



**Schellekens & 2 others v Putte (Civil Appeal (Application)
E058 of 2021) [2022] KECA 156 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 156 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E058 OF 2021
P NYAMWEYA, JA
FEBRUARY 18, 2022**

BETWEEN

MARINA SCHELLEKENS 1ST APPLICANT

MICHEL VAN DEN PUTTE 2ND APPLICANT

SAARTJE VAN DEN PUTTE 3RD APPLICANT

AND

LUC VAN DEN PUTTE RESPONDENT

(An application for extension of time to file and serve a Record of Appeal out of time from the ruling and order of the Environment and Land Court at Mombasa (Yano J,) dated 20th May 2021 in Mombasa ELC NO. 23A of 2020)

RULING

1. The Notice of Motion before this Court is dated 30th July 2021, and is brought by the Applicants herein under Rule 4 of the Court of Appeal Rules and Article 159 (2) (d) of *the Constitution* of Kenya, 2010. The Applicant seeks leave to file and serve the Record of Appeal out of time, and that the Record of Appeal in Civil Appeal no 58 of 2021 be deemed duly filed and the cost to abide in the cause.
2. The application is supported by the affidavit sworn on 30th July 2021 by George Oduor, the Applicants' advocate. The grounds upon which the Notice of Motion is based found in the motion and the Supporting Affidavit are that the Notice of Appeal against the decision was filed on 24th May 2021, consequently, the Appellants applied and diligently followed up the certified typed proceedings obtained them on 14th June 2021 and accordingly the record of appeal was to be filed in Court on 24th July 2021 as the latest date they were to be have filed by; just before the process of compiling and preparing the Record of Appeal, Counsel for the Applicant tested positive for COVID-19 and got into mandatory self-isolation for 21 days and took 14 days to fully and confidently resume work; the delay



- in filling the Record of Appeal was wholly occasioned by the Advocate and upon resumption to work, Counsel embarked on preparation of the Record which ready as at the time of filing this application;
3. The Applicant annexed copies of the ruling delivered by the Environment and Land Court (Yano J.) on 20th May 2021, the order issued therein on 22nd June 2021 and of the proceedings the said Court. The Applicants' advocate also filed a supplementary Affidavit dated 6th December 2021 wherein he reiterated that he contracted COVID-19 and annexed the Laboratory report from Mater Misericordiae Hospital in Nairobi, showing a positive result for COVID-19 on 19th June 2021.
 4. The Respondent filed a replying affidavit in response to the application, sworn by Ramdhan Salim, the Respondent's advocate. He deponed that the Record of Appeal was filed on 30th July 2021, 6 days after the date it should have been filed as required by the rules. Further deponed that even if Counsel for the Applicant contracted Covid-19, he should have given instructions to his office to file the necessary documents observing that Mr. Ngonze on several occasions was indicated as holding his brief. Finally, the Respondent's counsel deponed that if at all this Court in the exercise of its discretion is inclined to grant the orders sought, the costs of the application should be awarded to the Respondent.
 5. The hearing of the application was held on 15th December 2021, and Mr. Anangwe, the learned counsel for the Applicant, relied on the pleadings and affidavits and submissions filed, as did Mr. Salim, the learned counsel for the Respondent.
 6. The Applicants' counsel in his submissions dated 6th December 2021 acknowledged that the Record of Appeal ought to have been filed by 24th July 2021 and was filed on 30th July 2021, six (6) days later. He placed reliance on the case of *Leo Sila Mutiso vs Rose Hellen Wangare Mwangi*, Civil Application No. Nai 255 of 1997 (UR) where the principles governing the exercise of discretion in application for extension of time under rule 4 were well stated, and submitted that, on the aspect of delay, it had been demonstrated that there due diligence in terms of compliance with the timelines for filing and service of the Notice of Appeal and procuring the typed proceedings, and that the only delay come in the filing of the Record of Appeal.
 7. The counsel submitted that the delay was attributable to his indisposition as a result of COVID-19 and urged this Court to take judicial notice of the contagious nature of the disease. Further, that it was demonstrated that the delay was by 6 days, and the counsel cited the cases of *LSG Lufthansa Service Europa/Afrika GmBH & Another v Eliab Muturi Mwangi (practicing in the name and style of Muturi Mwangi & Associates Advocates)* [2019] eKLR and *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR where the delay of 30 days and three (3) months respectively were found not to be inordinate.
 8. On the aspect of success of the intended appeal, the counsel submitted that the Applicants were challenging the decision to grant orders of injunction against them in favour of their registered co-owners and allowing the co-owners exclusive possession of the entire property without paying rent, and that this was an arguable point and raised bona fide issues for determination. Lastly, on the aspect of prejudice, it was the counsel's submission that the Respondent was still enjoying the injunctive orders and there was no application for stay of the orders during the pendency of the appeal, as such there would be no prejudice occasioned to them.
 9. The Respondent's counsel in his submissions dated 10th December 2021 was of the opinion that the Applicants had not made a case for the granting of the orders sought, and while also citing the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi (supra)*, submitted that the reason for delay was not sufficient as the Applicants' counsel had not given a way to authenticate the certificate provided. Further, that even if that was the case, he should have given appropriate instructions to his office in



