



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimani v Kungu (Application E424 of 2021)  
[2022] KECA 374 (KLR) (25 February 2022) (Ruling)**

Neutral citation: [2022] KECA 374 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
APPLICATION E424 OF 2021  
S OLE KANTAI, JA  
FEBRUARY 25, 2022**

**BETWEEN**

**PETER MUNYUA KIMANI ..... APPLICANT**

**AND**

**SERAH WANJIRU KUNGU ..... RESPONDENT**

*(Being an application for extension of time from the Judgment of the Environment and Land Court of Kenya at Thika (L. Gacheru, J.) delivered on 29th July, 2021 in E.L.C. No. 8 of 2020)*

**RULING**

1. The Motion before me is brought under Article 159 of *the Constitution*, Section 7 of the *Appellate Jurisdiction Act*, Rules 4, 75 and 77 of the *Court of Appeal Rules, 2010* and the main prayer is that I be pleased to extend time within which the applicant (Peter Munyua Kimani) may file and serve Notice of Appeal and letter bespeaking proceedings and he be allowed to file and serve the same out of time. In grounds in support of the Motion and in a supporting affidavit of the applicant it is said amongst other things that the respondent (Serah Wanjiru Kungu) has extracted a decree which she intends to execute; that the applicant is desirous of appealing a Judgment of Gacheru, J., sitting at the Environment and Land Court (“ELC”) delivered on 29th July, 2021; that the intended appeal is arguable with probability of success; an application for enlargement of time was refused by ELC; that delay in lodging the said documents was occasioned by factors beyond the applicant’s control. The applicant further says that he had instructed a firm of advocates to take over conduct of the matter from advocates then on record; that notice of appeal and letter bespeaking proceedings were lodged on time as required but that the applicant then lost contact with the new advocates forcing him to appoint yet another firm of advocates; that the 3rd set of advocates discovered, upon enquiry from Law Society of Kenya, that the 2nd set of advocates had been struck off the roll of advocates; that he (the applicant) learnt to his horror from the 3rd set of advocates that the notice of appeal or other document filed by the disbarred advocate was invalid; that it was necessary to regularize the proceedings to initiate an



- appeal. The applicant says that he had no way of knowing that the disbarred advocate had no practicing certificate and, in his view, if time is enlarged there would be no prejudice occasioned to the respondent.
2. In a replying affidavit the respondent says without offering an explanation that the application is an abuse of the process of the court “...meant to cause unnecessary anxiety and expense hence wastage of this Honourable Court’s time and resources”; that the application is filed to deny her the fruits of her Judgment where she had pursued her rights for 11 years; that there is no arguable appeal; that the applicant occupied the suit land illegally against her interests.
  3. The applicant filed a supplementary affidavit where he says that the law allows him to access justice; that he is in possession of the suit property where he resides; that the irregular notice of appeal has since been withdrawn.
  4. I have perused written submissions filed for the parties and list of authorities relied on.
  5. The principles that apply in consideration of applications of this nature were well laid out by the Single Judge as was affirmed by the full court in the case of *Fakir Mohamed v Joseph Mugambi & 2 Others Civil Application No.332 of 2004 as follows:*

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. 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 (possibly) 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 the 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 factors: See *Mutiso v Mwangi*, Civil Application No. NAI. 255 of 1997 (ur), *Mwangi v Kenya Airways Limited* [2003] KLR 496, Major *Joseph Mwereri Igweta v Murika Methare & Attorney General* Civil Application No. NAI 8 of 2000 (ur) and *Murai v Wainaina (No. 4) 1982 KLR 38.*”

Judgment of the ELC was delivered on 29th July, 2021. The applicant says that he immediately instructed a lawyer to appeal the Judgment and that a notice of appeal and letter bespeaking proceedings were lodged on time but it was later found that the lawyer who had lodged the said documents was unqualified to do so as he was not in possession of a valid practicing certificate. The latest lawyer appointed by the applicant found that out after visiting the Law Society of Kenya portal. It was then decided that the position needed to be regularized thus the application before me which is dated 29th November, 2021, about 4 months after Judgment. In the circumstances where the applicant instructed an unqualified lawyer who filed documents which were irregular; where the applicant made many efforts to contact that lawyer in vain as the law offices were closed I am satisfied that the delay in taking necessary steps to file an appeal are sufficiently explained. The dispute between the applicant and the respondent involves a parcel of land ownership which is claimed by the respondent but the land is occupied by the applicant. It is important that the dispute be finally resolved through an appeal.

6. The applicant has satisfied me to exercise a discretion in his favor and I allow the Motion. The applicant to lodge a notice of appeal within 14 days of today and file Record of Appeal within 30 days thereafter. Costs of the Motion will be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2022.**

**S. ole KANTAI**



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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

