



**Maluki & 3 others v Mutua & another (Civil Appeal (Application) 297 of 2023) [2023] KECA 1675 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1675 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 297 OF 2023  
PM GACHOKA, JA  
DECEMBER 15, 2023**

**BETWEEN**

**BERNARD MASINGI MALUKI ..... 1<sup>ST</sup> APPLICANT  
ALPHONCE MBATHA KISYULA ..... 2<sup>ND</sup> APPLICANT  
JOSHUA MUTETI KILONZO ..... 3<sup>RD</sup> APPLICANT  
DAVID OSANO RAGIRA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**SARAH NZEMBI MUTUA ..... 1<sup>ST</sup> RESPONDENT  
JOHN KIOKO MUTUA ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time and stay of execution from the Judgment of the Environment and Land Court of Kenya at Machakos (Christine Ochieng, J.) delivered on 14th November 2022 in Constitution Petition No. 7 of 2019)*

**RULING**

1. Before me is a Notice of Motion dated 8<sup>th</sup> July 2023, expressed to be made under Articles 22, 25(c), 48, 50, 64, 67, 159 (2) (d) & (e), 164(3) (a) of [the Constitution](#); rules 41, 42, 43 (3), 45 & 47 of the Court of Appeal Rules, 2010 (now 2022).
2. The applicant seeks among other prayers, stay of execution of two judgments ELC Constitutional Petition No. 7 of 2019 as consolidated with ELC Case No. 116 of 2019 (Christine Ochieng, J.) and ELC Case No. 62 of 2018 (O. A. Angote, J.). In addition, the applicants seek leave to appeal out of time against the judgment of ELC (Christine Ochieng, J.) delivered on 14<sup>th</sup> November 2022.
3. After wading through the application, the only prayer that is relevant to this ruling is the one seeking leave to appeal out of time. I should state at the outset that it is important for parties or their advocates



to familiarize themselves with the rules before filing applications with omnibus prayers. A party cannot seek a prayer for leave to file a notice of appeal out of time, which is an application that should be heard by a single judge and at the same time apply for stay of execution of a judgment or ruling which is an application to be heard by a bench of 3 judges under rule 55 of the Rules of this Court and in which in any event cannot be filed before there is a notice of appeal on the record. Such applications lead to the wastage of precious judicious time, as a judge has to wade through many unnecessary documents to pick what is relevant. This is what has befallen me.

4. To put the application in context, I will give a background, albeit in a summary. The subject of the various suits is a parcel of land measuring about 370.6 hectares. Ordinarily and with a functioning land registry, a parcel of land should only have one title. However, in this case, the applicants and the respondents have their respective titles and each claims theirs as the genuine one. Legal battles are being fought in the civil and criminal courts on the genuineness of the titles.
5. In support of the application, Bernard Masingi Maluki, the 1<sup>st</sup> applicant has filed a rambling, garrulous, and long-winded 51 paragraphs replying affidavit. The affidavit makes all manner of accusations and insinuations and I will only confine myself to the reasons advanced for the delay in filing the notice of appeal and intended appeal. It is stated; that there existed several court cases in respect of the suit land; that they were not aware of some matters including a consent that was recorded in court on 20<sup>th</sup> June 2020; that their lawyer Francis Kalwa of Kalwa & Co. Advocates failed to keep them updated on the progress of the case; that their lawyers, Kalwa & Co. Advocates were compromised and failed to adduce evidence in court or file submissions; that they have lodged complaints with the Advocates Complaints Commission against the said advocates; that they only realized in February 2023 that there was something amiss with their legal representative; that judgment had been delivered without their knowledge; and that their attempt to engage their previous advocates, Kalwa & Co. Advocates was unsuccessful and this forced them to engage new advocates. In short, the applicants have heaped all the blame for the delay on their previous advocates.
6. The applicants have filed written submissions dated 21<sup>st</sup> July 2023 and rely on the case of *Liberato Kiranga Manga vs. Prime Bank Limited* [2021] eKLR in support of the prayer for extension of time.
7. The application is opposed. In yet another rambling and argumentative prolix 74-paragraph replying affidavit, John Kioko Mutua has given their version of the story. Most of it is on the history of the land, the genuineness of their title and alleged criminal activities by the applicant that led to their arrest and prosecution in Kiambu Criminal Case No. 121 of 2020. Again, I will only confine myself to the issue of the delay in instituting the appeal on time. The respondents have given a detailed account of the history of the land, the various suits that have been instituted and the alleged fraudulent activities of the applicants. I am unable to discern any serious averments on the question of extension of time save to the assertion that the intended appeal is unprocedural, bad in law, incompetent, incurably defective and an abuse of the court process. Indeed, the respondents have filed a notice of preliminary objection dated 4<sup>th</sup> August 2023 to the entire application.
8. The principles governing applications for extension of time have crystallized in many decisions of this Court and the Supreme Court. To sample just but a few; *Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustees* [2020] eKLR; *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR and *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.
9. The main ground given by the applicants for the delay is failure by the previous advocates to keep the applicant updated on what was happening in courts. The applicants assert that they were not aware that a judgment was delivered against them in February 2023. This Court has pronounced itself on



