



Mutemi v Kaesa (On Behalf of the Estate of Kaesa Kiiti) & 4 others (Civil Appeal (Application) E395 of 2023) [2023] KECA 1661 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1661 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E395 OF 2023
PM GACHOKA, JA
DECEMBER 15, 2023**

BETWEEN

ANGELINA MANZILE MUTEMI APPLICANT

AND

**ESTHER MASAA KAESA (ON BEHALF OF THE ESTATE OF KAESA
KIITI) 1ST RESPONDENT**
PETER KIITA NGUI 2ND RESPONDENT
SIMEON MUNYASYA 3RD RESPONDENT
SAMUEL M. MWINZI 4TH RESPONDENT
KITUI COUNTY COUNCIL 5TH RESPONDENT

(An application for extension of time from the Judgment of the Environment and Land Court of Kenya at Kitui (L. Kimani, J.) delivered on 18th May 2023 in ELC Case No. E005 of 2022)

RULING

1. By a Notice of Motion dated 14th August 2023, made under rules 4 and 42(1) of the [Court of Appeal Rules](#), the applicant seeks an order for extension of time to file and serve the memorandum of appeal against the judgment of the Environment and Land Court (ELC) at Kitui (L. Kimani, J.)
2. The Motion is supported by an affidavit of Angelina Manzile Mutemi sworn on 14th August 2023. The applicant depones that her late husband was dissatisfied with the judgment of the trial court and filed an appeal on 15th June 2011. I should state at the outset that the said judgment and appeal are not annexed to the application.
3. She further states that her husband died on 27th September 2019 before the appeal was heard and determined and she only became aware of the appeal when going through the documents of her late



- husband. Again no dates are indicated when this happened. In addition, she states that she could not file an application for substitution in time due to lack of relevant documents.
4. In yet another scanty statement, she states without giving details that she filed an application for substitution in the ELC which was dismissed. She then filed a notice of appeal on 22nd May 2023, but could not file the memorandum of appeal as she was unwell and had to outsource funds to instruct an advocate. It is her averment that the subject matter of the appeal is land and therefore, I should exercise my discretion in her favour in the interest of justice.
 5. The applicant also filed written submissions dated 4th October 2023, which reiterates the grounds in support of the appeal. Relying on the case of *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR, the applicant submits that she has advanced good grounds that explain the delay.
 6. In opposition to the application, the respondent an affidavit sworn on 11th October 2023, which unmask the facts that had been swept under the carpet by the applicant. In the relying affidavit, the respondent has given a background to this application as follows: that the judgment in the magistrate court delivered on 18th May 2011 has since been effected and the plot the subject of the suit is now registered in her name; that they were not aware of any appeal until 31st August 2018 when they were served with an application filed in the ELC on 29th May 2018, seeking stay of the decree that was issued in the trial court on 18th May 2011; that she has never been served with any appeal and therefore could not tell whether any was filed; it is true that the applicant's husband died on 27th September 2019 and substitution was not done within one year as per the law; that on 6th December 2021, the applicant filed an application for substitution in ELC which was dismissed on 27th October 2022; that the applicant yet filed another application for substitution on 24th November 2022, which was dismissed on 18th May 2023 on the ground that it was res judicata; and that the extension of time is being sought in respect of the second ruling.
 7. The respondent further deposes that the applicant has not shown the letter written to the court applying for proceedings and none was copied to her; and that no good reasons have been given for the delay. Furthermore, taking into account the fact that she is now 95 years old, the application amounts to harassment and she should enjoy the fruits of the judgment in peace.
 8. In addition, the respondent has filed written submissions dated 16th October 2023, which rehash the grounds in the replying affidavit. She submits that extension of time is an equitable relief and that the applicant has approached the Court with unclean hands. She states that the suit was filed in the magistrate's court in 1988 and judgment was delivered 23 years later on 18th May 2011 and that the applicant is guilty of indolence and therefore is not entitled to an equitable relief.
 9. With that background, the question to be answered is whether the applicant has met the conditions for the exercise of this court's discretion to extend time. The discretion to extend time is wide and unfettered; it has to be exercised judiciously and upon reasons; and it should not be exercised arbitrarily, capriciously and on sentimental grounds. (See *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others* [2013] eKLR. It is also now settled that issues that a Court should consider in the exercise of discretion to extend time are both discretionary and not exhaustive. (See *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR.
 10. I have considered the application, the respective affidavits and written submissions as well as the law. I take the position that a party approaching the altar of justice seeking any relief, equitable or otherwise must approach the Court with clean feet, clean hands, and a clear conscience.



11. Before me is an applicant who is economical with the truth. It is common ground that the judgment in the trial court was delivered on 18th May 2011 and no evidence was adduced by the applicant of when an appeal was filed, as none was attached to the application. The respondent in an affidavit stated that she has never been served with any appeal. The only grounds advanced for the delay is that the applicant was not aware of the suit before the death of her husband on 27th September 2019; and that she is elderly and has been unwell and that she has no money to instruct an advocate.
12. I note that no evidence of sickness was adduced; not even a paltry attendance card to a medical clinic. The applicant states that she had no money to instruct an advocate but does not state when she was able to raise the money and the date the advocate was instructed. As already noted, there was no disclosure that the applicant or her late husband had filed an application in the ELC before filing another application that was dismissed for being res judicata.
13. The applicant having failed to annex the appeal that was allegedly filed against the judgment delivered on 18th May 2011; having failed to disclose that an application for extension of time had been dismissed on 27th October 2022; and having failed to explain the delay from 18th May 2023 to 14th August 2023 when this application was filed brings me to the unwavering conclusion the delay is unexplained and the reasons advanced are flimsy.
14. The applicant is not candid and does not merit the exercise of discretion in her favour. One may ask; if the judgment delivered on 18th May 2011 in the lower court was implemented and the plot the subject of the suit is registered in the name of the respondent; if the applicant did not appeal against the dismissal of the first application seeking extension of time; taking into account the flimsy grounds advanced by the applicant, what possible arguable appeal can the applicant mount?
15. It is clear to me that no good reasons or plausible explanation has been given for the delay and the only available recourse is an order for dismissal of the application.
16. Accordingly, the application dated August 14, 2023 is dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH 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

