



REPUBLIC OF KENYA



**Tolgos & another (Suing as Trustees of Markwet Chepsiro Investment Group) v Murei & 7 others (Civil Appeal E137 of 2022) [2023] KECA 1219 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1219 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL E137 OF 2022  
F SICHALE, JA  
OCTOBER 6, 2023**

**BETWEEN**

**GILBERT KIPKOECH TOLGOS ..... 1<sup>ST</sup> APPLICANT  
DAVID YANO CHEBOI ..... 2<sup>ND</sup> APPLICANT  
SUING AS TRUSTEES OF MARKWET CHEPSIRO INVESTMENT GROUP**

**AND**

**ELISHA KIPLETING MUREI ..... 1<sup>ST</sup> RESPONDENT  
THOMAS KIPKORIR KOECH ..... 2<sup>ND</sup> RESPONDENT  
NOAH KIRWA CHUMA ..... 3<sup>RD</sup> RESPONDENT  
OBADIAH KIMUTAI SAINA ..... 4<sup>TH</sup> RESPONDENT  
ELIAZER KEMBOI (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE  
OF THE LATE WILSON KIPKEMOI BUSIENEI (SUED IN THEIR PERSONAL  
CAPACITY AND ON BEHALF OF LOIMA MULTIPURPOSE COOPERATIVE  
SOCIETY) ..... 5<sup>TH</sup> RESPONDENT  
THE CHIEF LAND REGISTRAR ..... 6<sup>TH</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

*(Being an Application for Extension of Time and/or Leave to Serve the Notice of Appeal dated 5th October 2021, Letter bespeaking proceedings dated 4th October 2021 and the Record of Appeal dated 10th June 2022 against the judgment of Njoroge J dated 30th September 2021) IN (Kitale ELC Case No. 110 of 2013)*



## RULING

1. The application before me sitting as a Single Judge is a motion dated 11<sup>th</sup> November 2022, brought pursuant to the provisions of Article 50 and 159(2)(d) of the Constitution of Kenya, Sections 3, 3A, 3B, 7, 9 and 17 (1) of the Court of Appeal Act (sic), Rule 41, 49,78 and 92 of the Court of Appeal Rules in which Gilbert Kipkoech Tolgos and David Yano Cheboi (the applicants herein) seek the following orders;
  - a. That the Notice of Appeal dated and filed on 5<sup>th</sup> October 2021 and the letter bespeaking proceedings dated 4<sup>th</sup> October 2021, filed on 5<sup>th</sup> October 2021 and served on 16<sup>th</sup> November 2021 be deemed to have been filed and served within time with leave of the court.
  - b. That the Record of Appeal/Memorandum of Appeal filed on 17<sup>th</sup> June 2022 and served on 8<sup>th</sup> and 12<sup>th</sup> August 2022 upon M/S Attorney General Chambers and M/S Gacheru and Company Advocates respectively to be deemed properly filed and served with leave of the court.
  - c. That in the alternative, the time within which to serve the Notice of Appeal, letter bespeaking proceedings and Record of Appeal be enlarged and the said document be properly filed and served with leave of the court.
  - d. That costs be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicants who deposed inter alia that the Superior Court delivered its judgment on 30<sup>th</sup> September 2021, whereupon they lodged a Notice of Appeal on 5<sup>th</sup> October 2021, together with an application for provision of the typed proceedings and the judgment and served upon the respondents accordingly on the same date. They further deposed that the time within which to lodge an appeal to this Court after lodging a Notice of Appeal of 60 days stopped running upon receipt by the Court of the application for typed proceedings and judgment on 5<sup>th</sup> October 2021 and that time resumed on 27<sup>th</sup> May 2022, upon notification by the Court that the proceedings and judgment were ready for collection.
3. They further deposed that they compiled the Record of Appeal and lodged the same in Court on 15<sup>th</sup> June 2022, which was exactly 19 days after time resumed on 27<sup>th</sup> May 2022 and that in effect the appeal herein was lodged within 24 days from the date of judgment which was within 60 days as provided by the law.
4. It was further contended that the Notice of Appeal and letter requesting for proceedings and judgment was served upon the respondents advocates on 5<sup>th</sup> October 2021, but was not received/stamped and returned to their advocates until 16<sup>th</sup> November 2021, on account of instructions from the managing partner of the 1<sup>st</sup>-5<sup>th</sup> respondents. That, the applicants advocate staff visited the 1<sup>st</sup>- 5<sup>th</sup> respondents advocates severally, until 16<sup>th</sup> November 2021 when the documents were stamped and released to their advocates whereupon the same were promptly served upon the Attorney General who acknowledged the same and released the same on the same day. They further deposed that the 1<sup>st</sup>-5<sup>th</sup> respondents’ advocates had moved this Court to strike out the appeal with the sole intention of blocking them from the seat of justice.



