



REPUBLIC OF KENYA



KENYA LAW
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**Ngetich v Ngetich & 4 others (Civil Application 118 of 2020)
[2023] KECA 1184 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1184 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION 118 OF 2020
F SICHALE, JA
OCTOBER 6, 2023**

BETWEEN

JOHN KIPKIRONG NGETICH APPLICANT

AND

JAMES KIPROP AGU NGETICH 1ST RESPONDENT

BENJAMIN K. ROTICH 2ND RESPONDENT

PAUL K. NGETICH 3RD RESPONDENT

WILSON KIPCHUMBA 4TH RESPONDENT

DANIEL ROTICH 5TH RESPONDENT

*(Being an Application for Extension of Time and Leave to file appeal
out of time from the Judgment and Decree of Ombwayo J delivered
on 11th June 2020 by Odeny J in Eldoret ELC Case No. 355 of 2012)*

RULING

1. The application before me sitting as a single judge is a motion dated September 30, 2020, predicated upon sections 3A and 3B of the *Appellate Jurisdiction Act* (cap 9) of the Laws of Kenya and rules 4, 41, 43, 47 and rule 75 (2) of the *Court of Appeal Rules* ("The Rules") in which John Kipkirong Ngetich (the applicant herein), seeks leave to file an appeal out of time.
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Gustine Othuro counsel who has the conduct of this matter on behalf of the applicant who deposed *inter alia* that the impugned ruling was delivered electronically due to the covid 19 pandemic and that no notice had been issued prior to delivery of the judgment. He further deposed that on June 11, 2020, when the judgment was delivered, their offices were closed due to covid 19 pandemic and that as soon as they realized that judgment had been delivered, they urgently filed the instant application without further



delay and that further the intended appeal raises a myriad of pertinent issues for consideration and as such, had very high chances of success.

3. The motion was opposed *vide* a notice of preliminary objection dated March 6, 2023 and a replying affidavit of even date sworn by Paul K. Ngetich the 2nd respondent herein who deposed that the delay herein was inordinate and that further no explanation had been given as to why no steps were taken between June 2020 and September 2020, given that access to the courts notwithstanding covid 19 had been granted since May 2020 and that further not even a memorandum of appeal had been annexed to the application to gauge the chances of success of the appeal.
4. Turning to the preliminary objection, it was contended by the respondents that the motion was incurably defective for failing to comply with rule 81 of this court and that further there had been inordinate delay, which delay had not been explained satisfactorily.
5. The applicant reiterated the contents of its supporting affidavit and submitted that the impugned judgment herein was delivered on June 11, 2020 electronically and that there was no notification of the intended reading of the judgment to any party and that further the judgment was delivered at the height of covid 19 when the courts had been closed and that the applicant only came to know of delivery of the same on September 29, 2020, after it was posted on t Kenya Law whereupon he swiftly moved to file this application on September 30, 2020.
6. It was further submitted that the appeal raised numerous triable issues with very high chances of success and involved land which is a very emotive issue and that it was in the interests of justice that the application be allowed.
7. On the other hand, it was submitted for the respondents that indeed the impugned judgment was delivered electronically on June 11, 2020 after the courts were allowed to operate electronically and that therefore, there was no cogent reasons why the notice of appeal was not filed within 14 days soon after judgment and that as such, the delay to file the notice of appeal was inordinate and inexcusable.
8. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the notice of preliminary objection, the replying affidavit, the further affidavit, the rival submissions by the parties, the cited authorities and the law.
9. Tuning to the preliminary objection, it is now trite law that a notice of preliminary objection must raise a pure point of law. See the locus classicus case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696. In the instant case it has been contended by the respondents *inter alia* that there has been inordinate delay in filing this application which delay has not been explained satisfactorily. The issue as to whether there has been inordinate delay can certainly not be pleaded as a pure point of law as the same would require interrogation of facts. In *Oraro v Mbajah* (2005) 1KLR 141: - Ojwang J (as he then was) stated persuasively thus;

“.....A ‘preliminary objection’ correctly understood is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point.... anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by



10. Consequently, nothing turns on this point and the notice of preliminary objection dated March 6, 2023, is hereby dismissed. 11. Turning to the merits or otherwise of the application before me, the principles upon which this court exercises its discretion under rule 4 are firmly settled. The court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion the court should do so judiciously.

11. See *Mwangi v Kenya Airways Limited* (2003) KLR 486 where this court stated thus;

“Over the years, the court has set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (civil application No Nai 255 of 1997 (unreported), the court expressed itself thus;

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are; first the length of the delay, secondly, 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.”

12. In the instant case, and as regards the length of the delay, the impugned judgment was delivered electronically on June 11, 2020, whereas the instant application was filed on September 30, 2020 a period of about 3 months. The applicant contends that he only became aware of the judgment on September 29, 2020, after the same was posted on Kenya Law.

13. It is not denied that prior to the delivery of the judgment electronically, no notice of the said delivery had been made to the applicant.

14. In view of this lapse, it is only fair that the motion be allowed.

15. Accordingly, the applicant’s motion dated September 30, 2020 is hereby allowed with no order as to costs.

16. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF OCTOBER, 2023.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

