



Ngugi v Thogo (Civil Application 372 of 2018) [2022] KECA 648 (KLR) (13 May 2022) (Ruling)

Neutral citation: [2022] KECA 648 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 372 OF 2018
AK MURGOR, JA
MAY 13, 2022**

BETWEEN

RACHEL MUKAMI NGUGI APPLICANT

AND

MERCY WANJIRU THOGO RESPONDENT

(Being an application to extend the time to file and serve the Memorandum of appeal and Record of Appeal from the Judgment of the Thika Environment and Land Court delivered by (Gacheru, J.) dated 28th September, 2018))

RULING

1. In this Notice of motion dated 13th December, 2018, the applicant, Rachel Mukami Ngugi seeks to extend time for filing and serving of the Record of appeal against the judgment of the Thika Environment and Land Court delivered on 28th September, 2018, and for the Notice and Record of Appeal be deemed as properly filed and served on the respondent. The application is brought on grounds and supported by an affidavit of Rachel Mukami Ngugi sworn on 13th December, 2018, wherein it was stated that a Notice of appeal was filed on 2nd October, 2018; that the lapse of time from the date of judgment was not deliberate, but was occasioned by the registry's delay in issuing the decree to enable the applicant file the record of appeal; that the request for the decree was filed on 2nd October, 2018 and it was not issued until 27th November, 2018, which delay affected the filing of the memorandum and record of appeal. That the appeal raises triable issues on points of law and fact with overwhelming chances of success, and if leave is not granted, the appeal will be rendered nugatory; that no prejudice would be occasioned upon the respondent if the orders are granted.
2. In a supplementary affidavit sworn by the applicant's counsel Nyambega Moses on 25th November 2021, it was deponed that the delay was occasioned by the registry. Mr Nyambega largely reiterated the applicants averments save to add that the Certificate of delay which was attached specified that it had



taken 57 days for the proceedings to be prepared. Also attached was a memorandum of appeal setting out 15 grounds of appeal.

3. Though served with the hearing notice on 9th February 2022, the respondent did not file a replying affidavit or written submissions in compliance with this Court's directions.
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 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 extension of time was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997.
5. This being an application for extension of time, it is essential for the applicant to satisfactorily explain the reasons for delay. The judgment was delivered on 28th September, 2018 and this application is dated 13th December, 2018. Essentially a period of 71 days would have lapsed from the date the Notice of appeal was filed. The rules of this Court specify that applicant had 60 days within which to file the record of appeal, so that, the applicant would be required to explain the remaining 11 days' delay.
6. In explaining the delay, the applicant contends that she was unable to obtain the decree, which is what led to the delay in filing the record of appeal. The applicant has attached a letter dated 23rd November, indicating that a request for certified typed proceedings was made on 2nd October, 2018 and that thereafter several trips were made to the registry to collect the proceedings and the decree; that on 12th October, 2018 one, Mr. Vincent Rianga visited the Registry and on 22nd October, 2018 and 23rd October, 2018, one Jane Njoki 'camped' in the registry in the hope of securing it, but to no avail. The Letter concluded by stating that:

“The purpose of this letter is to invite you to mitigate the said horrendous situation by supplying the said decree with a certificate of delay before noon of Monday the 26th November, 2018 to enable us take necessary steps on behalf of our clients”
7. A copy of the attached decree shows that it was finally issued to the applicant on 27th December, 2018. The prescribed 60 days would have lapsed on 2nd December 2018, which is about the same period covered by the certificate of delay. From that date until the application was filed is 11 days which the applicant has yet to explain. Taking into account the time for preparation of this application, and the zeal that the applicant has demonstrated in seeking to file the appeal, I am prepared to find that the remaining period of delay, which is not inordinate has been properly explained.
8. As to whether the appeal would be successful, the applicant has filed a lengthy memorandum of appeal setting out numerous complaints against the trial court's judgment. What is evident is that the dispute involves land. On this premises, there is all the more reason for the applicant to press forward and have it determined with finality by this Court. And, with this in mind, I can find nothing that would point to any prejudice that the respondent would suffer, were time extended, save that he will have to defend the appeal.
9. In sum, I allow the motion dated 13th December 2018, and order the applicant to file and serve her memorandum and record of appeal within 14 days from the date hereof. Costs in the appeal.

IT IS SO ORDERED.

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

A.K. MURGOR



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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

