



REPUBLIC OF KENYA



KENYA LAW
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**Njuguna v Gathogo & 4 others (Civil Application
E303 of 2022) [2022] KECA 902 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 902 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E303 OF 2022**

DK MUSINGA, JA

JULY 22, 2022

BETWEEN

HANNA WANJIRU NJUGUNA APPLICANT

AND

AUSTIN RICHARD GATHOGO 1ST RESPONDENT

EDWARD ALLAN ROBINSON 2ND RESPONDENT

JOHN NJENGA GACHUCHU 3RD RESPONDENT

ELIZABETH WANJIKU 4TH RESPONDENT

SAMSON JUMA 5TH RESPONDENT

(Being an application for extension of time within which to file an appeal out of time against the Ruling of the Environment and Land Court (S. Okongo, J.) dated 12th October 2021 in E.L.C. No. 1302 of 2014 Formerly HCCC No. 5729 of 1990)

RULING

1. The applicant's Notice of Motion dated 19th April 2022 seeks an extension of time to enable the applicant file an appeal out of time against the ruling of the Environment and Land Court at Nairobi, ELC No. 1302 of 2014 delivered on 12th October 2021. The applicant also prays for stay of proceedings in the aforesaid case but such prayer cannot be granted by a single judge. This ruling shall therefore be limited to the question of extension of time.
2. In the affidavit in support of the application, the applicant, said to be 84 years old, states that she was sick when the ruling was delivered by the trial court and was therefore unable to see her advocate in time so that she could be explained the contents of the ruling and give him further instructions; that upon meeting her advocate early this year, she instructed him to institute an appeal as she was dissatisfied with the said ruling; that the advocate informed her that he could not do so without leave of the court;



that she stands to suffer substantial and irreparable harm if the orders sought are not granted; that the intended appeal has high chances of success as demonstrated in an annexed draft memorandum of appeal; and that in her view, the delay in filing this application is not inordinate.

3. The respondents oppose the application and the 1st respondent has filed a replying affidavit stating, inter alia, that his advocate, Mr. J. P. Machira, has informed him that he was not served with the applicant's application and that he learnt of the same when he was served with an email from the Registrar of this Court on 24th June 2022 directing the parties on how the application was to be heard; that thereafter his advocate wrote to the applicant's advocate indicating that he had not been served with the application, upon which the applicants' advocate effected the service; that if any notice of appeal was filed it has not been served upon the respondents' advocates; that there is no evidence that the applicant was sick as alleged; and that there has been inordinate delay in filing this application.
4. The respondent further stated that this is a very old suit, initially having been filed way back on 12th November 1990 as HCCC NO. 5729 of 1990 before it was transferred to the Environment and Land Court (ELC) ELC Case No. 1302 of 2014; that the 1st respondent has been in occupation and possession of the suit property since 1986 to date; that the suit before the ELC is part-heard and on its tail end and the respondents will suffer considerable prejudice if the applicant will begin meddling with the suit as she is trying to do; that the applicant's application dated 10th June 2020 seeking, inter alia, to be joined in the suit as the 5th defendant and the Chief Land Registrar as the 6th defendant was dismissed for very good and varied reasons; that the intended appeal is not arguable and has no chances of success; and that the applicant has not obtained leave of this Court to appeal against the said decision and neither has she applied for the proceedings for purposes of an appeal. For those reasons, the respondents urged this Court to dismiss the application.
5. In the notice that was served upon the advocates for the parties herein on 24th June 2022, it was clearly stated that the application would be heard on 5th July 2022 by way of written submissions only and the parties were required to file and exchange written submissions before the hearing date. None of the parties did so. I will therefore proceed to determine the application on the basis of the affidavits on record.
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 delivered itself as follows: -

“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. The delay in filing this application is six months and 7 days or thereabout, which is inordinate. That delay has not been sufficiently explained. Although the applicant states that she was indisposed at the time of the delivery of the impugned ruling, no evidence by way of treatment notes or admission to a hospital or any other documentary evidence has been availed. Secondly, it has not been shown that any effort was made by the applicant or her family members to contact the applicant's advocate, either before or immediately after the delivery of the impugned ruling. There is equally no indication as to whether the applicant's advocate contacted the applicant or her family members to seek instructions as to whether to appeal against the ruling or not.



8. Regarding the chances of success of the intended appeal, although I have perused the draft memorandum of appeal, I am skeptical about the chances of success of the intended appeal, having perused the well-reasoned impugned ruling. As rightly stated by the respondents, the dispute over the suit property is very old, dating back to 1990. The trial judge was not persuaded that the applicant was not aware of the proceedings until 10th June 2020 when she sought to be joined as a defendant in the said suit.
9. Lastly, I think it would be quite prejudicial to the 1st respondent, and possibly the other respondents, if the finalization of the suit before the trial court is delayed any further by allowing this application.
10. All in all, the application dated 19th April 2022 is lacking in merit and I hereby dismiss it with costs to the respondents.

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

I certify that this is a true copy of the original

Signed

Deputy Registrar

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

