



**Mutua & another v Muindi & 2 others (Civil Application
E041 of 2021) [2022] KECA 550 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KECA 550 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E041 OF 2021
A MBOGHOLI-MSAGHA, JA
JUNE 10, 2022**

BETWEEN

MESHACK MUTUA 1ST APPLICANT

ROSE KATILE MUTUA 2ND APPLICANT

AND

JOHNSON MUSAU MUINDI 1ST RESPONDENT

KATELEMBO ATHANI MUPUTI FCS LTD TASKFORCE 2ND RESPONDENT

KATELEMBO ATHIANI MUPUTI FCS LIMITED 3RD RESPONDENT

((Application for leave to Appeal out of time against the Judgment of (Angote J) in Environment and Land Court at Machakos in ELC Misc. Application No. 33 of 2018))

RULING

1. This is an application by way of Notice of Motion dated December 17, 2020 brought under Article 159 (d) (sic) of *the Constitution* Sections 3A and 3B of the *Appellate Jurisdiction Act* and Rule 4 (1) and (2) of the *Court of Appeal Rules* seeking orders that time be extended for giving notice of appeal and leave to file an appeal out of time against the Judgment of the Superior Court delivered on June 12, 2020.
2. There is also a prayer that time be extended for the filing of the record of appeal out of time. The application is supported by an affidavit sworn by Meshack Mutua, the 1st applicant. The applicants have also filed submissions in urging the said application. There is no replying affidavit to the application neither have the respondents filed any submissions despite notice to both the parties served on May 12, 2022 requiring the filing of submissions.
3. It is the applicants' position that they have an arguable appeal and that the delay in complying with the rules cannot be attributed to them because, soon after the judgment of the Superior Court was



delivered they applied for proceedings which were delayed, and the certificate of delay issued on August 26, 2020 confirms that position. It is also their case that they have an arguable appeal as shown in the grounds set out in the Memorandum of Appeal annexed to the application.

4. In addressing application of this nature, the court is bound to consider the length of delay and the reasons thereof; whether or not there is an arguable appeal, and what prejudice, if any, may be suffered by the respondents if the application is allowed. – See *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231.
5. After the lower Court judgment was delivered on 12th June, 2020 the applicants’ counsel prepared a notice of appeal dated 15th June, 2020 and filed on June 16, 2020. However, the Registrar acknowledged the said notice on June 24, 2020 which was already out of time.
6. Although certificate of delay was issued on August 26, 2020 the applicants did not file the present application until December 17, 2020 which is 4 months thereafter, and that delay has not been explained.
7. I have also looked at the judgment of the lower court and the draft Memorandum of Appeal dated December 17, 2020. It is clear that the thrust of the judgement of the Superior Court was centred on whether or not the 3rd respondent had jurisdiction to address the subject of title relating to the land in dispute.
8. At this stage the court is not hearing the appeal from the judgement of the Superior Court. However, it is clear that there cannot be an arguable appeal from the facts and the ultimate decision upon which the judgment of the superior court was grounded.
9. In view of the foregoing, I am not persuaded that the applicants are deserving of the orders sought in the notice of motion. It follows the application is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

