



REPUBLIC OF KENYA



Thande (Suing as the Legal Representative of Francis Thande James Kiarie (Deceased)) v Kahira & another (Civil Application E581 of 2021) [2022] KECA 906 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KECA 906 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E581 OF 2021**

AK MURGOR, JA

APRIL 28, 2022

BETWEEN

**LIVINGSTONE WAWERU THANDE APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF FRANCIS THANDE JAMES
KIARIE (DECEASED)**

AND

**NELLIE NGONYO MWAURA 1ST RESPONDENT
JOHN KARANJA KAHIRA 2ND RESPONDENT**

(An Application for the extension of time to file and serve an appeal out of time against the Judgment of the Environment and Land Court at Nairobi (E.O. Obaga J.) delivered on 7th December 2020 in ELC Case No. 894 of 2014)

RULING

1. By a Notice of Motion dated 5th October 2021, brought pursuant to rule 4 of this Court's rules and section 3A and 3B of the [Appellate Jurisdiction Act](#), the applicant, Livingstone Waweru Thande suing as the representative of the estate of Francis Thande James Kiarie (Deceased) seeks leave to file and serve an appeal out of time and for the Court to deem the Record of appeal to be properly filed.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by the applicant on 5th October 2021 wherein it was contended that on December 7, 2020, the Environment and Land Court (ELC) at Nairobi delivered a judgment dismissing the Deceased's suit, and finding that the respondents' Counterclaim was merited; that in effect, the judgment ordered the cancellation of the title issued to the Deceased. The court further ordered that the register be rectified to reflect the name of the 1st respondent, Loise Wanjira Kahira as proprietor of LR No. Dagoretti/Kangemi/307 (the disputed property).



3. It was further stated that the applicant was aggrieved and filed a Notice of appeal on December 17, 2021 which was well within the prescribed period; that by a letter dated December 14, 2020, the applicant's advocates requested for certified copies of the proceedings and the judgment which was served on the respondents; that despite visiting the registry to collect the proceedings and judgment on several occasions, the applicant was continually informed that they were not ready; that the proceedings were supplied on September 23, 2021, together a Certificate of delay explaining the period and reasons for delay. The certificate was attached to the application. It was further contended that the statutory period within which to file the appeal has since lapsed, and that it was for this reason that the applicant sought leave to be file the appeal out of time. It was asserted that the applicant and all the beneficiaries of the Deceased would suffer great harm if leave were not granted, and that no prejudice would be occasioned to the respondents.
4. In a replying affidavit sworn on October 26, 2021 Nellie Ngonyo Mwaura, the 2nd respondent, opposed the motion, and deponed that the application was an afterthought since her advocates had not been served with a notice of appeal; that the application having been brought nearly 11 months after the judgment was rendered was a demonstration of the applicant's indolence. It was further deponed that the applicant, Livingstone Waweru Thande was a stranger in the suit, and could not purport to substitute the Deceased after the suit in the ELC was fully determined; that the delay in bringing the application was excessive and inordinate, and that in any event, it had been overtaken by events because the judgment and decree were executed on February 19, 2021 when the disputed property was registered in the name of their late grandmother, the 1st respondent.
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 frivolously 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 will suffer prejudice if the extension was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997.
6. Beginning with the period of delay, the judgment was rendered on December 7, 2020. This application was dated 5th October 2021 which is a 11 months delay in seeking to lodge the appeal. As to whether it has been explained, the applicant's case is that the delay was occasioned by the length of time it took the registry to prepare the proceedings; that after the proceedings were supplied, the registry issued the applicant with a Certificate of delay dated 23rd September 2021 indicating that it had taken 281 days to prepare them. Under the proviso to rule 82 (1) of this Court's *rules*, an applicant seeking for time to be extended may exclude the time for preparation of the proceedings specified in the Certificate of delay when computing the delay in lodging the appeal.
7. According to the Certificate of delay the time taken for preparation of the proceedings was 281 days which would explain the 11 months delay in lodging the record of appeal.
8. As a consequence, the only conclusion that can be reached is that the applicant has adequately explained the delay in lodging the appeal.
9. On the question of whether the appeal has a chance of success, since the applicant has not specified the grounds on which the appeal is to be brought, it is not possible to ascertain whether or not the appeal will be successful.
10. Finally, with respect to whether the respondents will be prejudiced if time were to be extended, in their sworn affidavit, the 2nd respondent has deponed that the judgment has been executed and the disputed property transferred to the 1st respondent. Clearly, the respondents have since taken steps to enjoy



the fruits of their judgment. But this notwithstanding, the subject matter of the dispute between the parties being land, my view is that it would be mutually beneficial for the dispute to be settled once and for all with the applicant's appeal being settled with finality.

11. In sum, the applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time to lodge the appeal. Accordingly, the Record of appeal lodged together with this motion is deemed as properly filed and served. Costs in the appeal.

12. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH OF APRIL, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar

