



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiarie v Njuguna & 2 others (Civil Application 57 of 2019)  
[2021] KECA 210 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 210 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 57 OF 2019  
DK MUSINGA, JA  
NOVEMBER 5, 2021**

**BETWEEN**

**JOHN WAWERU KIARIE ..... APPLICANT**

**AND**

**MAINA NJUGUNA ..... 1<sup>ST</sup> RESPONDENT**

**KIARIE NJUGUNA ..... 2<sup>ND</sup> RESPONDENT**

**GITAU NJUGUNA ..... 3<sup>RD</sup> RESPONDENT**

*(An application for extension of time to file an appeal out of time  
from the Judgment of the Environment and Land Court at Murang'a  
(Kemei, J.) delivered on 17th January 2019 in E.L.C No. 41 of 2017.)*

**RULING**

1. The applicant's notice of motion dated 17th April 2019 and brought under rule 4 of this Court's Rules seeks leave to file an appeal out of time from the orders of Kemei, J. dated 17th January 2019 in Murang'a ELC No. 41 of 2017. The gravamen of the application is that the applicant instructed his current advocate to take over the conduct of the matter from her former advocate but by the time his current advocate obtained leave to take over the conduct of the matter, the time for filing the intended appeal had already lapsed.
2. In his affidavit in support of the application, the applicant states that he was aggrieved by the decision of the trial court and instructed his then advocate to apply for proceedings and the judgment and file a notice of appeal; that on 18th January 2019 his advocates (Wambui Ngugi & Company) applied for certified copies of the judgment and the proceedings and put in a notice of appeal on 24th January 2019.



3. Thereafter, he engaged another advocate, Mr. T. M. Njoroge, who came on record on 4th April 2019, by which date the statutory period of filing the record of appeal had lapsed. The applicant further states that his intended appeal is meritorious and urges this Court to grant him leave to pursue the same.
4. The respondents opposed the application. They stated that the applicant is not entitled to an extension of time and cited the principles set by this *Court in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application No. 251 of 1997*.
5. They stated that the applicant approached this Court for extension of time nearly 3 months after the judgment was delivered; and that the delay was inordinate and has not been properly explained. They urged this Court to dismiss the application.
6. I have considered the affidavits and submissions filed by the parties. In *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi (supra)*, this Court stated:

“It is now well settled that the decision whether or not 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 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.”
7. On the first principle, that is, the length of the delay, the application was filed on 30th April 2019, 95 days after the notice of appeal was filed. Under rule 82 of this Court’s Rules, an appeal should be instituted within sixty (60) days of the date when the notice of appeal was filed. The delay is about thirty five (35) days, which in my view is not inordinate.
8. The applicant explained that the delay was occasioned by the change of advocate. Upon receipt of instructions, Mr. Njoroge obtained the proceedings and instituted this application.
9. Turning to the intended appeal, whereas it is not for a single judge to make definite findings about the chances of success of the envisioned appeal, all I can say is that given that the dispute between the parties is over a parcel of land that is registered in the applicant's name, the intended appeal is arguable. The trial court held that the respondents were in adverse possession of the disputed parcel of land. The applicant wishes to challenge that finding. From the annexed draft memorandum of appeal, the intended appeal is not frivolous.
10. I do not think that the respondents shall suffer any serious prejudice if this application is allowed. They are already in occupation of the land. On the other hand, the applicant wishes to exercise his constitutional right of appeal. I am therefore inclined to exercise my discretion in favour of the applicant.
11. Consequently, I allow this application and direct that the record of appeal be filed and served within thirty (30) days from the date of delivery of this ruling. The costs of the appeal shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**D. K. MUSINGA, (P).**

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**JUDGE OF APPEAL**



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

*Signed*

**DEPUTY REGISTRAR**