5. It was further deposed that the 1<sup>st</sup> to 5<sup>th</sup> respondents had also filed a Cross Appeal in the instant appeal, hence the need to allow the instant motion and proceed to set the appeal for hearing and that further the instant appeal raises weighty legal issues for determination with very high chances of success.
6. The motion was opposed by a replying affidavit sworn on 15<sup>th</sup> November 2022, by Ogongo Joshua counsel who has the conduct of this matter on behalf of the 1<sup>st</sup>-5<sup>th</sup> respondents who deposed inter alia that the applicants had not acknowledged that indeed the Notice of Appeal and the Record of Appeal had been filed outside the strict timelines and that further they had fallen short of telling the Court the length of the delay in days in serving the appeal and that further they had made no effort whatsoever to address the delay in instituting the impugned appeal.
7. It was submitted for the applicants that the delay in serving the Notice of Appeal and the Record of Appeal was not inordinate for the reasons that the impugned judgment was delivered on 30<sup>th</sup> September 2021 and the applicants promptly filed and served the Notice of Appeal on 5<sup>th</sup> October 2021 but the same were not received by and/or stamped by counsel for the 1<sup>st</sup>-5<sup>th</sup> respondents until 16<sup>th</sup> November 2021 and that as such, late service/acknowledgment of the Notice of Appeal was due to factors beyond their control.
8. It was further submitted that the Record of Appeal was filed on 17<sup>th</sup> June 2022 which was exactly 19 days after collection of the typed proceedings on 27<sup>th</sup> May 2022, and that the same was subsequently served on the office of the Attorney General and the 1<sup>st</sup>-5<sup>th</sup> respondents on 8<sup>th</sup> August 2022 and 12<sup>th</sup> August 2022 respectively and that as such, the delay of 2 months was not inordinate and was excusable.
9. On the possibility of the appeal succeeding, it was submitted that the applicants had an arguable appeal as can be discerned from the grounds set out in the Memorandum of Appeal dated 2<sup>nd</sup> June 2022 and that further the respondents would not suffer any prejudice as the 1<sup>st</sup>-5<sup>th</sup> respondents had filed a supplementary Record of Appeal and a Cross Appeal.
10. On the other hand, it was submitted for the 1<sup>st</sup> -5<sup>th</sup> respondents that the applicants herein have only insinuated that there was a delay in the way they had conducted themselves but had remained mum on the period of the delay and that further they had not made any effort whatsoever to explain the delay of one year in making this application since the Notice of Appeal and the letter bespeaking proceedings was served upon the respondents. It was further submitted that the applicants had not equally explained why there was a delay of 148 days from the date of filing the Record of Appeal and the instant application. There was no response on the part of the 6<sup>th</sup>-8<sup>th</sup> respondents and neither did they file written submissions.
11. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
12. The principles upon which this Court exercises its discretion to extend time are now firmly settled. The Court has under Rule 4 of this Court 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.
13. 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.”

