



**Gogo & another v Mwasina & 6 others (Civil Application
35 of 2021) [2021] KECA 130 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 130 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 35 OF 2021
SG KAIRU, JA
NOVEMBER 5, 2021**

BETWEEN

BINTOMARI JUMAA GOGO 1ST APPLICANT

**HAMISI AMRI MAZU (SUING AS PERSONAL REPRESENTATIVES OF THE
ESTATE OF AMRI MCHORO MWAMURI (DECEASED) 2ND APPLICANT**

AND

MATANO MWASINA 1ST RESPONDENT

IBRAHIM NJOROGE KIMANI 2ND RESPONDENT

BETINA MALTHER 3RD RESPONDENT

SWAN ISLAND LIMITED 4TH RESPONDENT

MOSES KABERI KARIUKI 5TH RESPONDENT

DICKSON OTIENO AKENO 6TH RESPONDENT

CHRISTINE MUMBI MIANO 7TH RESPONDENT

(An application for leave to file an appeal out of time against the ruling of the Environment & Land Court at Mombasa (Yano, J.) delivered on 16th July, 2020 in ELC Case No. 120 of 2007)

RULING

- 1 The applicants, Bintomari Jumaa Gogo and Hamisi Amri Mazu, are the personal representatives of Amri Mchoro Mwamuri, deceased who died on 13th May 2020. In their application before me dated 18th May 2021 made under Rule 4 of the *Court of Appeal Rules*, they seek extension of time within which file and serve a notice of appeal and record of appeal to challenge a ruling of Environment and Land Court given on 16th July 2020 which struck out the deceased's suit for adverse possession.



- 2 The principles governing applications of this nature as stated by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014* [2014] eKLR are that: extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay.
- 3 Before that, Waki JA in the case of *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR stated that:
- “The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors: See *Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997* (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000* (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
- 4 What then are the circumstances in the present application? The material before me in reference to the application includes the supporting affidavit of Bintomari Jumaa Gogo; replying affidavits sworn by Matano Mwasina and by Dickson Otieno Akeno, the 1st and 6th respondents respectively; written submissions by the applicants and by 6th and 7th respondents. Based on the material, in the suit before the ELC, the deceased sought to be declared the owner of properties therein mentioned on grounds that he had acquired the same by adverse possession having occupied the same for over 73 years.
- 5 An application was made to strike out that suit which culminated in the impugned ruling delivered by the ELC (C.K. Yano, J.) on 16th July 2020. Meanwhile, and seemingly unknown to the deceased’s advocates, the deceased had died on 13th May 2020 and in ignorance of that fact, the advocates for the deceased filed a notice of appeal followed by a record of appeal in Civil Appeal No. E6 of 2020 in the name of the deceased.
- 6 On 25th January 2021, the present applicants obtained a limited grant of letters of administration ad litem of the estate of the deceased on the strength of which they presented this application for extension of time on 18th May 2021. Exhibited to the affidavit in support of the application is a notice of withdrawal also dated 18th May 2021 relating to Civil Appeal No. E6 of 2020. The 6th and 7th respondents through the firm of F.M. Mwawasi & Company Advocates contend that the notice of withdrawal of Civil Appeal No. E6 of 2020, as well as that appeal, are incompetent and fatally defective as “the alleged appellant purporting to withdraw the appeal...is a non-existent appellant, having passed away on 13th May 2020.”
- 7 Bintomari Jumaa Gogo has deposed in her supporting affidavit that the deceased was her husband, that she is now the main actor in the matter and that she is 81 years old, “quite old and frail” and has been ailing due to old age and that she resides on the subject properties with her children and risks being rendered homeless if evicted. Counsel for the applicants Kenga & Company Advocates have submitted that the delay involved is excusable and that there are justifiable reasons for allowing the application.



- 8 Mrs. Kabole learned counsel for the 5th respondent indicates on behalf of her client that there is no objection to the application.
- 9 G.A. Okumu & Co Advocates for the 1st respondent and F.M. Mwawasi Advocates for the 6th and 7th respondents object to the application on grounds that the applicants cannot restart the appeal process all over again having filed an incompetent and defective appeal which is still on record and that there is a delay of more than 10 months which has not been explained and neither can the delay be attributed to the corona virus pandemic as the ruling in question was delivered one year prior to the outbreak of the pandemic.
- 10 I have considered the application, the affidavits, and the submissions. There is no dispute that the deceased died on 13th May 2020 prior to the delivery of the ruling on 16th July 2020. Oblivious of that fact, his advocates filed a notice of appeal and the substantive appeal in Civil Appeal No. E6 of 2020 in the name of the deceased and subsequently filed a notice of withdrawal of that appeal. On their part, the advocates for the 6th and 7th respondents had prior to the notice of withdrawal filed an application to strike out the appeal on grounds that the deceased, named in that appeal as the appellant, died on 13th May 2020. The matter of competence of the Civil Appeal No. E6 of 2020 and of its withdrawal are matters to be addressed in that appeal. For now, the question is whether the applicants have discharged their burden and explained to the court why the instant application should be allowed.
- 11 As already noted, the deceased died on 13th May 2020 prior to the delivery of the impugned ruling on 16th July 2020. His advocates proceeded to file an appeal in his name. It is not clear when the application for the limited grant of letters of administration was made but the same was issued on 25th January 2021. The widow of the deceased explains that she is elderly and ailing but gained strength to pursue the matter and filed the present application on 18th May 2021.
- 12 Some effort, though not entirely satisfactory has been made, to explain why having obtained the limited grant on 25th January 2021 the applicants then waited until 18th May 2021 to present the instant application. The claim by widow of the deceased that she was prevented by reason of her age and condition from moving faster in filing the instant application would have been better supported. However, given the nature of the dispute and the complaints articulated in connection with the impugned ruling, I am prepared to grant the applicants the benefit of doubt and to allow the application.
13. The applicants are hereby granted an extension of time within which to file and serve their notice and record of appeal. They shall do so within 21 days from the date of delivery of this ruling. Costs of the application shall be costs in the intended appeal.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF NOVEMBER, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is true copy of the original.

Signed

DEPUTY REGISTRAR

