



REPUBLIC OF KENYA



KENYA LAW
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**Gichoya v Kibata & 2 others (Civil Application 145 of 2019)
[2022] KECA 1432 (KLR) (14 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1432 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 145 OF 2019
W KARANJA, JA
OCTOBER 14, 2022**

BETWEEN

JOSEPH M GICHOYA APPLICANT

AND

BENSON MURIUKI KIBATA 1ST RESPONDENT

GIKIRI M NJOROGE 2ND RESPONDENT

GIKIRI FRANCIS GIKIRI 3RD RESPONDENT

(Application under Rule 4 of the Court of Appeal Rules 2010 seeking extension of time within which to file an appeal from the ruling of the ELC Court at Kerugoya (E,C.Cheronno,J) dated 14th June 2019 In ELC case no. 7 of 2016)

RULING

1. Before me is a notice of motion dated September 6, 2019 brought under rule 4 of the [Court of Appeal Rules](#). The applicant seeks leave and or extension of time within which to file and serve an appeal out of time in respect of a ruling of the Environment and Land Court at Kerugoya (ELC) (EC Cheronno) on the June 14, 2019. The application is premised on the grounds that the ruling was entered against the applicant to the effect that the applicant herein being an agent of the 2nd and 3rd respondents had committed an act of trespass, the applicant and the 3rd respondent were cited for contempt of the orders of the ELC issued on the June 16, 2017 and ordered to pay a fine of Ksh 100,000 each or six (6) months imprisonment in default.
2. Being aggrieved by the entire decision the applicant lodged a notice of appeal on the June 28, 2019 and served the same upon the 1st respondent's counsel and requested for typed proceedings on the June 28, 2019 which were ready for collection on September 2, 2019, leading to a delay in filing the record. The applicant says that it is in the interest of justice that the application be allowed.



3. The application is supported by the applicant's affidavit sworn on September 6, 2019, which reiterates the grounds in support of the motion and states further, that by the time of filing the appeal at the ELC the applicant was already in occupation of land parcel number Baragwe Thumaita/2813 (the suit land) having purchased it from the 3rd respondent in 2005. He deposed that he was not made a party to the suit and neither was he a party in the contempt of court proceedings subject of this appeal; that the delay is not inordinate; the intended appeal is arguable with a high chance of success and that he is desirous to appeal against the said decision.
4. The respondents have not filed any response but it is worth noting that a hearing notice was duly served upon the parties via email on the September 12, 2022.
5. In support of his application the applicant filed submissions dated July 18, 2022 in which he submits that he has met the threshold for enlargement of time to appeal out of time and that this court's power is discretionary in determining such applications, and urges the court to exercise the said discretion in his favour.
6. The principles that guide the court in the exercise of its discretion in dealing with applications for extension of time are well settled.
7. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999]2EA 231, these guidelines were enunciated as follows:-

"it is now 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 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."
8. See also *Mwangi v Kenya Airways Ltd* [2003] eKLR. On the length of the delay, the applicant submits that a delay of 9 days was not inordinate the last day for filing having been the August 28, 2019. The delay was occasioned when the proceedings were supplied on the September 2, 2019, though the same were signed on the August 19, 2019, which reason is excusable. On his appeal having good chances of success, the applicant maintains that the intended appeal is arguable for the reason that he was not served with the court order having not been a party in the proceedings; and that the respondents shall not suffer any prejudice in the event the application is allowed.
9. I have considered the application along with the guidelines set out above. The discretion that I am called to exercise in the determination of this application is provided under rule 4 of the [Court of Appeal Rules](#), which is wide and unfettered, with the only caution that the said discretion must be exercised judicially and not whimsically, considering also any peculiar circumstances of each case.
See also *Njuguna v Magichu & 73 others* [2003] KLR 507.
10. The applicant needs to demonstrate the considerations enumerated above. The ruling appealed against was delivered on the June 14, 2019 and the applicant lodged a notice of appeal on June 28, 2019. The delay involved in this matter is only 9 days. This delay cannot be said to be inordinate by any standards. The reason for the delay is well explained.
11. I would, however, entreat counsel to familiarise himself with the [Court of Appeal Rules](#), because had he complied with former rule 82 of the [Court of Appeal Rules 2010](#), presently rule 84, he would have



been covered under the proviso thereto and this application would not have been necessary and the time spent on the application would have been expended towards more beneficial pursuits.

12. That said, I also note that the application, though served was not opposed. Accordingly, I allow it with no order as to costs as it is not opposed.
13. I order that the applicant files and serves the record of appeal within 14 days from the date hereof, failing which the orders given herein will automatically stand vacated.

DATED AND DELIVERED AT NYERI THIS 14TH DAY OF OCTOBER 2022.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

