



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mogaka v Diamond Trust Bank Kenya Limited & 2 others (Civil Application E153 of 2021) [2022] KECA 174 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 174 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E153 OF 2021  
PO KIAGE, JA  
FEBRUARY 18, 2022**

**BETWEEN**

**ESTHER KEMUMA MOGAKA ..... APPLICANT**

**AND**

**DIAMOND TRUST BANK KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DALALI TRADERS AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**ALYSSA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application to file and serve a Notice of appeal and the Record of Appeal out of time from the Ruling and Order of the Environment and Land Court at Kisii (J.M Onyango, J) dated 25th September, 2020 in ELC Case No. 29 of 2019)*

**RULING**

1. The applicant, Esther Kemuma Mogaka, has brought by a Motion dated 03<sup>rd</sup> November 2021, seeking the following orders, *inter alia*:
  1. THAT this Honourable Court be pleased to extend time within which the Applicant may file and serve fresh Notice of Appeal challenging the ruling delivered on the 25<sup>th</sup> September, 2021 by Honorable Justice J.M Onyango in Kisii ELC Case No. 29 of 2019.
  2. THAT this Honorable Court be pleased to extend time within which the Applicant may file a Record of Appeal challenging the ruling delivered on the 25<sup>th</sup> September, 2021 by Honorable Justice J.M Onyango in Kisii ELC Case No. 29 OF 2019.



2. This being a Rule 4 application, I am succinctly aware that the Court of Appeal Rules do not expressly provide for the factors to be considered. Nonetheless, this Court has, over the years, devised appropriate principles to be applied to achieve a just decision. Thus, in the exercise of my free and unfettered discretion, I bear those principles in mind as stated in *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* (1999) 2 EA 231;

“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.”

3. The applicant deposed that she is the sole proprietor of a parcel of land known as LR. No. Kisii Municipality/block III/334 (the suit property) which she charged to Diamond Trust Bank Kenya Limited, the 1<sup>st</sup> respondent to secure a loan that was advanced to a Company where she was the co-director. Unfortunately, she defaulted in the loan repayment which prompted the 1<sup>st</sup> respondent to exercise its statutory power of sale. It advertised and sold the suit property to Alyssa Limited, the 3<sup>rd</sup> respondent through Dalali Traders Auctioneers\*\*, the 2<sup>nd</sup> respondent.
4. Esther filed suit with an application for a temporary injunction against the 3<sup>rd</sup> respondent to prevent it from taking possession of the suit property. In a ruling delivered on 25<sup>th</sup> September, 2020, Onyango, J dismissed the application with costs. Dissatisfied with the outcome, she preferred an appeal through her advocates. A notice of appeal was filed on 30<sup>th</sup> September 2020 and a letter bespeaking the proceedings was written and delivered on the same day.
5. Unfortunately, she fell ill and tested positive for COVID-19 in April 2021 while in the United States of America, where she resides. When her condition improved in June 2021, she followed up on her matter only to discover that the advocate who was handling the matter had since been appointed as a Judge of the Environment and Land Court and the appeal had not been filed. Because she is not familiar with advocates in Kenya, it took time for her to get a referral from a trusted one. She urged that this application be allowed as the delay was not inordinate and the appeal has a high chance of success.
6. In opposition, the 1<sup>st</sup> respondents submitted that in as much as the delay is inordinate, the application was misconceived and cannot succeed. By dint of Section 82(1) of the *Court of Appeal Rules*, the time taken by the registry to compile the typed proceedings is exempted from the 60-day computation. Hence without a letter detailing that the typed proceedings are ready for collection, the applicant cannot in law be condemned or the notice of appeal, timeously filed, deemed as expired. Without the proceedings, the applicant cannot mount a successful appeal. It urged that the application be dismissed with costs as it was premature.
7. The 3<sup>rd</sup> respondent filed a replying affidavit sworn by Bole Rahma, its property manager. He cited this as yet another attempt by the applicant to delay the 3<sup>rd</sup> respondent’s quest for justice, as she had previously filed a similar matter being Kisii ELC Case No. 284 of 2016 Esther Kemuma Mogaka & Another -vs- Diamond Trust Bank Kenya Limited. Her application for an injunction against the defendant therein over the suit property was equally dismissed. He averred that the applicant was not deserving of this relief as she has been negligent and indolent in the pursuit of the appeal and the reasons proffered for the delay are not plausible. He prayed that the application be dismissed.



8. The key that unlocks the Court's discretionary favour is its satisfaction that the reason for delay proffered is plausible and that it has been reasonably explained See, *Andrew Kiplagat Chemaringo -vs- Paul Kipkorir Kibet* [2018] eKLR.
9. The applicant claims that she was unable to follow up on the matter because she contracted COVID-19 and essentially blamed her advocate for failing to file the appeal while she was unwell. According to the record, the applicant contracted COVID-19 in April 2021 yet the ruling was delivered on 25<sup>th</sup> September 2020, over 5 months earlier. Meaning, she had ample time to follow up on the matter prior to her illness and failed to do so. Using the COVID-19 pandemic as an excuse has become way too common but it cannot be used to cure every delay or indolence. I find the reason proffered for delay to be unsatisfactory.
10. Her complaint about the appointment of her advocate as a Judge equally does not hold water. To my mind, the Honourable Judge was part of a law firm which did not close shop due to his appointment. Therefore, the matter could have easily been taken up by another advocate within the firm had they or she been keen to follow up on the same. The appointment is not a plausible reason to explain the delay. In any case, the onus and ultimate responsibility to ensure that the appeal was filed was primarily on the applicant.
11. I have come to the conclusion that the delay was not only inordinate but also inexcusable. In the result, I decline to grant the prayer to extend time and accordingly dismiss the application with costs.

**DATED AND DELIVERED AT KISUMU THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

