



Kahindi & 23 others (Suing on their own behalf and on behalf of the squatters/ residents residing and/or occupying plot No. 190/I/MN, Bombolulu) v Kimeu & another (Civil Application E007 of 2020) [2022] KECA 608 (KLR) (13 May 2022) (Ruling)

Neutral citation: [2022] KECA 608 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E007 OF 2020
P NYAMWEYA, JA
MAY 13, 2022**

BETWEEN

KESI KAHINDI & 23 OTHERS APPLICANT

**SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE SQUATTERS/
RESIDENTS RESIDING AND/OR OCCUPYING PLOT NO. 190/I/MN,
BOMBOLULU**

AND

PHILIP KIMEU 1ST RESPONDENT

JOSEPH HAMISI DENAR 2ND RESPONDENT

(An application for extension of time to file and serve a Notice of Appeal against the Judgment of the Environment and Land Court at Mombasa (Munyao Sila J.), delivered on 11th March 2020 in Mombasa ELC Case No 183 of 2013 (OS))

RULING

1. The application before this Court for ruling is a Notice of Motion dated 6th October 2020, and was indicated as being brought by the Applicants herein under Rules 4, 5(2)(b) and 41 of the [Court of Appeal Rules](#). The application was supported by an affidavit sworn on 6th October 2020 by James M. Loponi, the 4th Applicant herein. The Applicants had initially sought two prayers, the first for extension of time for filing and serving a Notice of Appeal and Record of Appeal; and the second for a stay of execution of the judgment delivered by the Environment and Land Court (ELC) on 11th March 2022. During the hearing of the application held on 4th April 2022, Mr. Kenga, learned counsel for the Applicants, with Ms. Jane Umara learned counsel for the Respondents not objecting, informed the Court that he was abandoning the prayer for stay of execution.



2. This ruling is therefore on the prayer for extension of time only, and both Mr. Kenga and Ms Umara relied on written submissions lodged with the Court dated 1st April 2022 and 31st March 2022 respectively. I have considered the arguments and submissions put forth therein by the counsel for the Applicants and Respondents on the said prayer. Mr. Kenga's case is that after judgment delivered against the Applicants on 11th March, 2020, the said Applicants, who were acting in person, failed to lodge a Notice of Appeal within the 14 days' period provided for under the law, and the Notice of Appeal was consequently filed and or lodged in Court seven days late on 2nd April, 2020.
3. The reasons for the late filing of the Notice of appeal were that after drafting the Notice of Appeal, the Applicants lodge it timely at the Court of Appeal registry because of the restriction of movement arising from the Covid-19 pandemic and restricted access to the court of persons who were not advocates. A copy of the Notice of Appeal dated 17th March 2020 and filed on 2nd April 2020 was annexed to the affidavit in support of the application.
4. Thereafter, that upon getting permission to access the Court, the Applicants lodged the Notice of Appeal together with an application for stay of execution of the impugned judgment before the ELC, which application was heard and not granted. The Applicants thereupon sought the services of the current Advocates on record, and were advised to lodge the present application which was filed on 16th October, 2020, about 7 months after the delivery of the judgment. Therefore, that the delay has been explained and given the circumstances obtaining during the relevant period, the delay is not inordinate as in any event, the filing was done 7 days after the lapse of the 14 days' period provided for under the law.
5. On whether the Respondents will be prejudiced if time is enlarged, the counsel for the Applicant submitted that while parties are required to enjoy the fruits of their judgments, an aggrieved party is also allowed in law to file an appeal, which the other party has an opportunity to defend. Therefore, that it cannot be said that great prejudice would befall a party against whom judgment is sought to be set aside. In addition, that the suit premises is a parcel of land which the Applicants have occupied for many years, and thus will be rendered homeless if their appeal is not heard, thereby facing condemnation without being heard.
6. Lastly, it was the counsel's submission that the intended is arguable and is not frivolous, as it raises arguable issues of both law and fact, being the proof of occupation and/or possession of the suit premises by the Applicants and whether such occupation or possession met the threshold for the grant of orders of adverse possession. Reference was made to the draft Memorandum of appeal annexed to the application and the grounds listed therein.
7. Ms. Umara on the hand made reference to the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commissions & 7 others* [2014] eKLR for the principles that the Court should consider in exercise of its discretion to extend time under Rule 4 of the Court of Appeal Rules, and urged that that the Applicants have not met the threshold laid out therein. Ms. Umara's case is that there was unreasonable delay on the part of the Applicants which has not been satisfactorily explained, as the present application for leave to extend time for filing of an appeal has been brought after four (4) months of the ruling intended to be appealed against.
8. Therefore, that the Applicants are guilty of laches and the reasons for the inordinate delay is not reasonable, as at no time was Nyali Bridge closed during the pandemic as averred by the Applicants. In addition, that the Respondents stand to suffer loss and damage having been denied occupation and enjoyment of their land.



