



REPUBLIC OF KENYA



KENYA LAW
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Nyakundi (Suing as Attorney of Christopher Mbaka Nyakundi) v Omanua (Civil Application E176 of 2021) [2022] KECA 486 (KLR) (25 March 2022) (Ruling)

Neutral citation: [2022] KECA 486 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E176 OF 2021
M NGUGI, JA
MARCH 25, 2022**

BETWEEN

**KENNEDY OMARE NYAKUNDI APPLICANT
SUING AS ATTORNEY OF CHRISTOPHER MBAKA NYAKUNDI**

AND

JOSEPHINE MORA OMANUA RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal and Record of Appeal out of time from the judgment of the Environment and Land Court (J.O. Onyango J) dated 27th October 2021 in Kisii ELC Case No. 369 of 2015)

RULING

1. In the application dated 15th December 2021 brought by way of Notice of Motion under Rule 4 of the Court of Appeal Rules and Article 159 constitution of the *Constitution*, the applicant asks this Court to extend time to allow him to file and serve a Notice of Appeal and Record of Appeal out of time against the decision of the Environment and Land Court (ELC) dated 27th October 2021 in Kisii ELC Case No. 369 of 2015. He also prays that the costs of the application be in the appeal. The application is supported by an affidavit sworn by the applicant's Counsel, Mr. Jeremiah Ongeru Samba, on 15th December 2021.
2. Mr. Samba avers that the ELC delivered its judgment virtually on 27th October 2021 but that a copy of the said judgment was not emailed to the applicant's advocates. On 2nd November 2021, Counsel for the applicant lodged a Notice of Appeal together with a letter requesting for a certified copy of the proceedings and judgment, both of which were dated 29th October 2021. Counsel for the applicant also paid the necessary fees in the sum of Kshs. 450.00 and a receipt was issued. The cost of the proceedings was not assessed immediately as the court file could not be traced. However, a clerk at the ELC registry stamped the said Notice of Appeal and letter with the court's official receiving stamp and returned



the copies to one Divinah Nyamachere, a court clerk working for a law firm in Kisii Town acting as an agent of the applicant's advocates. Ms. Nyamachere was advised to wait for the registry staff to try tracing the court file after which she could present the documents for endorsement by the Deputy Registrar of the ELC.

3. On 8th November 2021, the applicant's Counsel served the unsigned Notice of Appeal together with a copy of the letter upon Gideon Nyambati, advocate for the respondent, through his WhatsApp account on Safaricom Number 072xxxxxxx. Counsel for the applicant indicated in his message to the respondent's Counsel that a copy of a compliant Notice of Appeal would be served once it was made available by the court.
4. It is further averred on behalf of the applicant that he wishes to appeal against the decision of the ELC but has been denied his chance to appeal by the registry of the ELC misplacing the court file or by some collusion to deny the applicant the right to appeal.
5. Mr. Samba avers that the application has been brought without any unreasonable delay. He observes that while the court file was said to be missing, he was served with a taxation notice dated 1st December 2021 on 2nd December 2021 at 8.55 a.m. by the respondent's advocates through his official email. Upon receipt of the taxation notice, Mr. Samba had sent Divinah Nyamachere to go back to the registry and check for the court file as the matter had been listed for taxation on 7th December 2021. The said Divinah Nyamachere submitted the stamped Notice of Appeal for the Deputy Registrar's signature on 3rd December 2021 but for reasons that the applicant did not understand, it was not until the 15th of December 2021 that the Notice of Appeal was signed and returned, undated. Thereafter, the signed Notice of Appeal was served upon the respondent's advocates.
6. It was averred on behalf of the applicant that he was not responsible for the delay in signing the Notice of Appeal having presented and paid for it within the time line set by law. He is keen on challenging the judgment of the ELC, had gone to the court timeously but was frustrated by the court staff making the court file unavailable beyond the 14 days stipulated in this Court's Rules. It is the applicant's case that the intended appeal raises several issues of law, inter alia: that the learned Judge misdirected herself in holding that the applicant's claim was time barred and proceeding to send him out of court without relief; and in holding that she had no jurisdiction to order reopening of an access road leading to the applicant's land which had been blocked by the respondent's perimeter wall. Copies of the documents and communications referred to in the affidavit in support of the application for extension of time have been exhibited in the affidavit.
7. There was no response to the application by the respondent.
8. I have considered the application and the averments by Counsel for the applicant. The application is brought under Rule 4 of the *Court of Appeal Rules*, which provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
9. The court has wide and unfettered discretion in determining whether to extend time under this Rule. In exercising the discretion however, it should do so judiciously, bearing in mind the well settled



principles succinctly enunciated in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997:

“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.”

10. Judgment in this matter was delivered on 27th October 2021. It has been deposed on behalf of the applicant that on 2nd November 2021, a Notice of Appeal dated 29th October 2021 was lodged, stamped and paid for, but was not signed by the Deputy Registrar, because the Court file could not be found. A letter bespeaking the proceedings and judgment also dated 29th October 2021 was lodged and stamped on 2nd November 2021. Copies were served by the applicant’s Counsel by WhatsApp on 5th December 2021, with an undertaking to serve the documents once they had been duly endorsed by the Deputy Registrar.
11. Though the applicant was informed by the registry that the court file was missing, it was available for purposes of fixing the matter for taxation of costs, as the applicant’s Counsel discovered when he was served with a taxation notice set for 7th December 2021. Though he lodged the Notice of Appeal for signing by the Deputy Registrar on 3rd December 2021, it was only on 15th December 2021 that he received the signed but undated Notice of Appeal.
12. From this series of events, it is clear that there was no delay on the part of the applicant in taking the steps necessary for lodging his appeal against the decision of the ELC. Such delay as there was, from the material before me, was occasioned by the failure of the ELC registry to make the court file available. Thus, while the Notice of Appeal was not formally lodged within the time stipulated in the Rules, the delay cannot be attributed to the applicant. Accordingly, I find that the application dated 15th December 2021 is merited and I grant the orders sought as prayed.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF MARCH, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

