



Mwaura (Suing as the Administrator of the Estate of the Late Robert Mwaura Kagondu alias Mwaura Kagondu) v Estate of the Late Muturi Gachogu & 4 others (Civil Application E470 of 2022) [2023] KECA 1126 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1126 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E470 OF 2022
KI LAIBUTA, JA
SEPTEMBER 22, 2023**

BETWEEN

PAUL KAGWA MWAURA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE ROBERT MAWAURA KAGONDU ALIAS MWAURA KAGONDU) APPLICANT

AND

**ESTATE OF THE LATE MUTURI GACHOGU 1ST RESPONDENT
DAVID WANYOIKE GACHOGU 2ND RESPONDENT
MUIRURI GACHOGU 3RD RESPONDENT
LAND REGISTRAR KIAMBU DISTRICT 4TH RESPONDENT
DIRECTOR OF SURVEY 5TH RESPONDENT**

(Being an application for extension of time to file and serve the Notice and Record of Appeal out of time from the Judgment and Decree of the Environment & Land Court of Kenya at Nairobi (O. Mboya, J.) delivered on 14th July 2022 in E.L.C Case No. 372 OF 2008)

RULING

1. The applicant, Paul Kagwa Mwaura (suing as the administrator of the estate of the late Robert Mwaura Kagondu Alias Mwaura Kagondu) has moved this court vide his notice of motion dated December 19, 2022 seeking extension of time to file and serve the notice and record of appeal from the judgment of the Environment and Land Court at Nairobi (Ogut Mboya, J) dated July 14, 2022 in Nairobi ELC Case No 372 of 2008 out of time pursuant to rule 4 of the [Court of Appeal Rules](#).
2. The applicant's motion is supported by the applicant's affidavit sworn on December 19, 2022 and is anchored on 7 grounds set out on the face of the motion, namely: that the impugned judgment was



delivered on July 14, 2022; that he filed a notice of appeal on July 19, 2022; that, aggrieved by the decision of the ELC, his counsel filed an application for review, which was heard and dismissed; that he now wishes to appeal the judgment and decree of the trial court; that the respondents would not be prejudiced by the orders sought; that the intended appeal is arguable; and that it is only fair and just that the application be granted.

3. Learned counsel for the applicant filed written submission and list of authorities both dated February 6, 2023 in support of the motion, citing the cases of *Aviation Cargo Support Limited vs St Mark Freight Limited* [2014] eKLR; *Belinda Murai and 9 others vs Amos Wainaina* [1978] eKLR; and *Nicholas Kiptoo Arap Korir Salat vs IEBC* [2014] eKLR, all of which I have considered. According to learned counsel, the applicant's Motion has been brought without undue delay and should be allowed as prayed.
4. The respondents oppose the applicant's motion vide the replying affidavit of the 2nd respondent, David Wanyoike Gachogu, sworn on February 9, 2022 on his own behalf and on behalf of the 1st and 3rd respondents. It is curious that the 1st respondent begins by deponing that he "approves the extension of time sought by the applicant in this matter," but then proceeds to ask the court to dismiss the application. Going by the written submissions of counsel for the respondents dated February 9, 2023, the motion is opposed. Counsel asks me to rely on the grounds set out in the 2nd respondent's replying affidavit and dismiss the application.
5. In summary, the respondents contend that the subject dispute has been in court for over 20 years; that the applicant has not indicated that he has applied for certified copies of the proceedings; and that he has not given any good reasons why he has delayed in filing the appeal.
6. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to "... 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 ...," on such terms as it thinks just.
7. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under rule 4. 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."
8. The applicant's prayer for extension of time to file an appeal is dependent on my findings on the following factors: whether the intended appeal is arguable with a possibility of success; the length of the delay, and whether such delay is inordinate; the reasons for the delay in filing the intended appeal; and whether the respondent would be unduly prejudiced by extension of time as sought.
9. With regard to the merit of the appeal, it is noteworthy that the applicant preferred to apply for review whereupon his application was dismissed. The outcome of his application for review remains unchallenged. In my considered view, he cannot be seen to turn around and prefer an appeal, and option he had previously abandoned in preference for review.



10. The Court of Appeal in the *Chairman Board of Governors Highway Secondary School vs William Mmosi Moi* [2007] eKLR, when considering an application to for extension of time to file a notice of appeal, held that:

“...the Board gave instructions that an application be filed for review of the ruling of Hayanga J made on September 26, 2003. It is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances, we think, the options available to the Board were exhausted when the application for review was determined by the superior court and we doubt that the intended appeal would be valid even if it was filed.

An aggrieved party under order XLIV of the Civil Procedure Rules can only apply for the review of a decree or order either where “no appeal has been preferred” or where “no appeal is allowed”. An appeal is allowed on orders made under order 9A r 2 Civil Procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal is however only a formal notification of an intention to appeal and it cannot be said that the aggrieved party had “preferred” an appeal at that stage and was thus precluded from exercising the option of review.

... the Board was at liberty to pursue the option of review of the orders made on September 26, 2003 despite the filing of a notice of appeal to challenge the same orders. We have no hesitation however in stating that upon the exercise of that option and pursuit thereof until its conclusion, there would be no further jurisdiction exercisable by an appellate court on the same orders of the court.”

11. Considering a similar application in *Gerald Kithu Muchanje vs Catherine Muthoni Ngare & another* [2020] eKLR, Asike Makhandia JA also held that:

“The applicant was aggrieved by the judgment of the trial court. Under section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Martha Wambui v Irene Wanjiru Mwangi & another* (2015) eKLR, the court stated that “From the above provisions of section 80 of the Civil Procedure Act and order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of June 13, 2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...” See also the case of *Multichoice (K) Ltd V Wananchi Group (K) Ltd & 2 others* (2020) eKLR. This is exactly what happened here. Contrary therefore to the submissions by the applicant, the law on the issue is purely settled.”



12. As is the case here, the applicant preferred to seek review of the impugned judgment and, therefore, cannot turn around and seek to go on appeal against the same decision on account of dismissal of his application for review. In view of the foregoing, the applicant's notice of motion dated December 19, 2022 is incompetent and is hereby dismissed with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

