



REPUBLIC OF KENYA



KENYA LAW
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**Kori & 2 others v Munene & 3 others (Civil Application
143 of 2019) [2022] KECA 1434 (KLR) (14 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1434 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 143 OF 2019
W KARANJA, JA
OCTOBER 14, 2022**

BETWEEN

**BEATRICE NJOKI KORI 1ST APPLICANT
REGINA WANJIKU KORI 2ND APPLICANT
PRISCILLA WAMWARWA KORI 3RD APPLICANT**

AND

**EDWARD MUNENE 1ST RESPONDENT
JOSEPHINE WANJIKU NYAGA 2ND RESPONDENT
REGISTRAR OF LANDS, KIRINYAGA COUNTY 3RD RESPONDENT
HON.ATTORNEY GENERAL 4TH RESPONDENT**

(Application under Rule 4 of the COA, 2010 seeking extension of time within which to file and serve a notice and appeal from the decision of the ELC Court at Kerugoya (E.C. Cherono, J) dated 28th June 2019 in ELC case no. 20 of 2016(O.S))

RULING

1. The Notice of motion before me is in the nature of what this Court has on various occasions referred to as “Mongrel” application. It is dated September 2, 2019 and is expressed to be brought under rule 4 and 5(2)(b) of the Court of Appeal rules. The applicant seeks the leave of this Court to act in person; extension of time to file and serve the Notice of appeal and the Record of appeal out of time in respect of a ruling of the Environment and Land Court at Kerugoya (E.C. Cherono, J) delivered on June 28, 2019 and a temporary injunction restraining the respondents, their agents and servants from transferring, leasing, charging or disposing of land parcel No. Baragwe/Guama/1853 pending the hearing and determination of this application and the intended appeal. As it was drafted by a party in person, I will not say much about it.



2. Sitting as a single Judge, the only prayers that I have jurisdiction to entertain is the order to extend time for the applicant Beatrice Njoki Karoli to serve the Notice of appeal out of time (prayer No. 3); and prayer No. 4 which is a prayer that the applicants be granted leave to file and serve the record of Appeal out of time. The prayer that the applicants be allowed to act in person is misconceived as all an applicant/appellant needs to do is file a notice to appear in person and she does not need permission from the Court to do so.
3. The application is premised on the grounds that the ruling was entered against the applicants by upholding the 1st respondent's preliminary objection; their suit was found to be res-judicata and hence it was dismissed with costs to the respondents; that they were aggrieved by the entire decision and lodged a Notice of appeal dated on July 16, 2019, but time within which to file a record had lapsed. They say that the intended appeal is arguable with high chances of success and that it had been filed within a reasonable time and it is in the interest of justice that the application be allowed since the respondents stand to suffer no prejudice.
4. The application is supported by the affidavit of Beatrice Njoki Kori, the 1st applicant which affidavit merely reiterates the grounds in support of the motion. It states further that they intend to act in person; the notice was to be filed by 11th July 2019; the suit property risks to be transferred, charged or leased to third parties in the absence of an injunction. Their intended appeal is arguable with a high chance of success and that the suit property was gifted to them by their father.
5. The respondents have not filed any response in opposition to the application. In support of their application, the applicants have filed written submissions. They submit that under section 3A of the *Civil Procedure Act* and rule 4 of this Court's Rules, this Court has inherent, immense and considerable power to make such orders as may be necessary for the ends of justice and nothing in the Act can affect this power, all they are asking from the court is to have their case heard on merit. They place reliance on the case *Vishva Stone Suppliers Company Limited v RSR Stone* [2006] Limited [2020] eKLR. which set the principles for grant of extension.
6. Further it is submitted that they filed the notice on July 9, 2019 though lodged in court on the July 16, 2019, whereas the letter requesting for certified copies of proceedings was received on even date, the delay was occasioned by the registrar failing to serve the notice and issuing them with a certificate of delay. They say that the Record of appeal was not filed on time because the proceedings had not been supplied and they had not therefore been given a certificate of delay.

Lastly the Court is urged to find they have demonstrated sufficient reason for failing to comply and allow their application.

Rule 4 of the *Court of Appeal Rules* which deals with extension of time provides that:-

the court may, on such terms as it thinks just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these rules, whether before or after the doing of the act, and a reference in these rules to any such time shall be construed as a reference to that time as extended.

7. The said Rule empowers this Court to exercise its discretionary power which is unfettered to extend time in appropriate situations. The factors to consider when exercising the said discretion have nonetheless not been provided by the rule and this Court has over the years devised



8. appropriate principles to guide it in exercising the said discretion to ensure that it does so judicially and not in a whimsical manner. In its decision in the case of *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*[1999]2EA 231, this 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.” (Emphasis supplied)

9. See also *Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees*, civil application no. 190 of 2019, where this Court expressed that:-

some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice , if any, that each party stands to suffer, 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 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 intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity.

10. It is against those parameters that I must consider this application. On the question of delay, the ruling in the ELC court was delivered on the June 28, 2019 and the applicants lodged a Notice of appeal on 16th July, 2019. The applicants say they filed the Notice of appeal at the court registry on July 9, 2019 but the registrar signed it on July 16, 2019 indicating that as the day it was lodged. They say they had no control on the date it was lodged as that was a function to be exercised by the deputy registrar. I have no reason to doubt the applicants as it is common knowledge that sometimes the registrar takes time to sign the Notice of appeal and after a party files a notice, they have no say as to when the notice will be lodged. In any event, even assuming that the Notice of appeal was filed on 16th and not July 9, 2019, the delay of a few days can be countenanced. I would, therefore, have deemed the Notice of Appeal as properly filed and allowed the applicant 7 days within which to serve it on the parties.
11. My problem however, is that save for praying for extension of time within which to file and serve the Record of appeal out of time, there is nothing further in regard to that prayer. I am not told why the record was not filed on time; whether the proceedings have been typed; whether the letter bespeaking the proceedings was served on the other parties as the law demands and the steps taken to pursue the said proceedings. There is no evidence on record to demonstrate that the deposit required to be paid before typing of the proceedings is commenced has been paid. There is absolutely no basis given to enable me exercise my discretion to extend time for the filing of the record of appeal. That discretion cannot be exercised Accordingly, in as much as I sympathise with the applicant, I am unable to grant the orders sought. Ultimately, I find that granting leave to serve the Notice of appeal in absence of leave to file and serve the record of appeal out of time will not serve any purpose. This application is destined to fail. I dismiss it with no order as to costs as it was not opposed.

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

