



**Chepngetich & another v Tonui (Civil Appeal (Application)
E313 of 2022) [2022] KECA 1305 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1305 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E313 OF 2022
GWN MACHARIA, JA
DECEMBER 2, 2022**

BETWEEN

RUTH C CHEPNGETICH 1ST APPLICANT

ESTHER M WAMBUGU 2ND APPLICANT

AND

PHILIP K TONUUI RESPONDENT

(An application for extension of time for lodging a Notice of Appeal and Record of Appeal against the Judgment and Decree of the High Court at Nairobi (E.O. Obaga, J.) dated 31st October 2019 in H.C. ELC Suit No. 227 of 2001)

RULING

Brief Background

1. The respondent filed a suit in the High Court in Environment and Land Court (ELC) suit No 227 of 2001 and by a judgment dated October 31, 2019 the court entered judgment in his favor by holding that the applicants and the respondent owned the property LR No 209/12919 as tenants in common in equal shares. It is this judgment the applicants intend to appeal against. Notably is that the application is filed by the 1st applicant.

Application

2. The 1st applicant filed a notice of motion dated August 29, 2022, brought under section 3A and 3B of the [Appellate Jurisdiction Act](#), rules 4, 41, and 77 of the [Court of Appeal Rules](#), seeking the following unspent orders; -
 - a. That this honourable court be pleased to grant leave to extend the time limited for lodging a notice of appeal and subsequent record of appeal for the intended appeal against the judgment



and decree of Honourable Justice EO Obaga following the court's judgment delivered on October 31, 2019 in Nairobi ELC case No 227 of 2001.

- b. That upon the grant of prayer 2, the notice of appeal dated November 28, 2019 and filed on November 28, 2019 be deemed as duly filed.
 - c. That honourable court be pleased to extend the time for service of the notice of appeal dated November 28, 2019 and the letter bespeaking the proceedings of even date.
 - d. Costs.
3. The application is supported by the grounds on the face of it and an affidavit sworn by the 1st applicant, who averred that the High Court delivered its judgment on October 31, 2019 in favor of the respondent and she immediately instructed her then advocate M/s Mose, Mose & Millimo Advocates to pursue an appeal. She later came to learn that the notice of appeal was filed out of time without seeking leave and she sought opinion and instructions of different advocates in August 2022. That her intended appeal raises serious and arguable issues with a high probability of success and the delay is excusable as it is neither inordinate nor deliberate. Further, she risks suffering a substantial loss of losing her beneficial rights vested in all that land known as LR 12919/12 which is the subject property of the suit if such leave is not granted as prayed. That no prejudice will be occasioned to the respondent if this application is allowed having brought it in good faith and in the interest of justice. That if the orders sought are not granted the respondent may deal with the land rendering the appeal nugatory and the applicants' right of appeal will be derogated, and in any case, the mistake of her previous advocates should not be visited upon her.
4. The application is opposed by the respondent *vide* a replying affidavit sworn by himself on October 13, 2022. He avers that the judgment was delivered in the presence of all parties and the application herein is misconceived, inappropriate and bad in law as the delay is of a period of over two years thus it is inordinate, has not been explained and is therefore, inexcusable. That the applicant has never sought for certified copies of the proceedings, she participated in the taxation process and did not exercise any due diligence in pursuit of lodging an appeal within the stipulated time. That the present application is an exercise in futility and is meant to solely frustrate the respondent from enjoying the fruits of his judgment. That the applicant only awoke from slumber when Angote, J delivered a ruling on July 21, 2022 dismissing the 2nd applicant's application for stay of execution. That the reasons enunciated in the applicant's application for the delay do not warrant the granting of orders sought, the application is not meritorious and is an abuse of court process. It is urged that the same be dismissed.

Submissions

5. The applicant did not file her submissions as at the time of writing this ruling.
6. The respondent filed submissions dated November 2, 2022, submitting that the extension of time is discretionary, which should be exercised on sound, legal basis and judicially. That the delay in filing the notice of appeal has not been explained and, as well, the delay in filing the record of appeal is inordinate and inexcusable and the reasons put forth for the delay are inadequate and deficient. That the intended appeal has no chance of success, respondent will be highly prejudiced if the application is allowed, the application has not met the threshold for grant of the orders sought and should be dismissed with costs.



Analysis & Determination

7. I have considered the application, the supporting affidavit, the replying affidavit and the respondent's submissions. The only issue for determination is whether this court should grant the applicant leave to appeal out of the statutory stipulated period.
8. Rule 4 of the *Court of Appeal Rules* provides as follows:
 - “4. 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 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 a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
9. As was held by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the applicable considerations in cases of this nature are: -
 - a. “Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
10. Guided by the above principles, it is trite that the applicant has attached the delay in filing the notice of appeal out time to an advocate's mistake which should not be visited upon her, which mistake she only learnt in August 2022 on account that she lives and stays out of the country. The judgment being appealed from was delivered on October 31, 2019, which means that this application was filed close to three years since the date of judgment. With respect to the previous advocate's mistake, the applicant should have shown keenness in the prosecution of her appeal. It is trite that litigation belongs to the parties and not the advocate. She has not demonstrated for instance that she ever wrote a correspondence, say an email, to her counsel enquiring on the position of the trial court judgment or the need to appeal. She simply sat back and only awoke when the 2nd applicant's application for stay of execution was dismissed by the High Court. What this implies is that, the intention to appeal is intended to forestall any intended execution proceedings. She has not been diligent in following up on her appeal and I am not satisfied that the explanation offered by her is sufficient to warrant this court to exercise its discretion in her favor.
11. On the chances of the intended appeal succeeding, the applicant did not attach a draft memorandum of appeal from which I can accurately answer this question in the affirmative. Though the discretion



to appeal cannot be denied on the grounds of failure to attach a memorandum of appeal, I respectfully hold that the delay was inexcusable and the applicant is undeserving of the favorable exercise of this court's discretion. Accordingly, the application is unmerited and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

