



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ilaru v Wanjala (Civil Application 142 of 2021)  
[2022] KECA 470 (KLR) (11 March 2022) (Ruling)**

Neutral citation: [2022] KECA 470 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 142 OF 2021**

**F TUIYOTT, JA**

**MARCH 11, 2022**

**BETWEEN**

**GEORGE OKIMARU ILARU (AS LEGAL REPRESENTATIVE OF THE ESTATE  
OF ITABEL IRARU OLEIMAN) ..... APPLICANT**

**AND**

**MARGARET WELIME WANJALA (AS LEGAL REPRESENTATIVE OF THE  
ESTATE OF DAVID WANJALA WELIME) ..... RESPONDENT**

*(Being an application for leave to file an appeal out of time against the ruling and order of  
Justice Mukunya made on 29th May 2012 in Bungoma High Court Civil Suit No. 128 of 1994)*

**RULING**

1. The Motion before me said to be brought pursuant to rules 40, 41, 42, 43(1) and 75 of the Rules of this Court seeks that the Court do extend time within which the applicant can file an appeal against the ruling and order dated 29<sup>th</sup> May 2012 in the Environment and Land Court (ELC) in Bungoma High Court Civil Suit No. 128 of 1994.
2. In the affidavit made in support of the Motion, the applicant dedicates a considerable portion setting out the journey of the dispute that formed the proceedings before the superior court. It is unnecessary for this Court to rehash that journey save to observe that it is an old dispute which began sometime in 1980 and whose main actors are now deceased. The dispute involves ownership and right to possession of land comprised Kamukuywa settlement Scheme / Nailini/ 138. The main actors were Habil Iraru, the deceased father to the current applicant and David Walime, the deceased husband of the current respondent.
3. The suit before the ELC was dismissed for want of prosecution by Mukunya J on 28<sup>th</sup> March 2017. Through an application dated 3rd May 2017, the current applicant sought to be granted leave to be substituted as the plaintiff in place of his brother Andrew Iraru Abella who had died. In a short ruling



Mukunya J, noted that the suit had long abated and the suit having been dismissed under Order 17(2) Civil Procedure Rules, the only option open to the applicant was an appeal against that order.

4. The applicant tells this Court that he was aggrieved by that decision and he immediately, on 31st May 2017, applied for proceedings which he received on 22nd June 2017. He then took the proceedings to his advocate, a Mr. Were, who demanded legal fees of Kshs. 100,000/= which he could not raise due to financial struggles. The applicant deposes that it was not until recently that he heard of counsel Ocharo who sometime offers pro bono services and who has accepted to handle his matter on that basis.
5. There was no response to this application by the respondent.
6. Rule 4 of the Rules of this Court empowers a single judge, exercising that power on behalf of that court, to extend time. The power is discretionary to be exercised judiciously. So as to reach a judicious decision, the single judge may bear in mind, amongst other considerations, the length of the delay, the reason for the delay, the degree of prejudice to the respondents if the application is granted and, possibly, the chances of the success of the intended appeal (Fakir Mohamed –vs- Joseph Mugambi & 2 Others [2005] eKLR).
7. Considerable time has passed from the date of the order which is sought to be appealed against to the date this application was presented. It is more than 4 years from 3rd May 2017 to 8th October, 2021. This is a long delay! The applicant blames this delay on lack of finances to raise legal fees.
8. What the applicant failed to disclose is that he had made an attempt such as this in the ELC and which was disallowed. From the proceedings I was able to see that vide an application dated 8<sup>th</sup> July 2019, the applicant moved the ELC for extension of time to file a notice of intention to appeal against that order of Mukunya J. That application was declined by Olao J.  
  
on 23<sup>rd</sup> January 2020. The significance of this is not that there was anything improper with the applicant seeking enlargement of time in the first instance before the ELC because he would be entitled to so under the provisions of section 7 of the Appellate Jurisdiction Act (Cap 9) but what transpired there is evidence of the dilatory manner in which the applicant has dealt with this matter.
9. Before the ELC, the applicant had blamed the delay in financial inability to instruct counsel. The same reason here. There, he had told court that he was then able to move because of the pro bono help he had received from counsel Ocharo. The same change of fortune is told to this Court. In essence the help that came from counsel Ocharo was available on 8<sup>th</sup> July, 2019 when he moved the ELC.
10. Even if this Court was to accept that the applicant’s alleged financial inability was good reason for the delay between 3rd May 2017, the date of the order, to 8th July 2019, the date of this application before court, the applicant does not explain why it took him from 23rd January 2020, the date of the ruling disallowing the application before the ELC to 8th October 2021, the date of the current Motion. This long period of 21 months is unexplained and is certainly therefore inordinate.
11. I express no view on the arguability or otherwise of the intended appeal as I am unable to find any reason that would persuade me that the extremely dilatory conduct of the applicant is excusable.
12. I decline to exercise my discretion in favour of the applicant and I hereby dismiss the Notice of Motion dated 8th October, 2021. As the respondent filed no response, I make no order as to costs.

**DATED AND DELIVERED IN KISUMU THIS 11<sup>TH</sup> DAY OF MARCH 2022.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

