



Hutchinson (Suing in her Capacity As Administratrix of the Estate of Jean Wanjiku Hutchinson - Deceased and also as Beneficiaries of Estate of Raphael Alfonso Hutchinson - Deceased) & 4 others v Eastwest Holdings Limited (Civil Appeal (Application) E569 of 2023) [2023] KECA 1325 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KECA 1325 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E569 OF 2023
MSA MAKHANDIA, JA
NOVEMBER 10, 2023**

BETWEEN

ALISON HILDA GATHONI HUTCHINSON (SUING IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF JEAN WANJIKU HUTCHINSON - DECEASED AND ALSO AS BENEFICIARIES OF ESTATE OF RAPHAEL ALFONSO HUTCHINSON - DECEASED) 1ST APPLICANT

ARLENE JOY NYAMBURA HUTCHINSON (SUING IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF JEAN WANJIKU HUTCHINSON - DECEASED AND ALSO AS BENEFICIARIES OF ESTATE OF RAPHAEL ALFONSO HUTCHINSON - DECEASED) 2ND APPLICANT

ELIZABETH HUTCHINSON (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF RAPHAEL ALFONSO HUTCHINSON - DECEASED AND ALSO AS A BENEFICIARY OF SUCH ESTATE) 3RD APPLICANT

ROBERT ANDREW HUTCHINSON 4TH APPLICANT

JEAN ELIANOR ALBRITTON HUTCHINSON 5TH APPLICANT

AND

EASTWEST HOLDINGS LIMITED RESPONDENT

(Being an application for extension of time within which to file and serve the memorandum and the record of appeal against the judgment and decree of the Environment and Land Court (Mogeni, J.) dated 15th February 2023 in Nairobi ELC Case No. 815 of 2013)



RULING

1. By an application dated July 27, 2023, the applicants pray for extension of time within which to file and serve the memorandum and the record of appeal against the judgment and decree of the Environment and Land Court (ELC) at Nairobi dated February 15, 2023. They also pray for costs of the application to be provided for.
2. The grounds in support of the application and which are replicated in the supporting affidavit of Elizabeth Hutchinson, the 3rd applicant and, one of the administrators of the Estate of Jean Wanjiku Hutchinson sworn on July 27, 2023 are that: the judgment was entered on February 15, 2023 in favour of the respondents; on February 16, 2023, the applicants' counsel requested for a copy of the judgment and a certified copy of the decree to enable them lodge a notice of appeal. On February 21, 2023, they requested for certified copy of typed proceedings. They thereafter filed an application for stay of execution before the trial court on February 23, 2023, which was granted on terms that the applicants deposit the original title with the court which caused the file to remain in the chambers of the Judge for a long time, thus, making it difficult for them to get the certified copy of the decree and the certificate of delay on time. The proceedings were collected on April 17, 2023, a certificate of delay on June 21, 2023 and the certified copy of the decree on July 14, 2023 and this was after several personal follow-ups.
3. The applicant states that they are aggrieved by the judgment of the court and intend to appeal on the grounds that: the learned Judge erred in law and fact by failing to appreciate that there was a huge variation in the selling price which was not explained by the respondent; that the value of the property did not resonate with the purchase price; and, that the respondent could not have been entitled to the order of specific performance on a sale agreement that had lapsed. That based on the foregoing, the intended appeal is no doubt arguable. That should the application not be allowed they will have been denied the chance to challenge the judgment and that the respondent would in any event, not suffer any prejudice if the application is allowed.
4. In her further affidavit dated September 13, 2023, the applicant states that they had complied by the requirements of rule 82 of this Court's Rules and that the delay is not inordinate.
5. The application is opposed by the respondent who has filed a replying affidavit by one Rajesh Maneklal Rughani, its Director sworn on September 8, 2023. He deposes that there are no reasonable grounds stated as to why the applicants did not file the appeal in time. That even if there was a delay in obtaining the typed proceedings until 13th April 2023, there was still a delay of 49 days as per rule 82(1) (d) of this Court's Rules. Even if the earlier period is excluded, the 60 days period started running from 13th April 2023 and lapsed on June 13, 2023. Further, that the applicants waited until June 14, 2023 after the lapse of the statutory 60 days to write to the court and seek a certified copy of the decree without even enclosing the draft decree approved by the parties as required by the practice directions and only served the respondent's advocate with a draft decree for approval on July 4, 2023. As such, the respondent deposes that it is the applicants' sole intention to delay the matter and especially the contractual obligation on its part. That the respondent would suffer great prejudice since it has been denied an opportunity to own and develop the suit property for more than eleven years now.
6. The parties filed written submissions. The applicants' submissions are dated September 13, 2023 in which she reiterates the averments in their application and the affidavits in support thereof save to add that, article 159(2) (d) of the Constitution gives a leeway for courts to do justice to parties without undue regard to technicalities.



