



**Kivae Residents Organization v Lukenya Ranching & Farming Cooperative Ltd & 2 others
(Civil Appeal (Application) E634 of 2021) [2022] KECA 721 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 721 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E634 OF 2021
MSA MAKHANDIA, JA
JULY 22, 2022**

BETWEEN

KIVAE RESIDENTS ORGANIZATION APPLICANT

AND

LUKENYA RANCHING & FARMING COOPERATIVE LTD 1ST RESPONDENT

MACHAKOS LAND DISPUTE TRIBUNAL 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT MACHAKOS 3RD RESPONDENT

(An application for extension of time to appeal against the judgment of the High Court of Kenya at Nairobi (Wendoh, J.) dated 14th December 2007 in Misc. Civil Application No. 162 of 2007)

RULING

1. Before me is a notice of motion dated 14th October 2021 premised on Section 79G & 95 of the [Civil Procedure Act](#) and Order XLIX Rule 5 of the [Civil Procedure Rules](#). The applicant's main prayer is for it to be granted leave to appeal out of time against the whole judgment and decree of Wendoh, J. delivered on 14th December 2007.
2. The application is supported by the grounds on its face and the supporting affidavit of Silvester Peter Ndeti who is the secretary of the applicant. It is the applicant's case that judgment in Nairobi Judicial Review Miscellaneous
3. Application No. 162 of 2007 was delivered on 14th December 2007 in its absence. That it only became aware of the said judgment in 2021 as it had lost touch with its counsel, one Mr. Makundi. That when it became aware of the judgment, it immediately instructed its new counsel to urgently appeal the decision. That it became aware that judgment had been delivered when it filed in the Environment and Land Court "ELC" at Machakos, Judicial Review Application Number 13 of 2020 seeking an order of mandamus to compel the Land Registrar, Nairobi to implement the decree issued in Chief



Magistrate's Court, Machakos in Civil Miscellaneous No. 143 of 2006. After learning of the outcome it withdrew the judicial review application.

4. The respondents did not respond to the motion and neither did they file written submissions as directed by the court on 13th June 2022.
5. I have carefully considered the motion, the grounds thereof and the supporting affidavit. From the outset, I must point out that the application is brought under the wrong provisions of the law. This Court's jurisdiction for extension of time is derived from Rule 4 of this Court's Rules. The applicant has cited Sections 79G and 95 of the *Civil Procedure Act* and Order XLIX Rule 5 of the Civil Procedure Rules. These provisions are inapplicable in this Court but in the Courts below. I will however proceed to consider the motion as though it was brought under the proper provisions of the law in the interest of substantive justice and pursuant to Article 159 of the *Constitution*.
6. As earlier stated, this Court's jurisdiction on extension of time is premised on Rule 4 of this Courts Rules, which provides inter alia:-

4. Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a Superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

7. The principles upon which this court exercises discretion are settled. The court has wide unfettered discretion to extend time or not. However, in exercising this discretion, the court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi* Civil Application No. Nai 251 of 1997 where the court stated;

“It is now settled that the decision whether 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 reasons 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. In the instant case it is not in dispute that the impugned judgment was delivered on 14th December, 2007 a period of over 14 years ago. Certainly, a delay of over 14 years is inordinate. The applicant contends that the reasons for the delay is because it, had lost contact with its counsel and that the judgment was delivered in its absence. That may well be the case, but the applicant does not state the circumstances under which it lost touch with its counsel, and for how long. It is surely the duty of a client to pursue its instructions with counsel. It is not plausible that a client would instruct counsel and sit back and do nothing for 14 years. To me, there seems to have been singular lack of interest to pursue matter by the applicant from 2007 to 2020.
9. In the case of *Bi-Mach Engineers Limited Vs. James Kaboro Mwangi* [2011] eKLR, this Court held that:

The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as



if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion. The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and the principles stated above.”

10. I am in the premises not satisfied or persuaded by the reasons advanced by the applicant for the delay.
11. On the aspect of the chances of success of the intended appeal, it is not in my province at this stage to determine definitively the merits of the intended appeal. That is the duty of the full court when it is ultimately presented with the intended appeal. In the case of *Athuman Nusura Juma Vs. Afwa Mohamed Ramadhan* [2016] eKLR this Court stated as follows: -

This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”
12. However, there is no indication in the application of the grounds of appeal that the applicant intends to pursue. I cannot therefore discern any *iota* of an issue I would easily say is worthy the engagement of the mind of this Court when it sits to decide on the intended appeal, if at all.
13. On the degree of prejudice to the respondents, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying it the extension time to pursue its undoubted right to appeal, against the prejudice to the respondents who would want to enjoy the fruits of their judgment.
14. Taking into account the totality of all the circumstances in this case, I find that the delay is inordinate, the reasons given not plausible and the possibility of the appeal succeeding is doubtful. Similarly, I am of the considered opinion that the applicant would not suffer great prejudice as opposed to the respondent if the application is denied. In the end, I find the application devoid of merit and dismiss it with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