9. The principles governing the exercise of discretion in application for extension of time under Rule 4 of the Court of Appeal Rules, which were well stated in the case of *Leo Sila Mutiso v Rose Hellen Wangare Mwangi* Civil Application No Nai 255 of 1997 (ur) as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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. Rule 75(2) of the Court of Appeal Rules of 2010 requires that a Notice of Appeal is lodged within fourteen days of the decision intended to be appealed against. Rule 82 in turn requires the appeal, which shall include the memorandum of appeal, to be lodged within sixty days of the date of lodging of the Notice of Appeal. It is not in dispute that the judgment intended to be appealed from was delivered on 11th March, 2020 and that the Notice of Appeal, which was required to be filed by 25th March 2020, was instead lodged on 2nd April 2020. After considering the reasons proffered by the Applicants, I find that firstly, the delay of seven days in the lodging of the Notice of Appeal has been adequately explained by the effects of the prevailing Covid-19 pandemic and is therefore excusable. This Court in this regard takes judicial notice of the Covid-19 pandemic and the disruptions it caused to the society and judicial system operations.
11. Secondly, the instant application was lodged on 16th October 2020 about eight months later, and the Applicants have also explained that they sought to prosecute an application of stay of execution in the ELC during this period, in addition to being unrepresented at the time. I find the explanation reasonable and that the delay is not inordinate in the circumstances. On the whole I find that the Applicants have demonstrated the steps they have taken in moving their appeal forward. In addition, it is notable that the timelines for filing of the record of appeal start to run once a Notice of Appeal is competently before the Court, and this Court also has wide powers and discretion under Rule 4 as to the terms on which an extension of time can be granted.
12. On the chances of the intended appeal succeeding, at this stage all that I need to be persuaded on is that the Applicants have demonstrated the existence of plausible grounds of appeal. The counsel for the Applicant has in this regard raised an arguable point as to whether the fact of adverse possession was demonstrated, which issue reasonably arise from the impugned judgement.
13. Lastly, the Applicants have pointed out the prejudice they are likely to suffered if their appeal is not heard, of possible eviction from land they occupy. It is my view that there are interventions that are available to mitigate and address any prejudice that may be suffered by the Respondents during the pendency and conclusion of the intended appeal, and that the more appropriate course of action in balancing the interests of both parties and in the interests of substantive justice in the circumstances is to allow the appeal to proceed to hearing.
14. I therefore find that the Applicants merits the exercise of this Court’s discretion in their favour for the above stated reasons. I accordingly allow the Applicants’ Notice of Motion dated 6th October 2020, and grant the Applicants extension of time on the terms of the following orders:
- a) The Applicants are granted extension of time to file and serve their Notice of Appeal against the judgment dated 11th March 2020 delivered by the Environment and Land Court (ELC) in Mombasa ELC Case No 183 of 2013 (OS).



- b) The Applicants' Notice of Appeal filed on 2nd April 2020 is deemed to be properly on record.
- c) The Applicants shall file and serve their Record of Appeal within 60 days from the date of this ruling.
- d) The costs of this application shall abide the outcome of the appeal.

14. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

