



REPUBLIC OF KENYA



KENYA LAW
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**Wanjohi v Warui & another (Civil Application 54 of 2019)
[2022] KECA 30 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 30 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 54 OF 2019
AK MURGOR, JA
FEBRUARY 4, 2022**

BETWEEN

JENNIFER NJERI WANJOHI APPLICANT

AND

CHRISTOPHER MUCHOMBA WARUI 1ST RESPONDENT

LAND REGISTRAR, NYERI 2ND RESPONDENT

(Being an application for leave to file an appeal out of time against the judgment of the Environment and Land Court at Nyeri L. Waithaka, J. delivered on 11th February 2019 in Nyeri Environment and Land Court Case No. 232 of 2014)

RULING

1. The applicant, Jennipher Njeri Wanjohi is seeking leave under rule 4 of this Court's rules to extend time to file and serve a Notice of appeal dated 12th April 2019 out of time against the judgment of the Environment and Land Court delivered on 11th February 2019.
2. The motion is supported by the applicant's sworn affidavit and is brought on the grounds that she has an arguable appeal; that the delay in filing the appeal is excusable, and that she would suffer immense prejudice if the application for extension of time was declined.

It was also deponed that in the judgment the court dismissed her claim for rectification of the register pertaining to land parcel No. Konyu/Baricho/154 (the suit property); that thereafter she instructed her advocate to file an appeal; that her advocates were initially instructed by Kituo cha Sheria to act for her on a pro bono basis as she is a peasant farmer and has been ailing. It was deponed further that she was unable to raise funds for legal fees and court expenses, and only managed to raise the required amount in March 2019; that thereafter, her advocate agreed to file the intended appeal on a pro bono basis in respect of legal fees; that the suit property is family land and she stood to be greatly prejudiced if the appeal was not heard and determined.



3. In a replying affidavit sworn on 6th June 2019, the respondent averred that the delay in filing the appeal has not been explained because the applicant was at all times aware that she was required to paid disbursements and that the delay in bringing this application is inordinate; that the appeal has no chance of success since the applicant was a beneficiary of the alleged fraud, while the respondent was a bona fide purchaser for value of the suit property without notice of the alleged fraud.
4. 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*.
5. As concerns the period of delay, the judgment was delivered on 11th February 2019. This application is dated 25th April 2019, thus giving rise to a delay of 77 days. The applicant explains that the reason for delay is that she was unable to raise the requisite amounts for legal fees and court filing fees, and only managed to do so in March 2019, whereupon this application was filed seeking time to be extended to file the Notice of appeal out of time.
6. Attached to the applicant's affidavit is a letter from Kituo Cha Sheria dated 20th April 2011 that was the initial request made to the firm of Macharia Kingori Advocates to take up the applicant's suit on a pro bono basis. It is evident that the applicant was faced with financial challenges in so far as the filing of an appeal was concerned. This notwithstanding, she has endeavoured to file this application despite the challenges. I also find that the delay has been satisfactorily explained.
7. As to whether the appeal has any chance of success, the applicant has also attached draft memorandum of appeal setting out substantive grounds of appeal, which given the nature of the dispute, I am of the view that they are matters that should be fully ventilate before this Court. And this being a dispute involving family land, I consider that it would be mutually beneficial for both parties to have it determined with finality, with the result that I do not see that either party would be prejudiced one way or the other.
8. In sum, the Notice of Motion dated 21st April 2019 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 from 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.

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

