



Muthigu v Kirambia (Suing as the Legal Representative of the Estate of Peter Muriungi) & 2 others (Civil Application 124 of 2019) [2022] KECA 1433 (KLR) (14 October 2022) (Ruling)

Neutral citation: [2022] KECA 1433 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 124 OF 2019
W KARANJA, JA
OCTOBER 14, 2022**

BETWEEN

MUTHENGI M'MWATHI MUTHIGU APPLICANT

AND

LUCY KARIUKI KIRAMBIA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER MURIUNGI) 1ST RESPONDENT

THARAKA DISTRICT LAND ADJUDICATION OFFICER.. 2ND RESPONDENT

THE HON.ATTORNEY GENERAL 3RD 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 Chuka (P.M,Njoroge.J) dated 19th December 2018 in ELC case No. 208 of 2017 previously Meru E & L 169 of 2013)

RULING

1. Before me is a Notice of Motion filed on August 6, 2022 expressed to be brought under Article 50(1) & Article 159(2) of *the Constitution*, section 3(2), 3A & 3B of the *Appellate Jurisdiction Act* and Rule 4 of the Court of appeal rules. The applicant seeks enlargement of time within which to file and serve the Record of appeal; the Record of appeal already filed be deemed to be properly on record and the Notice of appeal filed on 28th December, 2018 and filed in this Court on 3rd July, 2019 be deemed to be properly on record in respect of a judgment of the Environment and Land Court at Chuka(ELC) (P.M.Njoroge J.) delivered on the 19th December, 2018.
2. The application is premised on the grounds on its face which state, *inter alia*, that he was aggrieved by the entire decision and his former advocates on record, Mokuia Obiria & Associates Advocates lodged a Notice of appeal on December 28, 2018 at the ELC registry. The present firm took over the conduct of this matter from the former advocates on January 29, 2019. Further, that the advocate



handling the matter wrote a letter dated February 12, 2019 requesting for typed proceedings but failed to serve the respondent's advocate as required under rule 82(2) of this *Court's rules*. When Mr Kennedy Chadianya Matotse took over the conduct of this matter he discovered the proceedings had been collected, however, the Record of appeal had not been filed and the time for doing so had lapsed.

3. That the mistake by the then counsel should not be visited on the innocent applicant; the intended appeal has overwhelming chances of success and it is only fair and just that extension of time be granted since the respondents shall not be prejudiced in any way.
4. The application is supported by the Affidavit of Kennedy Chadianya Matotse which Affidavit merely reiterates the grounds in support of the motion which I need not rehash.
5. The application is opposed through the Affidavit sworn by the 1st respondent on September 15, 2022. The respondent deposes that the applicant has not laid a basis to enable this Court exercise its discretion in his favour. An oversight by counsel is not a valid reason and there is inordinate delay in filing this application. She further states that her family has already settled on the land and, therefore, she will suffer prejudice if this application is allowed.
6. In support of his application the applicant has filed written submissions. He submits that this Court considers among other things the length of the delay, the reason for the delay, whether the applicant has an arguable appeal, public importance and the pursuit of justice in general. He states that he has an arguable appeal which need to be canvassed in this Court lest he loses his land and lastly that the application be allowed in the interest of justice. Reliance was placed on this Court's decisions in *Andrew Kiplagat Chemaringo v. Paul Kipkorir Kibet* [2018] eKLR and *Fakir Mohammed v. Joseph Mugambi & 2 others*[2005]eKLR .
7. On the other hand, the 1st respondent submits that this Court should not be convinced by the applicant's reason that the advocate omitted to file and serve the documents. Further, that there is a delay of 8 months in filing this application citing laxity on the part of the applicant.
8. Placing reliance on the decision in *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 others* [2014]eKLR, for the proposition that the applicant had to explain the reasons for the delay and the extenuating circumstances, as extension of time is not a right but an equitable remedy that is only available to a deserving party. The Court has been urged to dismiss the application with costs.
9. 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 offer guidance to it when called upon to exercise discretion to extend time under Rule 4. Such guidelines were enunciated in the celebrated case of *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* [1999]2EA 231, where the Court expressed itself 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 the Supreme Court decision of *Nicholas Kiptoo arap Korir Salat v. IEBC & 7 others*(*supra*) where the Court crystallised the said guidelines as follows:-

1. ‘extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court



2. A party who seeks for extension of time has a burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court
5. Whether there will be any prejudice suffered by the respondents if the extension is granted
6. Whether the application has been brought without undue delay and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

The power to extend time is discretionary however, the discretion must be exercised judiciously and on sound factual and legal basis. See *Njuguna v. Magichu & 73 others*[2003] KLR 507.

10. The judgment in the ELC was delivered on the December 19, 2018 whereas the Notice of appeal according to the applicant was filed at the ELC registry on December 28, 2018. The copy of the Notice of appeal annexed in this application was lodged by the former firm Mokuia Obiria & Associates at the High court at Chuka, and received at this Court’s registry on July 3, 2019. The notice was filed within time.
11. The letter requesting for typed proceedings is dated February 12, 2019 and received at the Court registry on the February 14, 2019. Rule 82(2) of the *Court of Appeal Rules* requires this letter to be served upon the respondents. This request should be made within 30 days from the date of judgment. This is not so in this case. Indeed, the applicant concedes that the said letter was not even served on the respondent as required by the Rules. This therefore means that the applicant cannot seek refuge the proviso to Rule former 82(2) of the *Court of Appeal Rules*.
12. I have considered this application, the rival Affidavits and Submissions filed by both parties along with the guidelines I have enumerated above. Clearly, there was inexcusable lack of diligence in the manner this matter was handled by counsel. I note however, that counsel has sworn an affidavit owning up to the situation the applicants presently find themselves in. If I disallow the application, then the applicant will be punished for indiscretions, or negligence of counsel which the applicant did not contribute to. The matter relates to land ownership and in my view, it will serve the ends of justice if the issues raised are ventilated in Court on appeal. No prejudice will be occasioned to the 1st respondent if the matter is heard on appeal and all the disputed matters settled once and for all as she is living on the property and will continue to do so until otherwise decreed by the Court. I am satisfied that the delay of 8 months can be countenanced in the circumstances of this case.
13. Accordingly, I allow the application and grant leave for the applicant to file and serve the record of appeal within 14 days from the date hereof, failing which the said leave will automatically lapse. The costs of the application are nonetheless awarded to the 1st 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

