



REPUBLIC OF KENYA



KENYA LAW
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**Misoi & 2 others v Muhindi (Civil Application E024 of 2023)
[2023] KECA 1295 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1295 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E024 OF 2023
WK KORIR, JA
OCTOBER 27, 2023**

BETWEEN

MARY JEROTICH MISOI 1ST APPLICANT

JOSEPH MASAMBU 2ND APPLICANT

KENETH MBWANGA 3RD APPLICANT

AND

RAPHAEL KAGALI MUHINDI RESPONDENT

*(Being an application for extension of time to file a notice of appeal
out of time to the decision of Environment and Land Court at Eldoret
(M.A. Odeny, J.) dated 24th June 2021 in ELC Case No. 12 of 2014)*

RULING

1. The application before me is brought pursuant to sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#), as well as rules 4, 43 and 49 of the [Court of Appeal Rules, 2022](#). Through the application dated 26th May 2023 the 1st applicant (Mary Jerotich Misoi), the 2nd applicant (Joseph Masambu) and the 3rd applicant (Keneth Mbwanga), seek leave to lodge a notice of appeal out of time and that the notices of appeal lodged on 8th March 2023 and 15th March 2023 be deemed as duly filed. They also pray that the costs of this application be in cause. The application is supported by affidavits sworn by each of the three applicants.
2. The application is premised on the grounds that the applicants are on the verge of being evicted from a portion of LR No Nandi/Chebilat/129 pursuant to the judgment of the Environment and Land Court at Eldoret in ELC Case No 12 of 2014 which allowed the claim of adverse possession by the respondent (Raphael Kagali Muhindi). According to the applicants, the judgment was delivered in their absence and they only came to know of its existence when the respondent filed an application



dated 3rd February 2023 before the trial court seeking to evict them. They also aver that their former advocate continuously assured them that they had won the case which assurance was not true. The applicants additionally depose that the said former advocate was involved in accident which incapacitated him making him lose track of the case. The 1st applicant further avers that between January 2022 and June 2022, she was taking care of her ill husband who passed away on 8th June 2023 hence she was unable to follow up on her case. She also avers that she is similarly of ill health and stands a risk of being rendered homeless.

3. I have gone through the availed material and find that the 2nd and 3rd applicants were never parties before the trial court. They are therefore strangers to this application as I do not see any order allowing them to participate in the proceedings before the trial court. I will therefore not consider their affidavits in this ruling.
4. The application was not opposed by the respondent.
5. Mr. Nabasenge for the applicants filed submissions dated 14th July 2023 in support of the application. Counsel urged that as was held in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Nairobi Civil Application No 255 of 1997, the factors to be considered in an application for extension of time are the length of the delay, the reason for the delay, the chances of the success of the intended appeal and the decree of the prejudice to the respondent if the application is granted. According to counsel, although the delay occasioned was 20 months, the delay was satisfactorily explained by the applicants. Counsel relied on the case of *Vitalis Omondi Othuon v National Water Conservation & Pipeline Corporation* [2016] eKLR where a delay of 22 months was excused as had been explained. Additionally, counsel relied on the case of *Vishva Stone Suppliers Co. Ltd v RSR Stone Ltd* (2006) [2020] eKLR where the Court excused a delay of 14 months as it was occasioned by an advocate and not the applicant. According to counsel, a complete record of appeal had been lodged and was awaiting regularization through this application.
6. Counsel submitted that the intended appeal had high chances of success. In support of his argument that the likelihood of success of an intended appeal will lead to extension of time, counsel cited the case of *County Secretary County Government of Busia v Manweri & Co. Advocates* [2021] eKLR where leave to appeal was granted on the ground that the intended appeal was not frivolous.
7. Certain principles and considerations have been devised through judicial decisions to aid in the disposal of applications for extension of time such as the instant one. For instance, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles for consideration thus:
 - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;



6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
8. I have considered the notice of motion, the supporting affidavit, and the submissions by counsel for the applicants. The question is whether the applicants have satisfied the prerequisites for extension of time. The first element I address is whether the applicants have tendered satisfactory reasons for the delay. As admitted by their counsel, the delay was for a period of about 20 months. The reasons advanced for the delay are that the applicants were not aware of the delivery of the judgment and had relied on the assurance of their previous advocate that all was well; that their former advocate was at some point incapacitated and could not follow up on the matter; and, that the 1st applicant was taking care of her ailing husband from 10th January 2022 to 8th June 2022 hence failed to follow up on the matter with their former advocates.
9. The present application is dated 26th May 2023. Even though the applicants do not state exactly when they got information of the existence of judgment, it is clear that their actions were prompted by the respondent’s application dated 3rd February 2023, which was to be heard on 22nd March 2023. It is therefore likely that the applicants knew of the existence of the judgment by 22nd March 2023. That being the case, the applicants have not offered any explanation for the delay occasioned between 22nd March 2023 and 26th May 2023 when this application was filed. Therefore, the delay of over 2 months has not been explained at all. Even if I was to accept the explanation that the 1st applicant was taking care of her ailing husband between 10th January 2022 and 8th June 2022, the delay prior to 10th January 2022 has also not been convincingly explained. It is only after an explanation is offered that there can be a basis for exercising discretion in favour of an applicant. As was held by the Supreme Court in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR the whole period of delay should be declared and sufficiently explained. The applicants have failed to do so and there is no reason to exercise discretion in their favour.
10. On the applicants’ averment that the fault was attributed to their previous counsel, I agree with the holding in *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR that mere allegation of indolence by counsel is not enough and that a litigant guilty of delay should offer an explanation as to the action taken in order to show that he did not condone or collude in the delay. An applicant must not have been careless on their own part. Surely, the applicants cannot say that for the entire period that their previous advocate kept assuring them that they had won the case, they never bothered to ask for the judgment. Indeed, the reasons advanced by the applicants for the delay are not plausible. For instance, on one hand they aver that their counsel kept reassuring them that all was well and on the other hand they claim that the same advocate did not follow up on the matter because he was incapacitated after an accident.
11. The next limb of my interrogation is whether the respondent will suffer any prejudice if the time is enlarged. This application being unopposed, no allegation of any prejudice has been made. In the circumstances, I am unable to find that any prejudice will be visited upon the respondent if the orders sought are granted.
12. However, in my view, the lack of prejudice to the respondent cannot compensate for the unexplained inordinate delay on the part of the applicants. In an application like the one before me, it is all about conducting a balancing act so that at the end of the day justice is done to all the parties. In that regard, I



find myself in agreement with the statement of the Labour Appeal Court of South Africa in *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22 that:

“The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

13. In the circumstances of this case, the reasons for the delay as adduced by the applicants are unsatisfactory, and the only conclusion is that the notice of motion dated 26th May 2023 is without merit. The application is therefore for dismissal and it is dismissed. I shall make no order as to costs since the respondent did not file any response.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF OCTOBER, 2023

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

