



**Ng'ang'a v Muiruri (Civil Application E139 of 2022)
[2022] KECA 688 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 688 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E139 OF 2022
DK MUSINGA, JA
JULY 22, 2022**

BETWEEN

JOSEPH MUIRURI NG'ANG'A APPLICANT

AND

MARY WAITHIRA MUIRURI RESPONDENT

*(Being an application for extension of time to file an appeal out of time
against the Judgment and Decree of the High Court of Kenya at Nairobi (A. O.
Muchelule, J.) dated 5th February 2019 in H.C. Civil Case No. 41 of 2011. (O.S.))*

RULING

1. The applicant's Notice of Motion dated 26th April 2022 is for leave to file an appeal out of time. The applicant further prays that this Court deems the notice of appeal dated 18th February 2019 as properly filed; and that the memorandum of appeal annexed to the application be deemed as duly filed upon payment of the requisite court fees.
2. The application is grounded on the applicant's supporting affidavit in which he depones, inter alia, that upon delivery of the judgment he wishes to appeal from on 7th February 2019, he instructed the firm of M/S Kinyanjui, Kirimi & Company Advocates to lodge an appeal against the judgment; that his advocate filed a notice of appeal dated 18th February 2019; that the proceedings were ready for collection on 9th April 2019 and his advocates requested their clerk to collect them and prepare the record of appeal but the clerk failed to do so because he left employment before he executed the given instructions.
3. The applicant further states that his advocates informed him that upon preparation of the record of appeal they discovered that there were missing documents and as such they could not finish compiling the same; that the advocates wrote to the registry seeking to peruse the file and obtain the missing documents; that the court file could not be traced at the time and only managed to get the said



documents on 29th October 2021, after which they applied for a certificate of delay, which was made ready for collection on 8th April 2022.

4. The applicant therefore states that the delay in filing the record of appeal was due to factors beyond his control and he should not be made to suffer for the same; that the intended appeal is not frivolous as demonstrated by the attached draft memorandum of appeal; and that the applicant will continue to suffer irreparable prejudice, loss and damages unless this Court grants the orders sought and therefore urges this Court to allow the application.
5. On 24th June 2022 at 3.56 p.m. the respondent's advocates Ms Gichuki Kibathi & Company, were served with a hearing notice by way of an email notifying them that the application would be heard on 5th July 2022 and were required to file written submissions. That notwithstanding, the respondents neither filed a replying affidavit nor submissions. The application is therefore not opposed. That notwithstanding I shall determine it on its merits.
6. The principles that guide this Court in the determination of an application of this nature are well settled. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 this Court stated:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well stated 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.”
7. Although there was inordinate delay in filing the record of appeal, the delay has been well explained and I have no reason to doubt the applicant's averments. A perusal of the annexed draft memorandum of appeal reveals that the intended appeal is arguable. The dispute relates to a parcel of land and it is only just and reasonable that the applicant be granted an opportunity to exercise his constitutional right of appeal. The certificate of delay was issued on 8th April 2022 and the application was filed shortly thereafter.
8. In view of the foregoing, I am inclined to exercise my discretion in favour of the applicant, which I hereby do. Consequently, the applicant is granted leave to file the appeal out of time and the same should be filed within thirty (30) days from the date of this ruling. As the respondent did not file any document in opposition to this application, I make no orders as to costs.

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

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

