



REPUBLIC OF KENYA



**KENYA LAW**  
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**Thoya v Mwaro (Civil Application 70 of 2016)  
[2022] KECA 1127 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1127 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION 70 OF 2016**

**JW LESSIT, JA**

**OCTOBER 21, 2022**

**BETWEEN**

**KARISA KAZUNGU THOYA ..... APPELLANT**

**AND**

**YAA BAYA MWARO ..... RESPONDENT**

*(An application to file a notice and record of appeal out of time for the hearing of an intended appeal against the judgment of the judgment of the Environment and Land Court at Malindi, (Angote, J) delivered on 27th September 2013 In ELC Land Case No. 96 of 2012)*

**RULING**

1. This is a Notice of Motion dated 13<sup>th</sup> December 2016, brought pursuant to Rule 4 of the Court of Appeal Rules [herein after Rules]. It seeks the following prayers:
  - 1). It seeks extension of time to file a notice of appeal and record of appeal out of time against the judgment of the Environment and Land Court in ELC Land Case No. 96 of 2012, delivered on 27<sup>th</sup> September 2013.
  - 2). That the annexed draft notice of appeal be deemed duly filed subject only to the payment of requisite fees.
  - 3). The annexed draft Record of appeal be deemed duly file subject only to payment of requisite fees.
  - 4). That the costs be in the cause.
2. The application is supported by the grounds on the face of the motion and reiterated in the supporting affidavit sworn by Mr. Gachara Kimani, counsel on record for the applicant. It is stated that the delay in filing the intended appeal within the statutory timeframes was as a result of the court file going missing



from the court registry, and that any apparent omission occasioned by counsel should not be visited on his client.

3. On 15<sup>th</sup> June 2022, this Court recorded a consent order for the substitution of parties. The submissions annexed to this application by both the applicant and the respondent relate to an application for substitution of parties. There are no other submissions on record. On the face of it the application is unopposed. In exercising its discretion under Rule 4 of the Rules, the court should do act 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 well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant the extension of time are first the length of the delay, secondly the reason given for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly the degree of the prejudice to the respondent if the application is granted.”

4. Applying those principles to the matter at hand, it is evident that this file has had quite a few challenges. The file missing for a period of time. The substitution of the parties suggests that the original parties must be deceased necessitating their substitution. It is also clear and counsel for the applicant alluded to it in his affidavit in support of the application that the counsel to the applicant blundered failing to file a notice of appeal within the requisite period. As Ringera, JA, [as he then was] observed in *Ecng Vs. Fnn*, Civil Application No. NAI 294 of 2013,

‘A blunder on a point of law can be a mistake. The door of justice is not closed because a person of experience who ought to have known better has made a mistake. The Court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates’.

5. Given the unique circumstances of this application, I find that the interests of substantive justice dictates that the application be allowed to give the applicant a chance to ventilate his appeal.

5. In the result the application dated 13<sup>th</sup> December, 2016 is granted in terms of prayer 2) and 3) in the following terms:

- a) The draft notice of appeal be deemed duly filed subject to payment of the requisite fees
- b) The draft record of appeal be deemed duly filed subject to payment of requisite fees.
- c) The applicant to pay the requisite fees for filing of the notice of appeal and the record of appeal within 30 days of today’s date.
- d). The costs shall abide the outcome of the appeal.

Those are my orders.

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

**J. LESIIT, JA**

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**JUDGE OF APPEAL**

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



*Signed*

**DEPUTY REGISTRAR**

