



**Mucwa v Makembo & 3 others (Civil Application 87 of 2020)
[2022] KECA 1006 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1006 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 87 OF 2020
K M'INOTI, JA
SEPTEMBER 23, 2022**

BETWEEN

MUTIRIA KARUMBAI MUCWA APPLICANT

AND

JAMES NJAGI MAKEMBO 1ST RESPONDENT

COUNTY COMMISSIONER, THARAKA SUB-COUNTY 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

(Application for extension of time to file notice and record of appeal out of time against the Judgment and Decree of the Environment & Land Court of Kenya at Chuka, (Njoroge, J.) dated 18th December 2018 in ELCC No. 188 of 2017)

RULING

1. The applicant's omnibus motion on notice dated September 19, 2020 seeks, at the same time, extension of time to lodge an appeal against the judgment and decree of the Environment and Land Court at Chuka (Njoroge, J.) dated December 18, 2018 and stay of proceedings as well as stay of execution of the same judgment. This Court has stated time and again that an application for extension of time and an application for stay of execution or stay of proceedings are two separate and distinct applications. The former is heard by a single bench whilst the latter is for the full court. The latter application cannot be competently made before the former has been heard and granted. (See *Abdulrazak Rageh Haji v. Mabadho Abdulrazak Adichare*, CA No. E030 of 2020), I shall accordingly treat what is before me as only the application for extension of time.
2. The judgment that the applicant seeks to appeal was delivered on December 18, 2018. The application for extension of time was made on September 18, 2020, three months short of a delay of two full



years. The delay in making the application is explained on the basis that the applicant is elderly and has been ailing and unable to instruct counsel; that he lacked financial resources; that previous advocates were not able to obtain certified copies of the judgment and the proceedings; and that mistake of counsel should not be visited upon the applicant. The applicant adds that he is in occupation of the suit property, namely LR No Rukurini/133 and that his intended appeal is meritorious.

3. These averments are repeated in the applicant's written submissions dated July 25, 2022 where he properly, albeit belatedly, abandoned the prayers for stay of execution and proceedings. The applicant adds that the intended appeal is not frivolous and that the respondent will not suffer any prejudice if time is extended. He relies on the rulings in *Visbnu Stone Suppliers Co Ltd v. RSR Stone (2006) Ltd* [2020] eKLR and *George Mwenda Mutburi v. Mama Day Nurse & Primary School Ltd* [2014] eKLR regarding the principles that guide the Court in an application for extension of time.
4. The 1st respondent opposes the application on the basis of his replying affidavit sworn on July 26, 2022 and written submissions dated the same date. The 1st respondent contends that he has been the registered owner and in occupation of the suit property since 2017; that the applicant has not shown cause to justify extension of time; that being neighbours he is aware that the applicant has not had any serious illness; that the delay involved is inordinately long; and that the applicant stands to suffer no prejudice because he is not in occupation of the suit property.
5. The other respondents, although duly served with the hearing notice, did not file any replying affidavits or submissions.
6. I have carefully considered this application. The principles which guide the Court on extension of time are well settled. In *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018] eKLR, they were stated as follows:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

7. The judgment in question was delivered on December 18, 2018. The notice of appeal was filed on December 31, 2018, which was within time. The applicant had earlier on December 19, 2018, also within time, applied for certified copies of the proceedings. By dint of rule 82 of the *Court of Appeal Rules*, the sixty days for filing the record of appeal excludes the period which the registrar certifies to have been needed to prepare and avail the proceedings. The applicant does not indicate when his advocates received the proceedings, but for the applicant to apply for extension of time, he must be in possession of the proceedings. Be that as it may, the application for extension of time was made on September 18, 2020, a few months short of two full years from the date of the judgment. That delay is inordinate and must be explained if the court is to exercise its discretion in the applicant's favour.
8. The applicant attributes the delay to his illness, which the 1st respondent, a neighbour, strongly disputes. All the evidence that the applicant had presented regarding his alleged illness is a noted dated September 17, 2020 from Tharaka Nithi medical superintendent indicating that the applicant is hypertensive. The applicant also avers that financial constraints prevented him from hiring an advocate.



However, the record loudly refutes that assertion. The notice of appeal was filed and the application for proceedings made by his advocates, Messrs Nyamu Nyagah & Company Advocates, who presumably represented him before the trial court. On October 22, 2019, the applicant, who claims to have had financial constraints, appointed another firm of advocates, M/s Gichunge Muthuri & Company Advocates, not to replace the first advocates but to act alongside them.

9. A person who can afford to hire two separate firms of advocates to pursue the same appeal cannot pretend to lack resources to hire an advocate to follow his appeal.
10. The first advocates, who are still on record, have not explained why they did not file the appeal on time. In these circumstances, other than plain indolence, I do not perceive what, even remotely, may be described as mistake by counsel. I am satisfied that the reason advanced by the applicant to explain the delay are not candid or genuine and that they amount to no explanation at all. As the Supreme Court held in Nicholas Kiptoo arap Korir Salat v. IEBC & 7 others [2014] eKLR, extension of time is not a right of a party but is a discretionary remedy that is only available to a deserving party. Accordingly, an applicant is obliged to place before the Court some plausible material explaining the reason for failure to comply with the time prescribed by the rules.
11. The 1st respondent also submits that the applicant is not on the suit premises and that he is the one who stands to suffer more prejudice. The applicant has not controverted this submission by the 1st respondent but has elected instead to maintain studious silence.
12. Taking all the foregoing into account, I find no merit in this application and dismiss the same with costs to the 1st respondent. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

