



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyaganga alias Joseph O. Nyaganga v Mohamed (Civil Application  
E010 of 2022) [2022] KECA 1277 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1277 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E010 OF 2022  
SG KAIRU, JA  
NOVEMBER 18, 2022**

**BETWEEN**

**JOHN O. NYAGANGA ALIAS JOSEPH O. NYAGANGA ..... APPLICANT**

**AND**

**AMIRAL HASSANALI MOHAMED ..... RESPONDENT**

*(An application for leave to file a notice of appeal and an appeal out of  
time against the judgment of the Environment & Land Court at Mombasa  
(Omollo, J.) delivered on 1st November 2017 in ELC Land Case No. 265 of 200)*

**RULING**

1. The respondent, Amiral Hassanali Mohamed, as the registered owner of the property known as Mombasa/Block v Main/Land South/133 (the property) filed suit against the applicant John O Nyaganga alias Joseph O Nyaganga, being ELC case number 265 of 2008, and sought a declaration that the applicant was a trespasser wrongfully in occupation of the property and sought an order for vacant possession as well as an order of injunction to restrain the applicant from remaining on the property or continuing with construction on the property.
2. In allowing the respondent's claim after a trial, the learned Judge of the ELC in a judgment delivered on November 1, 2017, the subject of the intended appeal, found that the applicant was in occupation of part of the property and that he "did not have any document to show that the people who sold him that land owned it". The Judge concluded:

“Therefore the [respondents] having proved they are the owners of the suit property and not having authorized the [the applicant] to carry out development on the land, such action can



only be treated as trespass. The persons who allegedly sold the land to the [applicant] did not have any document of ownership to pass any interest to the land.”

3. Dissatisfied with the judgment, the applicant promptly filed a notice of appeal dated November 3, 2017. Approximately two years later, the applicant filed his memorandum and record of appeal on September 10, 2019 in Civil Appeal No. 127 of 2019. However, by an application dated October 11, 2019, the respondent applied for orders to strike out the notice of appeal as well as the record of appeal, on among other grounds, that the record of appeal was filed out of time. In a ruling delivered on February 4, 2022, this Court noted that the applicant admitted that the record of appeal was filed four days late without leave of the Court having been sought and struck out the appeal.
4. On February 25, 2022, twenty-one days after delivery of the said ruling on February 4, 2022, the applicant lodged the present application which is dated February 22, 2022 seeking leave to file and serve notice of appeal and record of appeal out of time. The application is made under Rule 4 of the *Court of Appeal Rules*. In the grounds in support of the application and in his affidavit in support of the application, the applicant states that the record of appeal that was struck out was filed by his then advocates four days late and that the failure to apply for leave for extension of time was not his mistake but that of his advocate in computing time. He deposed that he has a storey building on the property and the respondent is likely to execute the impugned judgment of the ELC.
5. Arguments were presented before me in support and in opposition to the application during a virtual hearing on September 20, 2022 when learned Counsel Mr. Okanga appeared for the applicant while Mr. Karina, learned counsel, appeared for the respondent. Counsel relied on their respective written submissions which they briefly orally highlighted. Counsel based their respective arguments on the legal principles applicable in applications of this nature as pronounced by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR where that Court expressed that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court. That whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and public interest are also factors for consideration.
6. Similarly, in *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR Waki, J.A stated that:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso vs. Mwangi* Civil Appl. Nai. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, Major Joseph Mwereri *Igweta vs. Murika M’Ethare & Attorney General* Civil Appl. Nai. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
7. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. Each case must be considered on its own facts.
8. In relation to the present case, the matter has undoubtedly had a long history as the litigation goes back some 14 years or so to 2008 when suit was initially filed. Indeed, it appears from the impugned



judgment that an earlier ex parte judgment had initially been given in favour of the respondent in April 2010 in default of appearance or defence by the applicant which was later set aside, and the suit defended culminating in the impugned judgment delivered on November 1, 2017.

9. The applicant concedes that the record of appeal that was struck out was out of time, albeit by four days which he attributes to mistake of counsel. However, even then, the applicant was put on notice by the respondent of the defect in that record of appeal, when the respondent presented the application dated October 11, 2019 to strike out that appeal. It is not clear, and there is no explanation offered, why the applicant did not take steps to seek extension of time soon after being put on notice of the defect but chose instead to await the outcome of the application to strike out. As already stated, the ruling in that regard was delivered by this Court on February 4, 2022. It took the applicant another 25 days to present this application. No explanation at all has been offered for that delay.
10. As to whether the intended appeal is arguable, it seems, from the judgment intended to be challenged (and I say so without deciding) that the applicant appears to have conceded and acknowledged the respondent's title to the property and had implored the trial court to prevail on the respondent to accept a negotiation for the purchase of the property.
11. Having considered the application, the affidavit in support, the grounds of opposition and the written and oral arguments urged before me, I am not persuaded that the applicant has demonstrated that it is deserving the exercise of the Court's discretion in his favour as he has not laid a basis, to the Court's satisfaction for extension of time.
12. Consequently, the application dated February 22, 2022 fails and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF NOVEMBER 2022.**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