7. On its part, the respondent's written submissions are dated 14th September 2023 in which it equally reiterates the contents of its replying affidavit. The respondent further while relying on the case of *George Mwai Mburu v Mary Wamaitha Kaitany & another* [2015] eKLR submits that whether the appeal is filed on time or not goes to the jurisdiction of the court.
8. I have considered the application, the grounds in support thereof, submissions filed, authorities cited and the law. Rule 82 of the *Court of Appeal Rules* provides that a record and memorandum of appeal should be filed within 60 days of the lodging of the notice of appeal. The discretion that I am called upon to exercise in the determination of this application is provided for under rule 4 of this *Court's Rules* which provides inter alia as follows:

“The court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
9. This rule does not provide for factors that the court ought to consider in an application of this nature but this court has over the years devised appropriate principles to be applied in applications of this nature. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is now the *locus classicus*, laid down the parameters 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.”
10. The issues I am called upon to consider are both discretionary and non- exhaustive as was stated in the case of *Fakir Mohammed v Joseph Mugambi & 2 others* [2005] eKLR where the court rendered itself thus:

“The exercise of this court's discretion under rule 4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”
11. It is clear and as the many authorities of this Court would tell that, there is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”



12. Rule 82 of this Court's Rules provides that the record and memorandum of appeal should be filed within 60 days of the lodging of the notice of appeal. However, where a party files and serves an application for typed proceedings, the time taken to type the proceedings is exempted from the computation of the 60 days. Thereafter, the Deputy Registrar of the relevant court issues a Certificate of Delay for verification of the period to be excluded by the Court and the parties.
13. In the instant application, the judgment of the trial court was delivered on February 15, 2023, the notice of appeal was lodged on 21st, February 2023 and a request for certified copies of the proceedings was filed on February 23, 2023. I agree with the applicant that all these steps were undertaken within the stipulated timelines in our rules.
14. According to the certificate of delay issued by the deputy registrar of the ELC at Nairobi on June 21, 2023, a period of 49 days was taken to compile the proceedings. The instant application was filed on July 27, 2023, a period of 36 or so after collecting the proceedings. I do not consider this period of delay to be inordinate.
15. The applicants contend that they have an arguable appeal on the grounds already reproduced elsewhere in this ruling. I am satisfied that the intended appeal is not frivolous but arguable. See Muchugi Kiragu v James Muchugi Kiragu & another Civil Application No NAI 356 of 1996. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicants, in denying them an extension of time against the prejudice to the respondent by granting an extension. I think that justice of the case demands that the applicants be given an opportunity to exhaust the appellate process that they have commenced in earnest.
16. In the penultimate, the applicant has demonstrated the parameters set out in Leo Sila Mutiso (supra). The notice of motion dated July 27, 2023 is allowed. Accordingly, I make the following orders:
 1. That leave is hereby granted to the applicant to file and serve a record of appeal out of time.
 2. That the record of appeal be filed and served within fourteen (14) days from the date hereof.
 3. Costs of this application to abide the outcome of the intended appeal.
17. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

