



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Macharia & 5 others (Civil Application E075 of 2021)
[2022] KECA 969 (KLR) (26 August 2022) (Ruling)**

Neutral citation: [2022] KECA 969 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E075 OF 2021
KI LAIBUTA, JA
AUGUST 26, 2022**

BETWEEN

BENINA WATHUMA KAMAU APPLICANT

AND

NAHASHON GICHANGI MACHARIA 1ST RESPONDENT

JOHN GATHOGO KIRIKO 2ND RESPONDENT

JOHN RICHARD GATHONGO 3RD RESPONDENT

EDWARD NGINYI MWANGI 4TH RESPONDENT

ESTHER NJOKI NGINYI 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

(Being an application for extension of time to file and serve a notice of appeal and record of appeal out of time from the Judgment of the Environment and Land Court of Kenya at Murang'a (J. G. Kemei, J.) delivered on 11th March 2021 in Environment and Land Court Case No. 418B of 2017)

RULING

1. By a Notice of Motion dated September 3, 2021 and made under Rules 4, 39, 42, and 43 of the [Court of Appeal Rules](#), the Applicant (Benina Wathuma Kamau) seeks orders that: time be enlarged to file the annexed notice of appeal from the judgment of J. G. Kemei, J. in ELC No. 418B of 2017; the annexed Notice of Appeal be deemed as duly filed; leave be granted to file her record of appeal out of time; and that the costs of the application be provided for.
2. The Motion is supported by the applicant's affidavit sworn on September 2, 2021 and is made on the following grounds set out on the face of the Motion, namely that: the impugned judgment was



delivered on March 11, 2021; “due to the COVID-19 situation, it has been difficult to get funds for the appeal;” it has been very difficult economically, hence the delay; justice will be served if the application is allowed; no prejudice will be occasioned if the application is allowed, as the appeal will be determined on merit; the delay has been inordinate; and that the land is currently possessed and registered in the names of the respondents and hence allowing the application, the respondents will not be prejudiced. She prays that the same be allowed.

3. The applicant’s supporting affidavit restates the grounds aforesaid and adds: that at the time of the judgment, her advocates, though instructed to appeal, declined to do so, and the period lapsed; that if her application is not allowed, she will be prejudiced, as she would lose her property and, if given a chance, she can ventilate the same on appeal; and that if the application is not granted, she would suffer irreparably; and that the intended appeal would be rendered nugatory.
4. In response, the 5th respondent (Esther Njoki Nginyi) filed a replying affidavit sworn on October 15, 2021 on her own behalf and on behalf of the 4th respondent (Edward Nginyi Mwangi, her son) stating: that the applicant was being represented by the firm of M/s. Mwaniki Warima & Co. in the superior court in Murang’a ELC Case No. 418B of 2017 from its inception to conclusion when the judgment dated 11th March 2021 dismissed his case; that in compliance with Rule 75(1) and (2), now Rule 77(1) and (2) of the Court of appeal Rules, the applicant, through her advocates on record duly filed a notice of appeal dated March 17, 2021, which Notice was lodged and signed by the Deputy Registrar ELC at Murang’a on March 18, 2021; that, however, the applicant did not file the record of appeal within the statutory period of 60 days as required under Rule 82 (now Rule 84) of this Court’s Rules; that the Notice of Appeal filed on March 17, 2021
5. Learned counsel for the applicant having filed a notice of appeal on her behalf in good time, her application for orders to enlarge time to file the Notice is unwarranted. That leaves me with the remaining issue as to whether the applicant merits an order for extension of time to file the record of appeal.
6. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to “... 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 ...,” on such terms as it thinks just.
7. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that “the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”
8. The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR also lends clarity to the issue of the Court’s jurisdiction in determination of applications made under Rule 4. In principle, the discretion is unfettered. In its celebrated decision, the Court observed:

“The exercise of this Court’s discretion under Rule 4 has followed a well- beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is



granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”

