



Keen & 7 others v Wanjohi (Sued as the administratrix of the Estate of the late Francis Wanjohi Ndirangu) (Civil Application 97 of 2019) [2022] KECA 1197 (KLR) (12 October 2022) (Ruling)

Neutral citation: [2022] KECA 1197 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 97 OF 2019
LA ACHODE, JA
OCTOBER 12, 2022**

BETWEEN

**SALOME NAIVANUI KEEN 1ST APPLICANT
HUDSON MWANGI THUKU 2ND APPLICANT
KEVIN THUKU 3RD APPLICANT
LUCY WANJIRU KIGOME 4TH APPLICANT
JOSEPH THUKU 5TH APPLICANT
SUSAN NYARUAI 6TH APPLICANT
KAHURO THUKU 7TH APPLICANT
KAHURO THUKU 8TH APPLICANT**

AND

**ALICE WANJIRU WANJOHI RESPONDENT
SUED AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE FRANCIS
WANJOHI NDIRANGU**

(Being an application for extension of time to file an appeal against the Ruling of the High Court at Nakuru (W. Ouko J) dated 11th February, 2013 delivered)inHCCC NO. 56 OF 2008)

RULING

Back ground

1. The applicants Salome Naivanui Keen, Hudson Mwangi Thuku, Kevin Thuku, Lucy Wanjiru Kigome, Joseph Thuku, Susan Nyaruai, Kahuro Thuku and Githinji Thuku, filed a notice of motion dated June 24, 2019 against the respondent Alice Wanjiru Wanjohi (Sued as the administratrix of the



estate of the late Francis Wanjohi Ndirangu.) The application is brought under Rule 4 of the *Court of Appeal Rules* and is seeking the following orders:

- a. That this Court be pleased to extend time upon which the applicants herein can lodge an appeal against the Ruling of Hon. Justice W. Ouko dated February 11, 2013 delivered and countersigned by Hon. Justice Emukule on February 15, 2015.
 - b. That the notice of appeal filed on February 20, 2013 be deemed as properly lodged as extended by this Court.
 - c. That the record of appeal filed on May 6, 2016 be deemed as properly lodged as extended by this Court.
 - d. That the costs of this application be provided for.
2. The application is premised on the grounds on its face and the supporting affidavit of even date sworn by Hudson Mwangi Thuku. The said grounds are that the impugned ruling ordered the applicants to vacate land parcels No 453/3/1 and 453/3/2 (suit property), where they were brought up and the effect of the ruling was to render them destitute.
 3. The applicants aver that they lodged the notice of appeal within time and applied for the proceedings with an intention to appeal on the February 19, 2013, but the Deputy Registrar High Court at Nakuru constantly informed them that the file HCCC 56/2008 could not be traced. That on the May 28, 2015, through their advocates, they filed for certificate of delay which has not been issued to date. That they therefore, lodged the record of appeal on the May 6, 2016 long after the time within which to file the appeal had lapsed but aver that their appeal is arguable with high chances of success.
 4. A brief back ground that led to this application is that the applicants filed an application in HCCC no. 56 of 2008 in the superior court against the respondent under section 38 of the *Limitation of Actions Act* which was opposed by the respondent. Upon hearing the matter, the learned Judge found that the application was *res judicata* since the ownership of the suit property had been determined in Nakuru HCCC No. 405 of 1988, and the applicants' claim to adverse possession against the respondent did not satisfy the twelve-year period required. As such, the application was dismissed with costs.
 5. The applicants being disgruntled by the above ruling, filed a notice of appeal and a draft memorandum of appeal on the grounds, inter alia that: the Judge erred in dismissing the appellants claim when it was overwhelmingly clear that the appellants had a suitable claim against the respondent; the Judge erred in law and fact in holding that the appellants claim was based on the title of Naivanui Wanjiru who had lost in HCCC 405 of 1988 (Nakuru); the Judge erred in fact in dismissing the appellants assertion that they had lived in the suit property independently, openly and uninterrupted for well over 12 years; the Judge erred in law and fact in holding that the appellants occupations of the property was consensual entry by virtue of their lineal consanguinity and infirmity of the original owners Ngoris Ole Karura and Anna Memusi.
 6. The respondent swore a replying affidavit on October 4, 2019 and filed it in this Court. Wherein it was deposed that the judgment against which the applicants seeks to appeal was delivered way back on the February 15, 2013, a period of more than six years from the time when the instant application was lodged. It was also deposed that there was no communication from the High Court Registrar informing the parties that the file could not be traced as alleged by the applicants. Further, that the certificate of delay was ready for collection as of May 28, 2015 but the applicants failed to collect it. Further that there is no record of appeal filed in this Court as alleged by the applicants. As such, it was disposed that the



