



**Sifuna v Mulaya & another (Civil Application E324 of 2023)  
[2023] KECA 1172 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1172 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E324 OF 2023  
S OLE KANTAI, JA  
OCTOBER 6, 2023**

**BETWEEN**

**DAVID KINISU SIFUNA ..... APPLICANT**

**AND**

**EMILY KIVALI MULAYA ..... 1<sup>ST</sup> RESPONDENT**

**NELSON MUTURI NDUMBEYIA ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time within which to file memorandum of appeal, record of appeal and serve the notice of appeal from the Judgment of the Environment and Land Court of Kenya at Nairobi (Angote, J.) dated 18th May, 2023 in ELC Cause No. 280 of 2015)*

**RULING**

1. The applicant, David Kinisu Sifuna, prays in the main in the Motion on notice brought under rule 4 of the Court of Appeal Rules that I be pleased to extend time within which the applicant may serve notice of appeal out of time from the Judgment of Angote, J. delivered on 18<sup>th</sup> May, 2023; that I deem notice of appeal dated 19<sup>th</sup> May, 2023 as duly filed and served; that I extend time for filing memorandum and record of appeal out of time and costs of the Motion be in the intended appeal. It is explained in grounds in support of the Motion that time to serve notice of appeal has since lapsed; that delay in serving the same is excusable, is justifiable and was unavoidable; that the applicant became sick and had to seek treatment in India and when he came back to Kenya he realized that his clerk had not served notice of appeal upon the respondents; that notice of appeal had since been served upon the respondent. The applicant further says in a supporting affidavit that Judgment on the 2<sup>nd</sup> respondents undefended counterclaim was delivered on 18<sup>th</sup> May, 2023; that notice of appeal was lodged dated 19<sup>th</sup> May, 2023 and proceedings of the trial court applied for by letter of 19<sup>th</sup> May, 2023 and same were supplied on 21<sup>st</sup> June, 2023; that the applicant gave instructions to his law clerk to serve notice of appeal and letter requesting proceedings but this was not done; the applicant travelled to India for treatment



and that it was upon return while preparing for hearing of an application that he found that the said documents had not been served on the respondents. The applicant says that the appeal has high chances of success and that the respondents will not suffer any prejudice if I extend time.

2. I have not seen any replying affidavit by the respondents but there are written submissions by the 2<sup>nd</sup> respondent Nelson Muturi Dumbeya who gives facts of the case that was before the Environment and Land Court. The 2<sup>nd</sup> respondent also gives various reasons why he opposes the application. These would have been captured better in a replying affidavit.
3. The principles that govern an application for extension of time under rule 4 of our rules are well known and were well captured in the oft-cited case of *Leo Sila Mutiso v Rose Wangari Mwangi C.A. No. Nai 255 of 1997* as follows:

“It is now well settled that the decision whether or not to extend the 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”.

4. The applicant here filed a notice of appeal on time and applied for proceedings of the trial court to enable him appeal. He says that he instructed his clerk to serve the same on the respondents but this was not done through inadvertence. He says that he was taken ill and had to travel abroad for treatment and that it was upon his return that he discovered that the said documents had not been served on the respondents. Looking at all the facts as captured by both sides there is no doubt that the applicant intended to appeal the decision of the Environment and Land Court. He filed a notice of appeal and initiated a letter bespeaking proceedings but he says, and I am satisfied that in the normal course of business it is possible that a clerk may inadvertently forget or omit to serve documents assigned to him for service on the opposite side. There is no inordinate delay to take procedural steps in accordance with the rules and I think the scales of justice fall in favour of the applicant here. I am satisfied that the reason given for failure to serve documents is reasonable and that the applicant is entitled to my exercise of discretion in his favour. I allow the Motion dated 17<sup>th</sup> July, 2023. Notice of Appeal dated 19<sup>th</sup> May, 2023 is deemed as duly served upon the respondents. Let Memorandum and Record of Appeal be filed within 14 days of today. Costs of the application will be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

