the time within which to file and serve the notice of appeal against the judgment and order of the Environment and Land Court (ELC) (Angote J) delivered on 30th October 2020 in JR Misc. Application No. 7 of 2019.
2. The applicant was the 2nd respondent in a petition which was filed in the ELC at Machakos in which the 3rd respondent Abdulkarim Saleh Muhsin t/a Regional Containers Freights was the petitioner. In the judgment, the learned judge made a declaration that the determination made by the National Land Commission on 2April 8, 2017, in respect of land LR. No. 337/1884 (suit property) was null and void ab initio and issued a declaration that Abdulkarim Saleh Muhsin t/a Regional Containers Freights, are



- the lawful owners of the suit property. The court further issued an injunction restraining the applicant, among others, from interfering or dealing in any way with the suit property.
3. The applicant prays for time to be enlarged to enable it file a notice of appeal against the judgment. He explains that the judgment was released in 2020 at the height of the Covid lockdown with no notice to the parties and that he only became aware of the judgment on November 10, 2022 from some officers of the Ethics & Anti-Corruption Commission. He urges the Court to exercise its discretion under Rule 4 of the Court of Appeal Rules in his favour.
 4. In his affidavit sworn in support of the motion, the applicant states that the learned Judge who heard the matter was transferred to Nairobi before issuing the judgment and, that he had been following up but was advised that the file was with the Judge for preparation of the judgment, and was shocked to learn that the judgment had in fact been delivered on October 30, 2020. He urges the Court to exercise its discretion in his favour to enable him access justice and a fair hearing. He has exhibited a draft memorandum of appeal with 6 grounds contending that his intended appeal is arguable.
 5. The applicant has also filed written submissions urging that the court has discretion under rule 4 of the *Court of Appeal Rules* to extend the time for filing the notice of appeal; that he has a good reason for the delay; and that the respondents will not suffer any prejudice if the application is allowed. He cited *Vishva Stones Suppliers Company Limited vs RSR Stone* (2006) Limited [2020] eKLR, for the proposition that orders under rule 4 of the *Court of Appeal Rules* should not only be granted liberally but also on terms that are just unless the applicant is guilty of an unexplained and inordinate delay in seeking the court's indulgence. He urged that the delay in lodging the notice of appeal was as a result of the Covid lockdown which had affected court processes.
 6. The 3rd and 4th respondents objected to the motion through a replying affidavit sworn by Abdulkarim Saleh Muhsin (Abdulkarim), and written submissions. Abdulkarim swore that the applicant's motion is unfounded, mischievous, scandalous, and an abuse of the court process. He swears that the judgment of the ELC was not delivered without notice to the parties as all parties were served with an appropriate notice before the judgment was delivered on October 30, 2020; that the National Land Commission did not file any response to the petition in the High Court nor have they appealed the judgment.
 7. Abdulkarim states that records at the Machakos Law Courts have been automated and it was possible for the applicant to know the position of his matter including when the matter was coming up for judgment even without any file; that the applicant had not demonstrated that they wrote to the Court inquiring about the judgment; and that the applicant is not candid and even deliberately failed to serve the respondent with his motion.
 8. In its written submissions, the 4th respondent referred to *Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR for the principles applicable in the exercise of the court's discretion under rule 4 of the *Court of Appeal Rules*. The 4th respondent identified 5 issues for determination. These were: whether the applicant's motion has been filed without undue delay; whether there is a reasonable reason for the delay in filing the notice of appeal; whether the 4th respondent will suffer any prejudice if the application is allowed; whether the appeal if filed will be arguable with a possibility of success; and whether the orders sought, being discretionary in nature, should be granted to the applicant.
 9. The 4th respondent faulted the applicant for failing to inform the Court of the exact time when he learnt of the judgment such that the court is unable to know the time lapse between when the applicant came to learn of the judgment, and the time he filed his application for extension of time. He urged that there was undue delay in filing the application.



10. As regards the notice of appeal, the 4th respondent disputed the applicant's allegation that the court file was not available at the registry, by producing a bill of costs filed in July 2022, and two notices for taxation filed on September 7, 2022 and November 2, 2022. He reiterated that the records at the Machakos law courts being automated, a party can know the status of a matter using online records. He urged the Court to dismiss the applicant's explanation as it was not plausible. He contended that he would suffer prejudice if the application is allowed while the applicant on the other hand has not appealed or challenged the decision in petition No. 19 of 2019 which sought to enforce the JR. Application that was overturned. The 4th respondent urged the court to dismiss the applicant's motion as he was not only indolent but was also coming to the court with unclean hands.
11. Parties were duly served with a hearing notice on February 20, 2023 through email, which informed them that the hearing would proceed through written submissions and gave time to file and exchange the submissions. However, no reply or written submissions were received from the National Land Commission or the Chief Registrar of Lands.
12. I have carefully considered the motion, the affidavit in support and in reply, as well as the written submissions. The applicant has contended that although judgment of the ELC is indicated to have been delivered on October 30, 2020, he was not aware of the judgment because he was not served with a hearing notice. Although the 4th respondent disputes this, contending that all the parties were served with notices for the delivery of the judgment, the 4th respondent has not attached a copy of the notice that was forwarded to the parties for the delivery of the judgment.
13. In light of the circumstances before me, the contention by the applicant that he was not served with any notice for the delivery of the judgment, cannot be ruled out. It is common knowledge that October 2020 was during the period when the Covid pandemic was most prevalent. I would therefore give the applicant the benefit of doubt that the delay was contributed to by the circumstances prevailing during the Covid pandemic. The dispute involves land and the applicant has demonstrated that he has arguable grounds of appeal.
14. In the circumstances, it is only fair that the applicant be given an opportunity of pursuing his appeal. Accordingly, the motion dated November 15, 2022 is allowed. The applicant shall file and serve the notice of appeal within 14 days from the date of delivery of this Ruling.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

