



REPUBLIC OF KENYA



KENYA LAW

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**Ngewa (Suing on his own behalf and on behalf of the Estate of Joseph
Ngewa Kitole - Deceased) v Muteti & 10 others (Civil Application
E146 of 2021) [2021] KECA 94 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 94 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E146 OF 2021
F SICHALE, JA
OCTOBER 22, 2021**

BETWEEN

**GEOFFREY KITHOME NGEWA (SUING ON HIS OWN BEHALF AND
ON BEHALF OF THE ESTATE OF JOSEPH NGEWA KITOLE -
DECEASED) APPLICANT**

AND

**GEOFFREY MWANGANGI MUTETI 1ST RESPONDENT
JONATHAN PETER KILONZO 2ND RESPONDENT
KATUKU NGITE 3RD RESPONDENT
FRANCIS MUTISYA SILA 4TH RESPONDENT
PAUL WAMBUA KYENGO 5TH RESPONDENT
HARRISON MUTUA NZIOKA 6TH RESPONDENT
JOEL MALELU KIOKO 7TH RESPONDENT
MULILU KIMOTHO 8TH RESPONDENT
KYENZE MUIA 9TH RESPONDENT
DAVID KIVIEKO MUTETI 10TH RESPONDENT
THE LAND REGISTRAR MAKUENI COUNTY 11TH RESPONDENT**

*(Being an Application to enlarge time within which to file a Notice of Appeal from the judgment
of Mbogo J dated 19th January 2021.) IN (Makueni High Court ELC Case No. 88 of 2017)*



RULING

1 Before me is a motion dated 4th May 2021 and brought pursuant to the provisions of Rule 4 of the Court of Appeal Rules, Sections 1A, 1B and 3A of the Civil Procedure Act CAP 21 of the Laws of Kenya and all other enabling provisions of the Law in which Geoffrey Kithome Ngewa (the applicant herein) seeks the following orders:

- "1. Spent.
2. THAT the Honourable Court do enlarge time to file the annexed Notice of Appeal from the judgment of Honourable Justice Mbogo C.G in HCCC ELC No. 88 of 2017 delivered on 19th January 2021.
3. THAT the annexed Notice of Appeal be deemed as duly filed upon grant of this application.
4. THAT this Honourable Court be order of temporary injunction restraining the respondents, their agents, servants and or anyone acting or claiming through them from trespassing, entering, sub-dividing, evicting or in any other manner interfering with the parcel of land numbers MAKUENI/IKALYONI/1911:

MAKUENI/IKALYONI/2215	MAKUENI/IKALYONI/2221
MAKUENI/IKALYONI/2217	MAKUENI/IKALYONI/2216
MAKUENI/IKALYONI/2210	MAKUENI/IKALYONI/1912
MAKUENI/IKALYONI/2212	MAKUENI/IKALYONI/2211
MAKUENI/IKALYONI/2214	MAKUENI/IKALYONI/2213
MAKUENI/IKALYONI/1908	MAKUENI/IKALYONI/1908
MAKUENI/IKALYONI/1910	MAKUENI/IKALYONI/1909
MAKUENI/IKALYONI/2222	MAKUENI/IKALYONI/2224
MAKUENI/IKALYONI/2219	MAKUENI/IKALYONI/2218 and

MAKUENI/IKALYONI 2220 pending the hearing and determination of this application.

5. THAT this Honourable Court be pleased to grant an order of temporary injunction restraining the respondents, their agents, servants and or anyone acting or claiming through them from trespassing, entering, sub-dividing, evicting or in any other manner interfering with the parcel of land numbers MAKUENI/IKALYONI/1911:

MAKUENI/IKALYONI/2215	MAKUENI/IKALYONI/2221
MAKUENI/IKALYONI/2217	MAKUENI/IKALYONI/2216
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MAKUENI/IKALYONI/1910	MAKUENI/IKALYONI/1909
MAKUENI/IKALYONI/2222	MAKUENI/IKALYONI/2224
MAKUENI/IKALYONI/2219	MAKUENI/IKALYONI/2218 and



MAKUENI/IKALYONI 2220 pending the hearing and determination of the intended appeal.

6. THAT the costs of this application be in the cause.”

2 The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that they had instituted Environment and Land Case Number 88 of 2017, seeking to have some parcels of land registered in their names which suit was dismissed by Mbogo, J on 19th January 2021 on the grounds *inter alia* that the same was res judicata. He further deposed that he had built his house on the suit land with his siblings and that they have been staying there since they were born and that they delayed in instructing advocates on record to pursue the matter due to financial implications owing to the restraints caused by the Covid 19 pandemic and that further no prejudice would be occasioned to the respondents if the orders sought are granted.

3 The respondents did not file any response to the application.

4 It was submitted for the applicant that the Court had unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time and that the delay herein was not inordinate owing to the covid 19 pandemic causing economic distress and harsh financial implications on the applicant thus necessitating the delay in giving instruction to counsel and raising the requisite legal fees and that further the respondents would not suffer any prejudice if the instant application is allowed.

5 I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicants’ submissions, the cited authorities and the law.

6 The applicants motion is brought, under Rule 4 of this Court’s Rules. The said Rule provides:

“4.

Extension of time

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 or 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.”

7 The principles 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:

“It is now settled that the decision whether to extend the time for appealing 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 the 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.”

8 In the instant case the impugned judgment was delivered on 19th January 2021 whereas the instant application was filed on or about 4th May 2021, a period of about 4 months from the date of the impugned judgment. In my considered opinion, whereas the said delay maybe considered inordinate,



the same has been sufficiently explained to the satisfaction of this Court namely; that the applicant elayed in instructing his advocates on record to pursue the appeal as he was engaging his siblings on the financial implications owing to the restraints caused by covid 19 pandemic. In any event, the application is no opposed by the respondents.

- 9 As to whether there is a possibility of the appeal succeeding, I am mindful of the fact that I cannot say more regarding this issue as a Single Judge lest I embarrass the bench that will be eventually seized of the appeal.
- 10 As regards prejudice, it has not been demonstrated to this Court that the respondents will suffer any prejudice. On the other hand, if the instant application is not allowed, the applicants will stand to suffer great prejudice as they will be evicted from the suit property where they contend they have lived since birth.
- 11 Taking into totality all the circumstances in this case, I find that the applicants have demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in *Leo Sila Mutiso case* (supra), to extend time and therefore allow the application as prayed in terms of prayer 2 and 3 only . As regards prayers 4 and 5 for temporary injunction, I cannot make a determination regarding the same sitting as a Single Judge and I will make no further comment regarding the same.
- 12 Accordingly, the applicants are hereby granted 30 days within which to file a Notice of Appeal failure to which these orders shall stand vacated.

The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