9. The Applicant’s prayer for extension of time to file the record of appeal is dependent on my findings on the following factors: whether the intended appeal is arguable with a possibility of success; the length of the delay, and whether such delay is inordinate; the reasons for the delay in filing the record of appeal; and whether the Respondent would be unduly prejudiced by the extension.
10. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. In her undated draft Memorandum of Appeal, the applicant advances 9 grounds on which her intended appeal is anchored. According to her, the learned Judge erred in law and in fact: in not considering the evidence of the Land Registrar; by dismissing the applicant’s evidence, and by disallowing the applicant’s evidential documents; by applying the doctrine of innocent purchaser for value; in “testifying on behalf of the 1st and 2nd [respondents];” in ignoring section 28 of the *Land Registration Act*; in ignoring the evidence of the 3rd and 4th [respondents]; in upholding a fraudulent title; and in dismissing the applicant’s suit without due regard to evidence.
11. Even though this is not the only basis for consideration, the grounds set out in the Applicant’s draft Memorandum of Appeal point to a reasonable conclusion that the intended appeal is arguable with the possibility of success. In *Joseph Wanjohi Njau v Benson Maina Kabau*, Civil Application No. 97 of 2012 (Unreported), Hon. Mr. Justice Kathurima M’Inoti held that “the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court.”
12. In *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, the Court held that:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”
13. It is noteworthy, though, that demonstration by an applicant that he or she has an arguable appeal is not the only requirement or qualification for extension of time under Rule 4 to file an intended appeal. It is merely the first step that must be followed by satisfaction of the other requirements relating to the period of delay; the reasons for the delay; whether such delay is inordinate; and whether the adverse party would be prejudiced by grant of the orders sought under the Rule. In other words, is it too late in the day to approach the Court under Rule 4? Has the applicant explained to the satisfaction of the Court the reason for the delay in filing the intended appeal?
14. I take note of the fact that the impugned judgment was delivered on March 11, 2021. The applicant filed her Motion seeking extension of time to file her record of appeal on 3rd September 2021. The application comes approximately 6 months later. She blames the delay on her advocates and on the financial hardships occasioned by the prevailing COVID-19 pandemic that led to difficult economic conditions. Yet, nowhere in her supporting affidavit or other material before me does the applicant attempt to explain her failure to apply for and obtain certified copies of the proceedings in the ELC to facilitate preparation of the record of appeal.
15. It is over 16 months since her counsel lodged the notice of appeal and, yet, the applicant has taken no steps to institute the appeal in compliance with the requirements of Rule 84(1) of this Court’s Rules, a delay which, unless excusable for good reason, is inordinate. Accordingly, her conduct or inaction



for that long a period is inexcusable. In the circumstances, this Court cannot come to her aid. To hold otherwise would be to reward an indolent litigant who sat on her rights and, as an afterthought, now seeks to resurrect a dispute long dead and buried to the prejudice of those who peaceably embraced the judgment of the learned judge and moved on. Moreover, an attempt to plead financial difficulties flies in the face of the extant provisions for appeals by paupers, and of the numerous legal aid schemes of which I take judicial notice.

16. On the authority of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR, I find that the applicant's indolence counts and, in the absence of any reasonable excuse, works to the respondents' prejudice to the undesirable effect of unfairly delaying or denying them the fruits of the impugned judgment.
17. With regard to the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that "... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable." It is only then would consideration as to whether the intended appeal is arguable would be worthy of the Court's attention in exercise of its discretion under Rule 4.
18. In *Abdul Aziz Ngoma v Mungai Mathayo* [1976] Kenya LR p.61-2, this Court had this to say on the matter:

"We would like to state once again that this Court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered."
19. The applicant has not given any plausible and satisfactory explanation for the delay in filing her appeal. To my mind, her application comes as an afterthought, and there is no doubt in my mind that the Respondents would invariably suffer undue prejudice by extension of time to lodge the intended appeal so long a time after delivery of the impugned judgment. Indeed, this Court has on numerous occasions pronounced itself on the principle that litigation must come to an end. In view of the foregoing, I find that the Applicant's Notice of Motion dated September 3, 2021 lacks merit. It fails and is hereby dismissed with costs to the respondents.

DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

