



Mangi & 2 others v Estate of Hamisi Mwinyikai Ramadhhal alias Khamisi Mwinyikai (Deceased) & 7 others (Civil Application E009 of 2020) [2021] KECA 1088 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 1088 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E009 OF 2020
SG KAIRU, JA
DECEMBER 3, 2021**

BETWEEN

**SAFARI MWERI MANGI 1ST APPLICANT
PETER MWERI MANGI 2ND APPLICANT
CORNEL L. SHISANYA 3RD APPLICANT**

AND

**ESTATE OF HAMISI MWINYIKAI RAMADHAL ALIAS KHAMISI
MWINYIKAI (DECEASED) 1ST RESPONDENT
SULEIMAN KHAMISI MWINYIKAI 2ND RESPONDENT
MARYAM MWINYIKAI 3RD RESPONDENT
MASIKA KHAMISI MWINYIKAI 4TH RESPONDENT
HASSAN HUSSEIN 5TH RESPONDENT
CHIEF LAND REGISTRAR MOMBASA 6TH RESPONDENT
PHINEAS ERNEST WOLFFER 7TH RESPONDENT
NATIONAL LAND COMMISSION 8TH RESPONDENT**

(An application for extension of time to file an appeal against the judgment of the Environment and Land Court at Mombasa (Munyao Sila, J.) delivered on 30th July 2020 in ELC Case No. 68 of 2020 (OS))

RULING

1. The applicants in their application dated 7th October 2020 and brought under, inter alia, Rules 41, 42 and 43 of the Rules of this Court seek enlargement and extension of time to file an appeal from the



ruling delivered on 30th July, 2020 by Justice Munyao Sila in Mombasa ELC Case 68 of 2020 (OS). In that ruling, the ELC declined to grant the applicants an order of temporary injunction to restrain dealings in the property known as Plot No CR 4314/I/MN and any other titles registered in the Lands registry in Mombasa or there about over which the applicants claim to be entitled by adverse possession. In declining the request for temporary injunction, the ELC directed that the applicants needed to establish their claim during the trial. It appears that the substantive suit is pending determination in the lower court.

2. Dissatisfied with that ruling, the applicants duly lodged a notice of appeal on 5th August 2020 and now seek extension of time to file the memorandum and record of appeal which should have been filed by 5th October 2020. They have explained in the supporting affidavit that although they had compiled the record of appeal, they discovered when they were due to file it that they had omitted very crucial documents in the appeal which they rectified on 7th October 2020 by which time the 60 days provided for filing the memorandum of appeal and record of appeal had lapsed two days earlier. They therefore made the instant application dated 7th October 2020 which they filed on 22nd October 2020. The applicants urge that their intended appeal is meritorious because, among other reasons, the learned Judge failed to consider that the applicants have been on the property for 34 years.
3. In opposition to the application, the advocates for the 1st to 4th respondents Ms. Matata and Mwabonje Advocates submitted, on the strength of the case of *County Government of Mombasa vs. Kooba Kenya Limited* (2019) eKLR, that the applicants are guilty of inordinate delay and are not deserving of the order sought. It was urged that the applicants do not have a valid claim for adverse possession as they cannot dispute ownership to the property on one hand and claim adverse possession to the same on the other hand. Citing the case of *Abdul Azizi Ngoma vs. Mungai Mathayo* (1976) KLR, it was submitted that the applicants have not demonstrated sufficient reason to warrant grant of the order sought.
4. I have considered the application, the affidavits, and the submissions. As the Supreme Court of Kenya stated 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; 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; whether the application is brought without undue delay; and whether public interest should be a consideration. See also *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, Civil Application No. Nai 255 of 1997 [1999] 2 EA 23.
5. It is not disputed that the notice of appeal was filed promptly. The applicants have explained that they discovered on 5th October 2020, when the memorandum and record of appeal was due for filing, that a crucial document was missing; that two days later they were in a position to file the appeal but time had lapsed; that they promptly prepared the present application which they filed on 22nd October 2020.
6. I am satisfied that the delay involved is satisfactorily explained and neither is it inordinate in the circumstances. I accordingly allow the application. The applicants shall file and serve the memorandum of appeal and record of appeal within 45 days of delivery of this ruling. Costs of the application shall be costs in the appeal.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

