



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kiiru & 2 others v Mungai (Civil Application E012 of 2021)
[2021] KECA 19 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 19 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E012 OF 2021
DK MUSINGA, JA
SEPTEMBER 23, 2021**

BETWEEN

PETER KIHOTO KIIRU 1ST APPLICANT

PAUL NG'ANG'A 2ND APPLICANT

KARURA UMOJA INVESTMENTS LIMITED 3RD APPLICANT

AND

GEOFFREY KOMU MUNGAI RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal out of time in an intended appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Thika (Gacheru, J.) delivered on 29th October 2020 in ELC Case No. 723 of 2017)

RULING

- 1 Before me is a Notice of Motion dated 5th January 2021 brought under sections 3A and 3B of the *Appellate Jurisdiction Act*, rules 4 and 75 of the *Court of Appeal Rules, 2010*, 2010 and Article 159 (2) of the *Constitution of Kenya, 2010*, 2010 substantively seeking an order granting leave to the applicants to file and serve a notice of appeal out of time to enable them lodge an appeal against the judgment of Gacheru, J. delivered on 29th October 2020.
- 2 The application is premised on the grounds that upon delivery of the judgment, the 3rd applicant, being a limited liability company, had to convene a special meeting with its Board of Directors to deliberate on the judgment which meeting was delayed due to limitations on movement owing to the covid-19 pandemic. Further, that the Chairman of the Board of Directors of the 3rd applicant was diagnosed with testicular cancer in July 2020 and has been sickly. The 3rd applicant had therefore to await to have a convenient date for the meeting in which the Chairman of the Board of Directors would be present. That for these reasons, the applicants delayed in instructing their advocate to institute an appeal.



- 3 According to the supporting affidavit sworn in support of this application by Peter Kihoto Kiiru, the 1st applicant and a director of the 3rd applicant, the delay in filing the notice of appeal was not inordinate and or deliberate and is therefore excusable. The applicants further argue that they have an arguable appeal with high chances of success and that the respondent will not suffer any prejudice if this application is allowed.
- 4 The applicants have filed their written submissions that are dated 16th April 2021. I must point out that the applicants in their submissions refer to a notice of motion application dated 27th November 2020 and filed on 4th December 2020. I have not seen this application which the applicants are referring to. In their submissions, the applicants reiterate the grounds appearing in the application and argue that it is in the interest of justice that they be given an opportunity to pursue their intended appeal so that substantive justice is achieved.
- 5 The application was opposed by way of a replying affidavit sworn by the respondent on 4th May 2021. The arguments contained in the replying affidavit which are also replicated in the written submissions of the respondent dated 4th May 2021 are that the instant applicant is an abuse of the court process and was only brought by the applicants in bad faith and in an attempt to delay justice. The respondent argues that even though there was restriction of movement owing to covid-19, the Board of Directors of the 3rd applicant could still have had a virtual meeting. Further, that in the absence of the Chairman of the Board of Directors who was said to be ill, the other members of the Board could have met and passed any required resolution. For these reasons, the respondent argues that the application is unmerited.
- 6 I have considered the application, the grounds in support thereof, the submissions as well as the relevant law. The principles upon which this Court determines an application for extension of time under rule 4 are well settled. The Court considers, inter alia, the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231; *Fakir Mohammed v Joseph Mugambi & 2 Other* [2005] eKLR; and *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019.
- 7 In *Njuguna v Magichu & 73 Others* [2003] KLR 507, Waki, J.A. expressed himself thus:
- “The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless, discretion has to be exercised judicially, that is on sound factual and legal basis.”
- 8 The trial court delivered its judgment on 29th October 2020. Pursuant to rule 75 of the rules of this Court, the applicants were supposed to have filed their notice of appeal within fourteen days from 29th October 2020. There is a time gap of about 68 days between the date of the judgment and the date of this application. The applicants have explained the reasons for the delay and annexed documents in support where necessary. I find the explanation for the delay plausible. I also note that upon being issued with instructions to appeal, the advocate for the applicants had filed an application for enlargement of time to file a notice of appeal before the trial court. This demonstrates that the applicants did not sit on their rights of appeal and are keen on pursuing the appeal to its logical conclusion.
- 9 On the aspect of the chances of success of the intended appeal, it is not my role at this stage to determine definitively the merits of the intended appeal. That is the duty of the full court when it is ultimately



presented with the intended appeal. In this regard I am guided by the case of *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

- 10 Although the applicants have not annexed the draft memorandum of appeal to this application, I have perused the affidavit in support of the application as well as the impugned judgment and it is evident that the intended appeal is arguable.
- 11 On the issue of the degree of prejudice to be occasioned to the respondent if the application is allowed, the applicants argue that the respondent will not suffer any prejudice. I disagree with the applicants. The trial court decided the case in favour of the respondent and ordered that a transfer of the suit property be transferred to the respondent. It is obvious and the expectation of the respondent is that these legal proceedings come to an end. On the other hand, the applicants are exercising their constitutional right of appeal having been dissatisfied with the judgment of the trial court. The degree of prejudice that the respondent stands to suffer if this application is allowed is outweighed by the prejudice that the applicants will suffer if this application is not allowed.
- 12 Consequently, I allow the application and direct the applicants to file a proper notice of appeal within fourteen (14) days from the date of this ruling. The applicants shall also bear costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY SEPTEMBER, 2021.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

