



REPUBLIC OF KENYA



Physical Planning Officer, Kericho County & 4 others v Langat (Civil Application E001 of 2022) [2022] KECA 1195 (KLR) (12 October 2022) (Ruling)

Neutral citation: [2022] KECA 1195 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E001 OF 2022
LA ACHODE, JA
OCTOBER 12, 2022**

BETWEEN

**PHYSICAL PLANNING OFFICER, KERICHO COUNTY 1ST APPLICANT
DISTRICT SURVEYOR, KERICHO COUNTY 2ND APPLICANT
DISTRICT LANDS OFFICER, KERICHO COUNTY 3RD APPLICANT
DIRECTOR PHYSICAL PLANNING 4TH APPLICANT
DIRECTOR OF SURVEY 5TH APPLICANT**

AND

DAVID KIPKORIR LANGAT RESPONDENT

(Application for leave to file Notice of Appeal out of time from the Ruling and Orders of the Environment and Land Court at Kericho (MC Oundo. J) delivered on 2nd December 2021 in Environment and Land Court ELC Petition No 1 of 2013)

RULING

Introduction

1. By a notice of motion dated January 14, 2022, brought pursuant to rules 4, 5 and 82 (1) of this [Court's Rules](#) and Article 159 of the [Constitution of Kenya 2010](#), the Physical Planning Officer, District Surveyor, District Lands Officer, Director Physical Planning and Director of Survey all of Kericho County (the applicants herein) seek leave to file and serve an appeal out of time. They also pray that the application for stay of further proceedings in Kericho ELC Petition No 1 of 2013 dated December 31, 2021 and filed in Court on January 12, 2022 be deemed as filed before this Court for directions. The respondent is David Kipkorir Langat.



2. This application is premised on the grounds on its face and an affidavit in support sworn by Janet Lang'at, Deputy Chief State Counsel on January 14, 2022. The said grounds are that the Environment and Land Court at Kisumu delivered a ruling in an application brought by the respondent in Kericho ELC No 1 of 2013 alleging that the applicants had defied the judgment and decree of LC Waithaka J delivered on May 5, 2015. The applicants were found to be in contempt of court and as a result they are set to be sentenced to a term in prison, in total violation of their Constitutional rights.
3. The applicants aver that they were ordered to recall a Part Development Plan (PDP) in relation to the suit land, which was approved in 1986 and subsequently implemented fully before the filing of this suit. At the time of filing, hearing and determination of the suit the PDP had been fully implemented and persons who were not party to the suit had settled and developed the suit land, hence there was nothing to be recalled. They state that they were neither served nor aware of the ruling dated December 2, 2021 and only became aware of it when they were served on December 17, 2021. They filed the notice of appeal on the December 24, 2021 and that the delay in filing was not deliberate, inordinate nor was it willful, but was excusable as the counsel handling the matter was bereaved on the December 22, 2021.
4. The applicants contest the entire finding of the learned Judge and urge that it will serve the interest of justice if they are granted leave to appeal. Further that innocent parties who were not privy to the suit will suffer substantial loss and damage if the orders sought are not granted and the intended appeal will be rendered nugatory.
5. In opposition, the respondent filed a replying affidavit sworn on the January 27, 2022 and deposed that the notice of appeal was filed on the December 24, 2021 way after the statutory time lines since the impugned ruling was delivered on the December 2, 2021. Further that counsels on record for both parties were in court before the ELC Judge on the 24th of November, 2021, when the ruling date was postponed to December 2, 2021. They state that the ruling appealed against was in an application for contempt of the orders made in the ruling delivered on the March 12, 2015 which has never been reviewed or appealed against. They urge that the respondent has been denied entry and enjoyment of his legitimately acquired parcel of land.