14. In the instant case, and has rightly been contended by the 1<sup>st</sup>-5<sup>th</sup> respondents, it is indeed not in dispute that the applicants have not made any reference/invoked Rule 4 of this Court which gives this Court the jurisdiction and discretion to extend time or decline the same. Be that as it may, pursuant to the promulgation of *the Constitution* of Kenya (2010) the Courts are enjoined by Article 159 (2) (d) of *the Constitution* to focus on merits of or otherwise of a case and do substantial justice as opposed to clogging themselves with procedural technicalities. See the case of *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* [2013] eKLR, where the Supreme Court addressed itself thus:
15. From the circumstances of this case, I am inclined to overlook this omission and decide the motion on its merits or otherwise as I am satisfied that no prejudice will be suffered by the respondents due to the failure to invoke Rule 4 of this Court.
16. Turning to the merits or otherwise of the motion and as regards the delay, it is indeed not dispute that the impugned judgment was delivered on 30<sup>th</sup> September 2021. The applicants contend that they subsequently filed and served the Notice of Appeal together with a letter bespeaking of typed proceedings on 5<sup>th</sup> October 2021, which was well within time a fact that the 1<sup>st</sup>-5<sup>th</sup> respondents have disputed.
17. Be that as it may, I have indeed looked at the annexures annexed to the motion and indeed the Notice of Appeal was lodged in Court on 5<sup>th</sup> October 2021, and paid for on the same day which was well within the timelines. The record however shows that the same was served upon the respondents on 16<sup>th</sup> November 2021 which delay is certainly inordinate and outside the stipulated timelines. I will revert to this issue shortly.
18. Turning to the issue of the Notice of Appeal and letter bespeaking of proceedings and judgment being served on the respondents on 16<sup>th</sup> November 2021, the applicants contended they served the same on 5<sup>th</sup> October 2021, but the same was not received/ and or stamped and returned to them until 16<sup>th</sup> November 2021, a contention that the respondents have denied. I have however looked at the record and there is indeed a letter dated 27<sup>th</sup> October 2021 written by the applicants to the advocates for the 1<sup>st</sup>-5<sup>th</sup> respondents and copied to the Court and Office of the Attorney General in which the applicants express concerns over “continued holding of the Notice of Appeal” served to the respondents on 5<sup>th</sup> October 2021 and further requesting the respondents to release the documents to the applicants for further action, a contention that the respondents have not seriously contested.
19. From the circumstances of this case I am satisfied that the delay has been explained to the satisfaction of this Court and that the same was due to reasons beyond the applicants control and that indeed the respondents were served with the Notice of Appeal on 5<sup>th</sup> October 2021 as contended by the applicants. Though the Record of Appeal herein was filed on 17<sup>th</sup> June 2022, which was exactly 19 days after collection of the typed proceedings on 27<sup>th</sup> May 2022 and served on the respondents respectively on 8<sup>th</sup> and 12<sup>th</sup> August 2022 respectively, which was a delay of about 2 months, I am satisfied that the said delay herein is excusable and that no prejudice has been occasioned to the respondents and more so given the fact they have filed a Cross Appeal and a Supplementary Record of Appeal. 20. With regard to the possibility of the appeal succeeding, I have considered the grounds set out in memorandum of



appeal dated 2<sup>nd</sup> June 2022. I am however, alive to the fact I cannot make further comments regarding this issue lest I embarrass the bench that will be eventually seized of the appeal.

21. As regards to whether the applicants will stand to suffer any prejudice if the instant motion is not allowed, I am satisfied that the applicants will stand to suffer prejudice if the instant motion is not allowed as they will have been driven from the seat of justice. On the contrary, the respondents will not suffer any prejudice if the instant motion is allowed as they have already filed a Cross Appeal and in my considered opinion it would be in the interests of justice if the instant motion is allowed so that all the issues in controversy can be canvassed and determined to their logical conclusion.
22. Given the circumstances, I find that the applicants have demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time to file the intended appeal.
23. Accordingly, the applicants motion dated 11<sup>th</sup> November 2022 is hereby allowed in terms of prayers 1, 2 and 3.
24. The costs of the motion shall abide the outcome of the intended appeal. 25. Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 6<sup>TH</sup> 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**

