



Chege v Maina (Civil Application 39 of 2018) [2022] KECA 62 (KLR) (4 February 2022) (Ruling)

Neutral citation: [2022] KECA 62 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 39 OF 2018
AK MURGOR, JA
FEBRUARY 4, 2022**

BETWEEN

JOHN MAINA CHEGE APPLICANT

AND

BETH WAITHERA MAINA RESPONDENT

(Being an application to lodge a Notice of appeal out of time against the ruling and order of the Environment and Land Court at Murang'a Kemei, J. delivered on 8th March 2018 in Murang'a Environment and Land Court Case No. 379 of 2017)

RULING

1. The applicant, John Maina Chege is seeking leave under rule 4 and 75 of this Court's rules to extend time to file and serve a Notice of appeal out of time against a judgment of the Environment and Land Court delivered on 8th March 2018.
2. The motion is supported by the applicant's sworn affidavit and is brought on the grounds that the respondent, Beth Waitthera Mwangi filed a suit seeking for an order that land parcel No. Makuyu Kimoroni Block 1/1904 (the suit property) be determined as matrimonial property and therefore jointly owned by the applicant and the respondent. The applicant filed a defense and a notice of preliminary objection contending that the Environment and Land Court had no jurisdiction under Article 162(2) of the Constitution to hear a dispute touching on matrimonial property since such matters are vested in the jurisdiction of the Family Division of the High Court; that on 15th March 2018 the trial court dismissed the applicant's preliminary objections. The applicant was dissatisfied with the trial court's decision and intended to lodge a Notice of appeal, but was unable to file the notice within the prescribed period owing to a delay in obtaining the ruling of the trial court.
3. In a replying affidavit sworn on 4th May 2021, and in the written submissions, the respondent asserted that the applicant requested for the ruling but did not request for the certified copies of the proceedings; that further this application was filed almost two months after the ruling was delivered; that this delay



in filing the application has not been in any way explained; that, in addition, the applicant has not demonstrated the likelihood of success of the intended appeal.

4. It was further averred that the respondent stands to suffer grave prejudice if the order is sought are granted, as it will have the effect of prolonging the litigation in the courts.
5. Under rule 4 of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No. Nai 251 of 1997*.
6. The ruling was delivered on 8th March 2018, and this application was brought on 24th April, 2018 resulting in a delay of 46 days.
7. Has the delay in filing the Notice of appeal been explained? The applicant explanation for the delay was that the court was responsible for the delay in supplying the certified ruling; that a request for the ruling was made on 8th March 2018, and it was not until the 31st March 2018 that the ruling was made available to the applicant. By this time the period for filing the Notice of appeal had already expired. Indeed, a consideration of the ruling shows that the court certified it on 31st March 2018. And it is evident that by this time the period for filing of the Notice of appeal had already lapsed. In view of the circumstances, I am prepared to find that the reason for delay in filing the Notice of appeal has been adequately explained.
8. Turning to the likelihood of success of the intended appeal, the applicant's case is that the Environment and Land Court does not have jurisdiction to hear and determine a matrimonial dispute, as this is the preserve of the Family Division of the High Court. Since jurisdiction is everything, my view is that it would be prudent for the question of jurisdiction to be resolved at this early stage of the proceedings.
9. And since I consider that it will be of mutual benefit to both parties to have the dispute resolved once and for all, I do not envisage that either party would be prejudiced one way or the other.
10. In sum, the Notice of Motion dated 24th April 2018 is merited. I exercise my discretion to extend time and hereby make the following orders;
 1. That time be and is hereby extended to file and serve the Notice of appeal within seven (7) days for the date of this Ruling, the failure of which, this extension order will lapse;
 2. The Memorandum and record of appeal to be lodged in accordance with rule 82 of this Court's rules.
 3. The costs of this application shall abide by the intended appeal.
11. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