respect of the appeal knowing the strict timelines set by the Court. Reliance was also placed on the decision in *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* [2018] eKLR for the proposition that any delay should be satisfactorily explained.

10. I have considered the rival arguments by the parties herein, and the background to the application, which arises from an application made by the Respondent in the Environment and Land Court, seeking a temporary injunction against the Applicants with respect to the suit property in which she claimed she resided with her children, and bought with her funds, and only included the Applicants as registered proprietors out of love and affection, arising from the fact that she was married to the 1st Applicant. The said application was allowed by the Environment and Land Court in ruling intended to be appeal from dated 20th May 2021, which also ordered each of the parties to meet their respective costs of the application.
11. The parties in this regard do not dispute that the Applicants lodged a Notice of Appeal against the ruling on 24th May 2021. Under Rule 82 of the *Court of Appeal Rules*, the Record of Appeal ought to have been filed within 60 days from 24th May 2021, namely 24th July 2021, and it is not in dispute that the Record of Appeal was lodge out of time on 30th July 2021. The power to extend time to file the Record of Appeal out of time is in this regard provided in Rule 4 of the Court of Appeal Rules, and under Rule 53(1) of the Rules, this power may be exercised by a single Judge of this Court.
12. While the Court has wide unfettered discretion in this regard, it should act judiciously and according to the principles set out in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi*, (1999) 2 EA 231 where the court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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.”
13. The Applicant’s counsel has given a given an account of the events leading to the delay in the filing of the Record of Appeal and provided the supporting evidence. The Respondent claims that his reason for the delay is not satisfactory. This Court however not only finds the Applicant’s counsel has provided credible evidence to support his averment that he contracted COVID-19 at the time he was required to prepare and file the record of Appeal, but also takes judicial notice of the protocols in place to deal with the COVID-19 pandemic, including self-isolation. The said counsel has therefore given adequate reasons for the delay, and it is also my view that a 6-day delay in filing the Record of Appeal was not inordinate.
14. On the aspect of the success of the intended appeal, the Applicant’s counsel averred that the Applicants have an arguable appeal on account of their rights arising from the impugned ruling as co-owners of the suit property, which is a pausable argument. Lastly, the Respondent does not dispute that she will not suffer any prejudice given that she is in occupation of the suit property. I therefore find that arising from the above stated factors, the Applicants’ merit the exercise of this Court’s discretion in their favour.
15. I accordingly allow the Applicants’ application by way of the Notice of Motion dated 30th July 2021 to the extent of the following orders:



1. The time for filing of the Applicants' Record of Appeal is hereby extended from 24th July 2021 to 30th July 2021, and the Record of Appeal filed in Civil Appeal No 58 of 2021 on 30th July 2021 is deemed to be duly filed.
2. The costs of this application shall abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18th DAY OF FEBRUARY 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

