



REPUBLIC OF KENYA



**Sketty (Administrator of Estate of Nassor Mohamed Nahdy (Deceased) v Shah & 3 others
(Civil Application E028 of 2022) [2022] KECA 1287 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1287 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E028 OF 2022
SG KAIRU, JA
NOVEMBER 18, 2022**

BETWEEN

**MUNIR MOHAMED SKETTY (ADMINISTRATOR OF ESTATE OF NASSOR
MOHAMED NAHDY (DECEASED) APPLICANT**

AND

**JANENDRA RAICHAND SHAH 1ST RESPONDENT
RAVJI RAMJI MANJI 2ND RESPONDENT
REGISTRAR OF TITLES 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

*(An application to file and serve memorandum and record of appeal out of
time from the judgment of the Environment and Land Court at Mombasa
(Yano, J.) delivered on 9th March 2021 in ELC Case No. 233 of 2009)*

RULING

1. Before me is an application dated 9th May 2022 lodged on 10th May 2022 seeking leave to lodge appeal out of time against a judgment delivered on 9th March 2021 by the Environment and Land Court (ELC) (Yano, J). The application is supported by an affidavit sworn by Munir Mohamed Sketty, the applicant and was urged before me on 20th September 2022 by learned counsel Mr. Lawrence Obonyo holding brief for Mr. Hayanga, learned counsel.
2. In his written submissions dated 6th June 2022 which he highlighted, Mr Obonyo submitted that the delay in filing the memorandum and record of appeal was attributable to delay in obtaining the copies of proceedings; that a certificate of delay was issued and that no prejudice will be occasioned to the respondent.



3. Learned counsel Miss Oruta for the 1st respondent in opposing the application relied on the replying affidavit sworn by Janendra Raichand Shah in opposition as well as written submissions dated 19th September 2022 which she orally highlighted and urged that the criterion for extension of time has not been met; that no reasonable explanation for the delay in filing the memorandum and record of appeal has been given; that the certificate of delay indicates that the proceedings were ready on 11th February 2022 and the present application was filed late; that granting the application will be prejudicial to the 1st respondent which should enjoy the fruits of the judgment.
4. Learned counsel Ms Kiti for the 3rd and 4th respondents who was initially on the virtual platform had exited the platform by the time her opportunity to address the court and I did not therefore have the benefit of her submissions.
5. I have considered the application, the affidavits, the submissions and authorities cited. In the judgment delivered on 9th March 2021 by the Environment and Land Court, the subject of the intended appeal, the ELC allowed the 1st respondent's suit while dismissing a counterclaim by Nassor Mohamed Nahdy, deceased and ordered the deceased to pull down and remove any construction and all his properties from the 1st respondent's property known as Subdivision Number 890 (Origin No 284/99) Section III Malindi North and further restrained him from preventing the 1st respondent from accessing that property.
6. Intending to challenge that judgment on appeal, on 22nd March 2021, the applicant, the personal representative of Nassor Mohamed Nahdy, deceased lodged a notice of appeal dated 19th March 2021 and served it on 29th March 2021. By a letter dated 16th March 2021 addressed to the Deputy Registrar of the ELC and copied to Patricia Langat & Associates Advocates and the Attorney General, the applicant applied for typed copies of the proceedings. Numerous reminders were sent to the Deputy Registrar in follow up the last of which was on 7th February 2022.
7. On 14th March 2022, the Deputy Registrar ELC issued a certificate of delay certifying that the period from 16th March 2021 to 11th February 2022 was required for the preparation and delivery of the copies of the proceedings. Having lodged the notice of appeal on 22nd March 2021, the 60 days within which the applicant should have filed the memorandum and record of appeal remained frozen until 11th February 2022 as indicated in the certificate of delay. If the 60 days within which the applicant should have filed the memorandum and record of appeal are to be computed from 12th February 2022 (the period from 16th March 2021 to 11th February 2022 per certificate of delay being excluded), then the last day on which the memorandum and record of appeal should have been filed would be 12th April 2022. The present application was lodged on 10th May 2022 in which case there is a delay of 27 days in presenting this application.
8. However, the certificate of delay was not issued on 11th February 2022 but was issued over a month later on 14th March 2022. Although the proviso to Rule 84 provides for exclusion of "such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy", it is not clear how the applicant would benefit from that proviso where, as here there is a delay in issuing the certificate of delay. There is in my view a presumption in the proviso that the certificate of delay is issued immediately the typed proceedings are ready for delivery to the applicant.
9. Taking 14th March 2022, the date when the certificate of delay was issued as the date when the 60 days began to run, the latest the applicant should have filed the memorandum and record of appeal should



have been 12th May 2022 by which time the present application for extension of time had been lodged on 10th May 2022.

10. Based on the foregoing, and having regard to the legal principles upon which the Court is required to exercise its discretion in matters of this nature (See [*Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*](#), Supreme Court Application No 16 of 2014[2014] eKLR), I am satisfied, based on the reasons stated above, that this is a proper case for the Court to exercise its discretion in favour of the applicant. I accordingly allow the application in terms of prayer 1 and direct the applicant to file and serve his memorandum and record of appeal within 21 days from the date of delivery of this ruling.
11. The costs of the application shall abide by the outcome of the intended appeal.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF NOVEMBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

