



REPUBLIC OF KENYA



KENYA LAW
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**Githuku v Gitau & 11 others (Civil Appeal (Application)
E323 of 2022) [2022] KECA 1304 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1304 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E323 OF 2022
GWN MACHARIA, JA
DECEMBER 2, 2022**

BETWEEN

ESTATE OF RAPHAEL NGUGI GITHUKU APPLICANT

AND

SAMUEL MWEHIA GITAU 1ST RESPONDENT

CATHERINE WANJIKU MWANGI 2ND RESPONDENT

GABRIEL NJUGUNA NJOROGE 3RD RESPONDENT

JANE WANJIRU NJUGUNA 4TH RESPONDENT

PENINA KAGWIRIA MURIIKI 5TH RESPONDENT

MARY NKATHA MARIANKURA 6TH RESPONDENT

KIMUNYE INVESTMENT COMPANY 7TH RESPONDENT

PATRICK KABURU MUCHAI 8TH RESPONDENT

SUSAN WAITHERA GICHUKI 9TH RESPONDENT

THIKA LAND REGISTRAR 10TH RESPONDENT

ATTORNEY GENERAL 11TH RESPONDENT

GITHUNGURI CONSTITUENCY RANCHING CO. LTD ... 12TH RESPONDENT

(Being an application for extension of time to file a Memorandum of Appeal and Record of Appeal from the Judgment of the (L. Gacheru, J.) delivered on 10th February, 2022 in E.L.C No. 407 of 2017.)



RULING

Brief Background

1. The 1st respondent herein instituted a suit in the ELC Court seeking, an order of cancellation of all title deeds to wit Ruiru Kiu Block 2/ 9759 - 9770, held by the 3rd – 10th defendants, being the resultant title deeds arising from the sub-division of the mother title Ruiru Kiu Block2/3765 and a declaration that the title held by the Plaintiff is the only legal title deed, costs and interest of the suit and any other further relief that the court deemed fit to grant.
2. By a judgment dated February 10, 2022 the Court (Gacheru, J.) declared the 1st respondent to be the bona fide owner of all that parcel of land known as Ruiru Kiu Block 2/3765/ Ruiru Block 2 (githunguri)/3765, directed the 10th respondent to cancel all certificate of titles Ruiru Kiu Block 2/ 9759 – 9770 held by the 3rd – 9th respondent, the 2nd respondent to indemnify the 3rd - 9th respondents and the applicant, 10th and 11th respondent to indemnify the 2nd respondent and they would also bear the costs of the suit. The applicant being aggrieved by the decision, intends to appeal against the said judgment.

Application

3. The applicant filed a Notice of Motion dated September 5, 2022, brought under rule 4 of the [Court of Appeal Rules](#) 2022, seeking the following orders; -
 1. That the applicant be granted leave to file the Memorandum of Appeal and Record of Appeal out of time against the Judgment of Hon Lady Justice Gacheru delivered on 10th February, 2022.
 2. That the said leave do operate as stay of execution.
 3. That the costs of this Application be provided for.
4. The application is supported by the grounds on the face of it and affidavit sworn by Samuel Githuku, the administrator of the applicant. He avers that the judgment was delivered on February 10, 2022; that on February 17, 2022 his advocates wrote to the Deputy Registrar requesting for certified copies of the court proceedings which were ready for collection on the June 30, 2022 but the Certificate of Delay was prepared later and is dated July 29, 2022. That the record of appeal is now ready and he is desirous of pursuing the appeal and no prejudice at all will be visited upon the 1st respondent given the fact that he is in possession of the suit property. He avers that the delay in lodging the Memorandum of Appeal was for reasons beyond the applicant's control and was not so inordinate to be inexcusable. He has a good and arguable appeal with high chances of success and unless leave is granted to file the intended appeal, the same will be rendered nugatory and it would be in the best interest of justice and all fairness to allow the present application.
5. The application is not opposed.

Submissions

6. The applicant submits that the court has discretionary powers to enlarge time for filing an appeal where time has expired, and he could not file an appeal without the court proceedings which were not ready until the June 29, 2022. He prays that the time used in preparing the proceedings be exempted in the computation of time necessary for preparing proceedings as per the annexed Certificate of Delay. That



from the annexed Memorandum of Appeal, he has an arguable appeal with a high chance of success, the respondents will not be prejudiced and if at all they are prejudiced they can adequately be compensated with an award for costs. That the application was brought without undue delay and the same should be allowed with costs.

Analysis and determination

7. I have considered the application and the submissions made. The only issue for determination is whether the application is merited.

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. This Court differently constituted in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determining an application under rule 4. The court held that:

“the decision whether or not to extend time is discretionary. The court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”

10. The applicant avers that judgment in the Environment and Land Court (ELC) was delivered on the February 10, 2022 and on the February 17, 2022, a letter was written to the Deputy Registrar requesting for certified copies of the proceedings and simultaneously filed the Notice of Appeal. The certified copies of proceedings were ready for collection on the June 29, 2022 and they collected them on the June 30, 2022 as per the annexed Certificate of Delay. The application herein is dated September 5, 2022. The explanation for the delay is that the applicant was waiting to be supplied with certified copies of proceedings.

11. Rule 84 of the *Court of Appeal Rules* provides: -

(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

- i. a memorandum of appeal, in quadruplicate
- ii. the record of appeal, in quadruplicate
- iii. the prescribed fee, and
- iv. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded 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.”



12. Under the above provision, an appellant is afforded some reprieve in so far as the computation of the 60-day window within which he should lodge the Record of Appeal is suspended during the typing of proceedings provided he serves the letter bespeaking proceedings upon the court and the respondent. A Certificate of Delay has been provided indicating that the proceedings were ready on 29th June, and the time for preparation for the same was from February 17, 2022 to June 30, 2022, that is One Hundred and Thirty-Three (133) days both days inclusive.
13. The applicant does not state whether he served the said letter on the respondents or not and this court cannot presume that he did. As such, he was obliged to file the Record of Appeal strictly within sixty uninterrupted days of filing the Notice of Appeal. This period lapsed on April 18, 2022. There is also a 2-month unexplained delay from the date of issuance of the certified copies and the date of filing this application.
14. I do not consider this duration to amount to inordinate delay and from the copy of the Memorandum of Appeal filed, it shows that the appeal is arguable on points of law and fact. The lengthy judgment of Gacheru, J. shows that the court had to consider disputed issues of fact and weighty issues of law and the appeal relates to a valuable property. In the interest of justice, the applicant should be afforded an opportunity to exercise his right of appeal.
15. The respondents have not demonstrated that they would suffer undue prejudice if time is extended. On the other hand, the applicant would suffer prejudice as he is already condemned to indemnify the 2nd respondent.
16. The applicant also asked for stay of execution of the impugned judgment, though he has not stated what law he relies on. It is trite law that an application for stay of execution of either proceedings or judgment or ruling or order falls under rule 5(2)(b) of this court's Rules. Such a relief does not fall under the ambit of a single judge, and ought to have been sought separately. For this reason, the request for stay though not formally framed in the prayers is out of order and I decline to entertain it.
17. Having considered the application, I am satisfied that the court should exercise its discretion in favor of sustaining the application. Accordingly, the application is allowed as follow; -
 - a. Time is extended for filing the Memorandum of Appeal and the Record of Appeal.
 - b. The Memorandum of Appeal shall be filed and served within 7 days of this ruling and the Record of Appeal within 60 days of this ruling.
 - c. The costs of the application shall be in the appeal.

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