the question of mistake by advocates. In considering where to tilt the scale where a party purports to blame their previous advocates in determining whether the reasons advanced are sufficient, this Court has distinctively pronounced itself as follows in *Lee G. Muthoga vs. Habib Zurich Finance (K) Ltd & another Civil Application No. NAI 236 of 2009*, the Court restated that a litigant should not suffer because of his advocate's oversight. Similarly, Madan, JA in *Belinda Murai & Others vs. Amos Wainaina (1978) LLR 2782 (CALL)* stated:

“...A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress”.

10. While this Court has appreciated the principle that a mistake of an advocate should not be visited upon a client, a client should not simply blame his advocate for all transgressions in the matter. He has a duty to pursue the prosecution of his or her case. [See *Ouko JA (as he then was) in Charles John Musee vs. Corporate Insurance Company Limited, Civil Application No. Nai 176 OF 2019*.

In *Habo Agencies Limited vs. Wilfred Odhiambo Musingo (2015) eKLR*, the Court stated:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

Sir Wilfred Green MR at the beginning of his judgment in *Gatti vs. Shoosmith (1939) 3 ALL ER 916* (at page 197) had this to say:

“Under the rule as it then stood, the case of *Re Coles and Ravenshear [1097] 1 KB 1*, was decided. That was a case where counsel had misconstrued the rule, and, as a result of the advice given, the appeal was out of time. It was there held that the fact that the delay was due to a mistake of a legal adviser did not constitute a ground for giving the special leave which the rule required.”

11. It is therefore clear that it is not in all cases that blaming an advocate is taken as a good reason. A party is the owner of the case and it should be diligent to follow up and know what is happening with their case. That said I find the circumstances of this case a bit peculiar. The advocates for the parties have concentrated on the legality of their titles, the history of the land, the various court cases, and the competency of the intended appeal.
12. Given the circumstances of this case and taking into account that the respondents have mounted a vigorous challenge on the legality of the applicant's title, I am inclined to excuse the delay of about



5 months. The respondent will not suffer any prejudice as they will have an opportunity to raise the many legal arguments contained in the replying affidavit at the hearing.

13. Accordingly, in the peculiar circumstances of this case, I reluctantly allow the application and for avoidance of doubt this is only on the prayer for extension of time. The applicant shall file and serve the notice of appeal within the next 14 days and a record of appeal within 45 days from the date of filing the notice of appeal. As regards the other prayer in the application, the same shall be listed for hearing by the registry in the normal manner, if the parties are desirous of pursuing the same. Further, I order that in the event the notice of appeal or the record of appeal is not filed as directed, this application shall stand dismissed. The costs of this application shall abide the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER 2023.**

**M. GACHOKA CIArb, FCIArb**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