Submissions

6. This application was disposed of by way of written submissions. The applicants' submissions are dated January 25, 2022 and those of the respondent are dated February 3, 2022.
7. In their submissions, the appellants urged that upon being served with the impugned ruling on the December 17, 2021, they filed a notice of appeal on December 24, 2021 together with an application seeking stay of the proceedings in the superior court under a mistaken belief that they were within the prescribed period. That they were not aware that the ruling had been deferred from November 4, 2021 and delivered in their absence on December 2, 2021, since it was delivered without notice to them. It was their argument that 7 days out of time is not deliberate and not too inordinate as to prejudice the respondent.
8. They urged the court not to punish the client for an inadvertent error of the counsel and relied on the case of *Vishwa Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) e KLR to buttress this argument.
9. In rebuttal, the respondents submitted that the applicants filed the notice of appeal 22 days after the ruling was delivered, which was in contravention of Rule 75 (2) of the *Rules* of the Court. They asserted that the delay occasioned was inordinate and therefore inexcusable. Further, that on the November 4,



2021 in the presence of all counsels, the court postponed the ruling to December 2, 2021 when it was duly delivered. As such, it was their argument that the failure of the counsels of the applicants to attend court on the day scheduled for the ruling was sheer negligence.

Determination

10. The prayers sought by the applicants are a mixture of stay of proceeding and extension of time for filing notice of appeal. Applications for stay are heard by a full bench, whereas applications for extension of time are heard by a single Judge. Since this matter is before a single Judge, what can be determined is the application for extension of time only.
11. I have therefore considered the application, the grounds in support thereof, the submissions filed and the law, to determine whether the applicants are deserving of the orders sought. Rule 75 of the [Court of Appeal Rules](#) provides that notice of appeal should be filed within fourteen days of the date of the decision against which it is desired to appeal. Rule 4 of the [Court of Appeal Rules](#) 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 reference in these Rules to any such time shall be construed as a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
12. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* (1990) 2 EA 231 which is the locus classicus, laid down the parameters for consideration in an application for extension of time as follows:

“It is now well 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 in to 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.”
13. Further, in [Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees](#), Civil Application No 190 of 2019 it was stated as follows:

“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 a 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 appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity”
14. The impugned ruling was delivered on the 2nd of December 2021, hence the application ought to have been filed by December 16, 2021. This application was filed on January 14, 2022 one month and some twelve days after the ruling was delivered. The law does not prescribe a minimum or maximum period of delay. What is paramount is that reason(s) for the delay must be reasonable and plausible as stated in



the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* (2018) e KLR cited by the applicant to wit:

“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 favorably exercisable”

15. The applicant’s reasons for the delay in filing this notice of motion is that the counsel on record inadvertently filed the notice of appeal thinking that they were within the prescribed time, as they were not made aware of the ruling date. On the other hand, the respondent argued that counsels for both parties were present on the 4th of November, 2021 when the date of the ruling was postponed to 2nd of December, 2021 therefore they ought to have been present during the ruling date. In *Bi-Mach Engineers Limited v James Kaboro Mwangi* [2011] eKLR the Court held inter alia that:

“The filing of a notice of appeal is a simple and mechanical task and could even have been done on December 30, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and principles stated above.”

16. The applicants further contended that the mistake of the advocates should not be visited on the clients. In my view, the delay in filing the notice of appeal is not inordinate and it is well explained.
17. The applicants contended that they have an arguable appeal on the ground that the orders issued by the Superior Court could not be complied with, as at the time this suit was filed the Part Development Plan had been fully implemented and persons who were not party to the suit had settled and developed the suit land. Without going in to the merits of the appeal, I am satisfied that the intended appeal is arguable. In *Muchugu Kiragu v James Muchugi Kiragu & another* Civil Application No NAI 356 of 1996 this court held that:

“Lastly, we would like to observe that the discretion granted under rule 4 of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of an appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

18. The court has also 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 and finds that in these circumstances, denying the extension of time will be more prejudicial to the applicants, than allowing would be to the respondent.
19. From the foregoing I find that the applicants have demonstrated the existence of the parameters set out in *Leo Sila Mutiso (supra)*. Accordingly, I allow the application and make the following orders:
- a. That leave be and is hereby granted to the applicants to file and serve a notice of appeal out of time against the ruling and orders of the ELC at Kisumu (MC Oundo) in ELC Petition No 1 of 2013.
 - b. That the notice of appeal filed in court on December 24, 2021 be and is hereby deemed as duly filed.



c. The applicants shall bear the costs of the application.

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

