



REPUBLIC OF KENYA



**Hinzano & another v Ngala (Civil Application 70 of 2020)
[2021] KECA 263 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 263 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION 70 OF 2020
SG KAIRU, JA
DECEMBER 3, 2021**

BETWEEN

SIMEON PATRICK HINZANO 1ST APPLICANT

KALUME HINZANO NGALA 2ND APPLICANT

AND

MKUTANO HINZANO NGALA RESPONDENT

(An application for extension of time to file an appeal against the judgment of the Environment and Land Court at Malindi (Olola, J.) delivered on 29th April, 2020 in ELC Case No. 202 of 2014)

RULING

1. In their application dated 18th August 2020, the applicants Simeon Patrick Hinzano and Kalume Hinzano Ngala seek orders under Rule 4 of the Court of Appeal Rules that they be granted leave to file a notice of appeal and a memorandum and record of appeal out of time. They intend to challenge a judgment of the Environment and Land Court (J.O. Olola, J.) delivered on 29th April 2020.
2. The brief background is that the applicants and the respondent, Mkutano Hinzano Ngala, are brothers. At the heart of the dispute are two properties, namely Kilifi/Takaye/Musoloni/294 and Kilifi/Takaye/Musoloni/608, left behind by their late father, Hinzano Ngala deceased. In the judgment the applicants intend to challenge on appeal, the ELC ordered the Kilifi County Land Registrar and Surveyor to ensure that the two properties are partitioned equally among the three brothers and that upon such partitioning, each of the brothers be registered as owners of their respective portions.



3. It is an established principle that in an application of this nature, the Court is called upon to exercise judicial discretion. In *Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR* Waki, J.A 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. In his affidavit in support of the application, the 1st applicant Simeon Patrick Hinzano deposes that they (the applicants) were not aware that judgment had been delivered “since it was during that time of Covid 19 pandemic and the court operations were paralyzed in the whole country”; that the advocate who was representing them in the matter did not inform them that the judgment had been delivered and his office was closed; and that it is “only recently that we perused the court file and discovered that judgment had been delivered in favour of the respondent against us”.
5. Under Rule 75 of the *Court of Appeal Rules*, the applicants should have filed the notice of appeal by 13th May 2020. Although the applicants say they “were not aware that judgment had been delivered since it was during that time of Covid 19 pandemic and court operations were paralyzed in the whole country”, they do not explain how that prevented them from either filing the notice of appeal or presenting the present application sooner. Furthermore, the applicants state that they became aware of the judgement when they perused the court file but do not say when they did so. They also blame their advocate for failing to inform them of the delivery of the judgement. In the end it becomes difficult to discern from the application and the supporting affidavit the reason or reasons for delay involved.
6. As already indicated, the judgment was delivered on 29th April 2020. The present application dated 18th August 2020 was presented on 19th August 2020. That is a delay of about three months that is not, in my view, satisfactorily explained. 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* 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. The Supreme Court further pronounced that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Further, that whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and public interest are also relevant considerations.
7. As to the merits of the intended appeal, although the applicants complain that the Judge failed to consider other properties of the deceased, it is noteworthy that the Judge ordered the properties the subject of the suit to be partitioned equally between the brothers.
8. All in all, the applicants have not demonstrated, to my satisfaction, what prevented them from either filing the notice of appeal in time or bringing the present application sooner. Consequently, I do not have sufficient basis to exercise the discretion of the Court in favour of the applicants. In the result, the application dated 18th August 2020 is declined and is hereby dismissed. I make no orders as to costs.



DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF DECEMBER 2021.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