applicants have not offered any justifiable reason for the delay and the extension of time would be prejudicial to the respondent.

Submissions

7. Directions were given on September 1, 2022 for the filing of written submissions for the disposal of the application. No submissions had been filed on behalf of the applicants by the date of hearing of the application, while submissions dated September 16, 2022 were filed on behalf of the respondents,
8. The respondent's argument is that the applicants had not given sufficient reasons why they lodged this application more than six years from the time the impugned ruling was delivered. She contends that the length of delay in the instant case is inordinate since, according to the certificate of delay the deputy registrar confirmed that the certified copies of proceedings were supplied to the applicant's advocates on the May 28, 2015. The respondent asserts that she has been fighting for over 30 years for the land bequeathed to her by her deceased husband and her frail body may not enjoy her inheritance and fruits of the judgment if the applicants are allowed to continue with this kind of unmerited abuse of court process.

Determination

9. I have considered the rival arguments in the application, the replying affidavit and the submissions on record, together with the authorities cited and the law. *Leo Sila Mutiso v Hellen Wangari Mwangi* (1999) 2 EA 231 which is the *locus classicus* on applications under Rule 4 of this *Court's Rules*, laid down parameters to be considered as follows:

“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 reference in these Rules to any such time shall be construed as a reference to that time as extended.

10. The matters to be considered while deciding an application of this nature are not exhaustive. In *Mwangi v Kenya Airways Ltd* KLR 486, this Court having set out matters which a single judge should take into account when exercising the discretion under Rule 4, held:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the *Court of Appeal Rules* (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

11. On the duration of delay, this Court in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR pronounced itself as follows:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable”



12. The impugned judgment was delivered on February 15, 2013 whereas the instant application was filed on the June 24, 2019. The delay in filing the instant application and record of appeal is approximately six years and five months. The applicants' explanation for the delay is that the Court file could no be traced for a long time. Therefore, they were not able to obtain the typed proceedings and judgment in good time. They deposed that their advocate wrote to the Deputy Registrar High Court Nakuru seeking to be supplied with proceedings but they were constantly informed that the file could not be traced. On the other hand, the respondent argued that there was no such communication from the Deputy Registrar Nakuru.
13. I note that the applicants have not attached any correspondence between themselves and the Deputy Registrar Nakuru, to support their claim. In their supporting affidavit, the applicants also deposed that the Deputy Registrar refused to issue them with the Certificate of delay, despite their requests, but the respondent deposed that the Certificate of delay had been available and attached a copy dated November 1, 2016 to their replying affidavit.
14. I am therefore satisfied that in the circumstances of this case, the delay in filing the record of appeal is inordinate and the reasons for the delay advanced by the applicants are not plausible or satisfactory.
15. As regards the success of the intended appeal, the applicants contend that the appeal has overwhelming chances of success. They have attached a memorandum of appeal to buttress this fact. I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2015 where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single Judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly””.
16. I have balanced the competing interests of the parties, that is, the injustice to the applicants, in denying them an extension, against the prejudice to the respondent in granting an extension. I am of the view that the respondent will be more prejudiced if the extension of time is granted. The applicants have failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso (supra)* in the instant case. Accordingly, I find no merit in the application and dismiss it with costs.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF OCTOBER, 2022.

L.A. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

