



**Muhangani & another v Mwadziwe & another (Civil Application  
E019 of 2022) [2022] KECA 1126 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1126 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E019 OF 2022**

**JW LESSIT, JA**

**OCTOBER 21, 2022**

**BETWEEN**

**WYCLIFF JIRONGO MUHANGANI ..... 1<sup>ST</sup> APPLICANT**

**FRANCIS MUJUMBA ALUHA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**RAYMOND GONZI MWADZIWE ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPHINE NYEVU MWADZIWE ..... 2<sup>ND</sup> RESPONDENT**

*(An application to file a notice, memorandum and record of appeal out of time for an intended appeal against the judgment of the Environment and Land Court at Mombasa, (Matheka, J) delivered on 18th January 2022 In ELC No. 232 of 2011)*

**RULING**

1. The application has been brought pursuant to Rule 4 of the *Court of Appeal Rules*. The applicant seeks that the time limited for the applicant to file and serve the respondents with the notice of Appeal, the Memorandum of Appeal and Record of Appeal be enlarged and or extended to allow the filing and serving of the same within such time as the court shall deem fit. The applicant also seeks costs.
2. The grounds for the application are on the face of the Motion and in the supporting affidavit both dated April 4, 2022 sworn by the applicant. It is stated that the applicant's advocate Mr. Gathara Mahindia sent the Notice of Appeal by email to the Court registry on February 1, 2022 within period stipulated by Rule 77 of the Rules but got no response. Follow-up on March 18, 2022 yielded no fruit. That up to the time they made this application on April 4, 2022 no response had been received. Annexed to the applicant's affidavit is a copy of the Notice of Appeal, the forwarding email to the Court, the undated draft Memorandum of Appeal and the impugned judgment marked WJ 1 to WJ 4.



3. The respondents have opposed the application through a replying affidavit sworn by the 1<sup>st</sup> respondent and dated June 6, 2022. The replying affidavit was rehashed in the written submissions of Mr. Stephen Oddiaga for the respondents. It is contended that the matter has been pending in court since 1997; that the judgment was delivered on the January 18, 2022 and so the Notice of Appeal ought to have been filed by January 31, 2022. It was urged further that having sent the Notice of Appeal to court by email on February 1, 2022, no explanation was given by the applicant why no follow-up was made after the initial one of 18<sup>th</sup> of March 2022. Counsel relied on the case of *Kany Zabarya & another v Shalom Levi* C Application No 80 of 2018 which sets out the principles that guide the exercise of discretion to extend time and provides that sufficient reason should be exhibited.
4. I have considered this application, the affidavits sworn by the parties and the submissions both written and oral in support of the respective sides. The principles that guide the exercise of discretion under Rule 4 of the Rules, in an application of this nature have been alluded to by both advocates, and set out succinctly in the case cited by counsel for the respondent. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997 where the court stated;

“It is now settled that the decision whether 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 reasons 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.”
5. The court has to consider the length of the delay, the reasons given for the delay, the prejudice the respondent may suffer if the order is granted and any other factor, for instance public interest. The applicants have shown that they sent the Notice of Appeal by email to the court for assessment of court fees on 1<sup>st</sup> February 2022. The email is attached to the applicants’ affidavit together with the Notice. It is not contested either that as of 1<sup>st</sup> February when the Notice was sent to court, it was within the time limited under Rule 77 of the Rules[2022]. There was one follow-up with the court registry.
6. The respondents contend that there is no sufficient cause shown as between February 1, 2022 and March 18, 2022 no follow-up was demonstrated. It is my view that the applicant demonstrated that they were not indolent but did what they could to ensure compliance with the Rules. The Notice was sent in time and follow- up undertaken. Eventually when this application was filed, the delay involved is of two months, caused in part by the lack of response by the court.
7. The court should act judiciously and balance the interests of both parties. On the one hand the applicant has a right to appeal, while the respondents have a right to enjoy the fruits of their judgment. Striking a balance between the two interests, I find that in view of the explanation given for the delay and the fact there has not been inordinate delay or indolence on the applicants’ part, the applicants should be given an opportunity to pursue their appeal.
8. After carefully considering this application, I find that the same has merit and should be allowed. In the result, the application dated April 4, 2022 is allowed in the following terms:
  1. The applicant has 30 days to file and serve the Notice of Appeal, Memorandum of Appeal and the Record of Appeal from today’s date.



2. The registry will thereafter set a date for case management directions, and fix dates for the hearing of the appeal.
3. The costs shall abide the outcome of the appeal

**DELIVERED AND DATED THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022**

**J. LESIIT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**

