



Kamau & another (Suing as the administrators & personal representative of the Estate of Kamau Munge Ngure) v Munene & 3 others (Civil Appeal (Application) 92 of 2020) [2022] KECA 1435 (KLR) (14 October 2022) (Ruling)

Neutral citation: [2022] KECA 1435 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 92 OF 2020
W KARANJA, JA
OCTOBER 14, 2022**

BETWEEN

WANJOHI KAMAU 1ST APPLICANT

NJOGU KAMAU 2ND APPLICANT

**SUING AS THE ADMINISTRATORS & PERSONAL REPRESENTATIVE OF
THE ESTATE OF KAMAU MUNGE NGURE**

AND

PAUL KANGANGI MUNENE 1ST RESPONDENT

**BETH CATHERINE W KANGANGI (SUING AS ADMINISTRATOR OF THE
ESTATE OF KANGANGI NGUNY) 2ND RESPONDENT**

DISTRICT LAND REGISTRAR, KIRINYAGA REGISTRY ... 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

(Application under Rule 4 of the COA, 2010 seeking extension of time within which to file an appeal from the decision of the ELC Court at Kerugoya (E.C.Cheronno, J) dated 22nd November 2019 in ELC case no. 138 of 2017)

RULING

1. Before me is a Notice of motion dated March 23, 2020 brought under “Rule 7 of the *Appellate Jurisdiction Act*” (non existent) and Rule 4 of the *Court of Appeal Rules*. The applicants seek enlargement of time within which to file and serve the Notice of appeal and memorandum of appeal in respect of a ruling of the Environment and Land Court at Kerugoya (EC Cheronno J) on the November 22, 2019. The application is premised on grounds that judgment was entered against the applicants in which the preliminary objection dated April 24, 2018 was found to have merit and the suit was



struck out for being res-judicata as there were several decisions by the courts relating to the same parcel of land, same parties or parties claiming through them and the same issues which had directly and or substantially been conclusively determined in previous litigation. All those cases were cited before the learned Judge who confirmed that the issues raised had been determined either between the parties before the court or their parents, and their claims to the suit property had been dismissed.

2. The applicants say they are desirous of appealing against the decision saying they were misled or misadvised by their previous counsel resulting in various failed suits and that the intended appeal is arguable with a high probability of success. Further, that the applicants stand to suffer substantial loss and that the respondents shall not be prejudiced in any way in the event the application is allowed.
3. The application is supported by the affidavit of Njogu Kamau, the 2nd respondent which affidavit merely reiterates the grounds on the face of the motion and he avers further, that the former suits were not heard on merit and they were dismissed on procedural technicalities and that the justice principle in the intended appeal supersedes the need for a finality of litigation, and that it is in the interest of justice that the court exercises its discretion in their favour.
4. The application is opposed by the 2nd respondent through her replying affidavit sworn on September 19, 2022. She avers that the applicant has not met the legal threshold for granting of the orders sought as required under Rule 4 of this [Court's rules](#) and that the application has been filed by a stranger violating rule 23 of this [court's rules](#). Further that the applicant has failed to explain the reason for the long delay in filing and serving the appeal against the ruling which was delivered on November 22, 2019. It is further averred that the applicant has failed to demonstrate that the intended appeal is arguable and that this application is an afterthought having failed to annex the letter requesting for typed proceedings. Accordingly, she prays that the application be dismissed.
5. The applicant submits that the delay in lodging a Notice of appeal was inadvertent since they failed to receive proper advice from their former advocate on record.
6. On substantial loss, the applicants submit that eviction may arise at any time if they are not granted the order and that the intended appeal will be rendered nugatory. They therefore urge the Court to exercise its discretion in their favour and accord them an opportunity to be heard on appeal and that the intended appeal is arguable. The applicants have placed reliance on the decision in [Vishva Stone Suppliers Company Limited v RSR Stone\[2006\]Limited](#) [2020] eKLR for this proposition.

The respondents did not file any written submissions.

7. Under Rule 4 of this [Court's Rules](#) the court has unfettered discretion to extend time where a party seeks extension of time to file an appeal out of time. Like in all cases where the Court is called upon to exercise its discretion, such discretion must be exercised judicially and not whimsically. The factors to consider however have not been provided by this rule in applications of this nature but this Court has over the years devised appropriate principles to guide it in this regard. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999]2EA 231, the Court laid down the parameters to be followed 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.’



See also *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, civil application no 190 of 2019.

8. For this application to succeed, the applicants need to demonstrate the considerations listed above. The ruling in the ELC was delivered on the February 22, 2019 and they were required to lodge the Notice of appeal within 14 days which they failed to do. The instant application is dated March 23, 2020 and the same was filed in court on the October 14, 2020. This is a delay of almost 20 months from the date of ruling. In my view, this delay is inordinate. There is not the slightest attempt to explain this delay. All the applicants are saying is that they were misled to file a multiplicity of suits in respect of the same subject matter, an exercise that culminated in the dismissal of their suit vide the Ruling which is the subject of the intended appeal. This is however, neither here nor there as reasons for filing afresh matters that have already been determined do not mitigate or otherwise excuse violation of the *res judicata* rule.
9. I have read the impugned ruling and also the judgment of Boaz Olao, J who found a similar suit *res judicata* and I am not persuaded that the intended appeal will see the light of day in this Court on appeal. It is also not correct to say that the respondents will not be prejudiced if the leave sought is granted. The matter has been litigated since 1970s and the respondents have to keep defending the suits thus unnecessarily expending time and other resources that could be applied towards more fruitful or beneficial pursuits. That is prejudice by any standards.
10. The upshot of the above analysis is that I decline to exercise my discretion in favour of the applicants, and dismiss the application dated March 23, 2020 with costs to the 2nd respondent.

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

