



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthee v Muthee (Civil Appeal (Application) 446 of 2020)  
[2022] KECA 1254 (KLR) (7 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1254 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 446 OF 2020  
LK KIMARU, JA  
NOVEMBER 7, 2022**

**BETWEEN**

**JOSEPH MWENJE MUTHEE ..... APPELLANT**

**AND**

**STEPHEN MUTHEE ..... RESPONDENT**

*(Being an application to appeal out of time against the ruling of  
the judgment of the Environment and Land Court (Obaga, J.)  
dated 31st October, 2019 in Nairobi ELC Case No. 1453 of 2020)*

**RULING**

1. The applicant, Joseph Mwenje Muthee has filed an application seeking several prayers, but for the purpose of this ruling, this court shall only consider one prayer which it has jurisdiction to consider as a single judge of the court, the prayer that:  
  
“The court be pleased to grant leave to the appellant/judgment debtor to appeal out of time against the judgment made by the Hon Justice EO Obaga on October 31, 2019 in Milimani ELC No 1453 of 2013”
2. The application is supported by the annexed affidavit of the applicant and the grounds stated on the face of the application. In summary, the applicant attributes the delay in filing the appeal in time to the delay in procuring the certified typed copies of the proceedings for the purpose of filing the appeal. The applicant urged the court to allow his application in the interest of justice.
3. The application is opposed. Njoroge Wachira, the respondent’s advocate swore a replying affidavit in opposition to the application. He contends that the application is not properly before this court because the applicant has mixed prayers thus creating confusion. He noted that the applicant should have sought the leave of the court to serve the respondent, out of time and in lieu of applying for



extension of time to file the appeal out of time, sought a certificate of delay from the Environment and Land Court. He thus urged this court to dismiss the application with costs as the applicant had placed no cogent reason to enable this court exercise its discretion in his favour.

4. This being an application for extension of time under rule 4 of the *Court of Appeal Rules*, 2022, this court has unfettered discretion to extend time for any party to do what he is required to do within the period specified in the *Court of Appeal Rules*. In *John Karani Mwendu v Japheth Bundi Chebari* [2021] eKLR, Sichale, JA held thus:

“The principle upon which this court exercises its discretion under rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion, the court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No Nai 251 of 1997 where the court stated that:

“It is now settled that the decision whether to extend the time for appeal is essentially discretionary. It is also well stated 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 delay; secondly, the reasons 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.”

5. In the present application, it is clear that the applicant was not to blame for the delay in the typing of the proceedings by the Environment and Land Court. The applicant immediately applied for certified copies of the proceedings and judgment after the delivery of the judgment. Upon receipt of the same, he filed the present application before this court. As correctly observed by the respondent, the applicant sought other prayers, which this court, sitting at a single Judge of the court, lacks jurisdiction to grant. The respondent wants this court to dismiss the entire application for the reason that the applicant presented to this court some of the prayers which cannot be granted by this court. This court is however of a different view. If the prayers that this court has jurisdiction can be severed from the other prayers, nothing in law prevents this court from considering the same on its merit.
6. In the premises therefore, this court finds merit with the application for extension of time to file appeal out of time. The notice of appeal and the record of appeal shall be filed and served within thirty (30) days of today’s date. The respondent shall have the costs of the application in any event.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**L. KIMARU**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

