



REPUBLIC OF KENYA



Chai Lwambi Mwalambe (suing as Legal Representative of the Estate of Lwambi Mwalambe Beponda) v District Land Registrar & 4 others; Said & 6 others (Interested Parties) (Civil Appeal (Application) E069 of 2021) [2022] KECA 549 (KLR) (6 May 2022) (Ruling)

Neutral citation: [2022] KECA 549 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E069 OF 2021
P NYAMWEYA, JA
MAY 6, 2022**

BETWEEN

CHAI LWAMBI MWALAMBE (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF LWAMBI MWALAMBE BEPONDA) APPELLANT

AND

**DISTRICT LAND REGISTRAR 1ST RESPONDENT
SENIOR REGISTRAR OF TITLES 2ND RESPONDENT
COMMISSIONER OF LANDS 3RD RESPONDENT
PROVINCIAL ADMINISTRATION 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

AND

**ALI ABDALLAH SAID INTERESTED PARTY
SAUMU RASHID INTERESTED PARTY
FATUMA SAID OMAR INTERESTED PARTY
HANTER AHMED ADAM INTERESTED PARTY
NUSRA ABBAS INTERESTED PARTY
JAFFAR ABDULRAHMAN DOKA INTERESTED PARTY
ABDULRAHAMAN ALI INTERESTED PARTY**

(Application for extension of time to file a record of appeal from the judgment of the Environment and Land Court at Mombasa (Munyao Sila J.) delivered on 30th September 2020 in ELC Petition No. 5 of 2010)



RULING

1. The Appellant herein has moved this Court by way of a Notice of Motion application dated 1st October 2021, seeking enlargement of time to file its record of appeal against the judgment dated 30th September 2020 delivered by the Environment and Land Court (ELC) in Mombasa ELC Petition No 5 of 2010, and that the filed record of appeal be deemed as properly filed. The application is supported by an undated affidavit sworn by the Appellant. The Appellant's grounds for the application are that while he filed and served a notice of appeal in time, the time for filing the record of appeal has lapsed and unless the court enlarges time, his intended appeal which touches on historical injustices in a land matter will be rendered nugatory. The Appellant detailed the background giving rise to the dispute over the suit property, which he claimed to have been registered in the name of his deceased grandfather, and annexed copies of the pleadings he filed in the ELC, the impugned judgment and of his memorandum of appeal.
2. The 1st to 5th Respondents filed Grounds of Opposition dated 1st March 2022, which opposed the application on the grounds that the Appellant had failed to lay a basis to warrant the exercise of this Court's discretion, and had not provided a reasonable cause for the delay which is therefore unexplained and inordinate.
3. During the hearing held on 2nd March 2022, Mr. Gekonde, the learned counsel for the Appellant, reiterated the grounds for the application. The counsel submitted, while relying on written submissions dated 22nd October 2022, that the impugned judgment was delivered during a time when the country was gravely affected by the Covid-19 epidemic which also affected the preparation of the record of appeal since the Appellant was unable to cater for the costs. In addition, that the Covid-19 epidemic is a matter of public knowledge.
4. Mr. Makuto, learned counsel for the 1st to 5th Respondents, was also present, and confirmed having been served with the Notice of Appeal on 8th October 2020. The counsel made reference to his written submissions dated 1st March 2022 to submit that an application seeking orders of extension of time within which to file a record of appeal must be made timeously and without inordinate delay. Reliance was placed on the decision by the Supreme Court of Kenya in *Charo vs. Mwashetani & 103 Others* (2014)eKLR, that timelines are vital ingredient in the quest for efficient and effective governance under the Constitution. The decision of the said Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commissions & 7 others* [2014] eKLR was also cited by the counsel, for the principles that the Court should consider in exercise of its discretion to extend time.
5. Mr. Makuto's position was that the Appellant had not made any attempt to show that there was reasonable a cause for the delay; that from the record of appeal filed, the proceedings were certified on 2nd November 2020 and the record of appeal filed on 4th October 2021, and the unexplained delay of 11 months was therefore inordinately long.
6. The Interested Parties were not in attendance during the hearing, and did not file any response to the application. Mr. Gekonde in this regard exhibited an affidavit of service attesting to service of the hearing notice n on the Interested Parties.
7. I have considered the arguments put forth by the counsel for the Appellant and 1st to 5th Respondents, and 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”

8. I have also considered the context of the application, which arises from a constitutional petition filed by the Appellant in the ELC for infringement of his constitutional rights to non-discrimination and property, on the basis that his forefathers were the beneficial owners of the disputed land, which is occupied by his family members, and that the Government has resettled members of the Nubian community thereon. The Respondents in response denied the Appellants claim to the suit property, while the Interested Parties claimed to be the lawful owners of the property, the same having been allotted to and occupied by them. The prayers by the Appellant to inter alia be declared as lawful owners of and allocated the suit property and certificate thereof; to be paid compensation; for repossession of the suit property; and to restrain the Respondents from allotting the suit property or title thereof to any other persons were found not to be merited, and dismissed by the ELC (S. Munyao J.).
9. Aggrieved, the Appellant thereupon lodged his Notice of Appeal, and the instant application. The applicable legal provision as regards the timeline for filing of the record of appeal is Rule 82(1) of the *Court of Appeal Rules*, under which the record ought to have been filed by 8th December 2020, within 60 days from 8th October 2020 when the Appellant lodged his Notice of Appeal. The Appellant in this regard does not dispute that the proceedings of the trial Court were availed to him on 2nd November 2020, and conceded delay in filing the record of appeal almost one year later, on 4th October 2021.
10. The Appellant in this regard implores this Court to have regard to the effects of Covid-19 pandemic, and the nature of his claim which involves historical injustices to land. In this regard, I do take judicial notice of the Covid-19 pandemic and the disruptions it caused to the society and judicial system operations, and I am prepared to find that the delay was excusable for this reason. I also note in this regard that the Appellant has since taken steps to prepare and file the record of appeal in mitigating this delay. On the chances of the intended appeal succeeding, there are reasonable grounds raised by the Appellant in the draft memorandum of appeal that he annexed, principally that there was no proper and legal analysis of the concept of and evidence of historical injustices in relation to the suit property, and of the evidence of the different claims to the suit property.
11. Lastly, the given the emotive nature of land disputes, and that there are interventions that are available to mitigate and address any prejudice that may be suffered by the Respondents and Interested Parties during the pendency and at the conclusion of the appeal, the balance tilts in favour of the Appellant with regard to exercise of this Court’s discretion.
12. I therefore find that the Appellant’s Notice of Motion application dated 1st October 2021 is merited for the above stated reasons, and allow the application on the terms of the following orders:
 - a) The Appellant is granted extension of time to file and serve its record of appeal against the judgment dated 30th September 2020 delivered by the Environment and Land Court (ELC) in Mombasa



- b) The Appellant's Record of Appeal filed on 4th October 2021 is deemed to be properly on record.
- c) The Appellant shall meet the costs of this application.

13. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH 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

