



REPUBLIC OF KENYA



KENYA LAW
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**Matendechere v Mutoko (Civil Application E62 of 2022)
[2022] KECA 880 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 880 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E62 OF 2022**

M NGUGI, JA

JULY 22, 2022

BETWEEN

MUSA LUBANGA MATENDECHERE APPLICANT

AND

DINAH ANYONA MUTOKO RESPONDENT

(Being an application for extension of time to file an appeal and record of appeal out of time against the judgment of the High Court of Kenya at Kakamega (J.N. Njagi J) dated 28th October, 2020 in High Court Succession Cause No. 558 of 2013)

RULING

1. In the application dated 4th May 2022, the applicant seeks extension of time to lodge a notice of appeal and record of appeal against the ruling of the High Court delivered on 28th October, 2020. He further seeks orders that the notice of appeal dated 4th November, 2020 and the record of appeal dated 3rd February, 2021 be deemed as properly filed. He also asks that the costs of the application be provided for.
2. The application is brought under the provisions of Rule 4 and 42 of the Court of Appeal Rules 2010 and is supported by an affidavit sworn by the applicant on 4th May 2022 setting out the grounds in support of the application.
3. The applicant states in the grounds in support of the application that the delay in filing the notice and record of appeal was due to circumstances beyond his control. He had instructed the firm of Andia & Co. Advocates to file an appeal against the impugned judgment but the said firm had inadvertently failed to do so. He contends that the appeal raises substantial issues with high chances of success and the respondent will not suffer any prejudice should the prayers sought be granted.



4. In his affidavit in support of the application, the applicant deposes that he was the objector in the succession proceedings before the High Court. He was dissatisfied with the decision of the court on his objection and he had instructed the firm of Andia & Co. Advocates to lodge an appeal against the said decision. The said firm had filed a notice of appeal dated 9th November 2020 and served it on the firm of Getanda & Co. Advocates on 11th November 2020. The said firm had requested for certified copies of proceedings on an undisclosed date, and the proceedings were supplied on 3rd February 2021.
5. According to the applicant, he had subsequently lost his job which was his only source of living prompting him to relocate to another town, and he had lost touch with his advocates then on record. He could not find a job in the new town due to the Covid 19 pandemic and had gone back home to find the respondent in the process of executing the orders of the court made on 28th October 2020. He had filed an application for stay of execution in person as he could not afford the services of Counsel, but his application had been dismissed as he still had Counsel on record and had not filed a notice to act in person. He had then engaged the services of Oscar Munyendo, his current Advocate, who agreed to take up the appeal on pro bono basis. He contends that his appeal has high chances of success and the respondent will not suffer any prejudice if the orders the applicant seeks are granted.
6. In his submissions dated 4th July 2022, the applicant asks this Court to exercise its discretion on humanitarian grounds to allow him to prosecute the appeal. He relies on the case of *Vishva Suppliers Company Ltd vs RSR Stone (2006) Limited* (2020) eKLR.
7. I have considered the application and the grounds in support. The principles on the basis of which this Court will exercise discretion in favour of an applicant for extension of time were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (supra). These are the length of the delay, the reason for the delay, the degree of prejudice to the respondents if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted.
8. The decision sought to be appealed from in this case was delivered on 28th October 2020. The applicant avers that a notice of appeal was filed on 9th November 2020, which is about 12 days after the date of the judgment. It was therefore filed within the time provided under Rule 75 of the Court of Appeal Rules, 2010, then in force. It is not clear from the application and the averments in support why an application for the notice of appeal to be deemed as having been filed in time has been made.
9. The applicant avers that his Counsel applied for the proceedings, though he does not say when the proceedings were applied for, and whether the letter bespeaking the proceedings was copied to and served on the respondent's advocates on record. The proceedings were, however, supplied on 3rd February 2021, and there is a receipt to this effect attached to the affidavit in support of the application.
10. The present application was filed on 4th May 2022. The appeal was required to be filed within 60 days of the notice of appeal. The application for extension of time was therefore filed some 18 months from the date the notice of appeal was filed.
11. The question is whether the explanation offered for the delay in filing the present application is plausible. The applicant states in the grounds in support of the application that he lost touch with his Advocates then on record. That after 3rd February 2021, he lost his job; that he tried to file an application for stay in person, which application was dismissed. No evidence of the said application is annexed, nor is there an explanation offered as to why, if the proceedings were ready on 3rd February 2021, the record of appeal was not filed. Other than his averments that he lost his job and moved from his hometown to a place he does not name, there is no plausible reason advanced to explain the delay in filing the record of appeal within the time stipulated in the Rules.



12. A third factor to be considered in determining whether or not to exercise discretion in favour of a party is, possibly, the chances of the appeal succeeding. The appellant has not annexed a draft memorandum of appeal to his application, nor has he indicated in his affidavit what his grounds of appeal would be. He limits himself to averring that his appeal has high chances of success. Without an indication of what he intends to raise on appeal, this Court has no material on the basis of which it can gauge the possibility or otherwise of the success of his appeal
13. As for the prejudice likely to be suffered by the respondent, I note that the issue in contention related to a parcel of land registered in the name of the respondent's brother, which the appellant, a step-brother, was claiming to be entitled to. The respondent had been kept out of the said property by the objector. To allow the present application would enable the objector to keep the applicant from the parcel of land which the succession court found she was solely entitled to.
14. In the circumstances, I find no merit in the application dated 4th May 2022, and it is hereby dismissed. As the respondent did not file a response to the application, there shall be no order as to costs.

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

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

