



REPUBLIC OF KENYA



**Wanjiku v Githuka & another (Civil Application 138 of 2019)
[2021] KECA 257 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 257 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 138 OF 2019
SG KAIRU, JA
DECEMBER 3, 2021**

BETWEEN

DAINA WAMBUI WANJIKU APPLICANT

AND

EUNICE WANGU GITHUKA 1ST RESPONDENT

CHARLES MUNYIRI GACHIGUA 2ND RESPONDENT

(An application for extension of time to file and serve notice of appeal and record of appeal out of time against the judgment of the Environment & Land Court at Nyeri (L.N. Waitbaka, J.) delivered on 14th February 2019 in ELC Case No. 45 of 2015)

RULING

1. I begin this ruling with an apology to counsel for the delay. The application was listed for hearing before me on 17th February 2021 alongside three other applications which I dealt with immediately by making orders on the same. I was under the mistaken impression I had also dealt with this application when in fact I had not. This has just been drawn to my attention by the Registry. I regret the oversight.
2. By her application dated 23rd August 2019, the applicant, Daina Wambui Wanjiku, applied under Rule 4 of the Court of Appeal Rules for extension of time to file and serve notice of appeal and memorandum of appeal. She intends to challenge a judgment delivered by the Environment and Land Court at Nyeri on 14th February 2019 in ELC Case Number 45 of 2015 dismissing her suit seeking cancellation of a title issued to the 2nd respondent in respect of the suit property. The court found that the orders she sought could not be granted because the 2nd respondent was an innocent purchaser for value without notice.
3. The applicant has deposed that the hearing of the suit was concluded on 12th July 2018 and judgment was to be delivered on notice; that no notice of delivery was in fact given and it was only on 19th March



2019 when her former advocate established on inquiry at the court registry that judgment had been delivered on 14th February 2019; that on 11th April 2019 she instructed her current advocates to file a notice of appeal; that between 19th March 2019 and 11th April 2019, she was looking for funds to pay her new advocates.

4. The applicant's advocate, Wanderi Muthigani, deposed in a supporting affidavit that although notice of delivery of judgment was initially given for 23rd October 2018, it was not delivered on that date; that he did not receive any notice subsequently of delivery of the judgment on 14th February 2019 and it was upon making enquiry at the ELC registry on 19th March 2019 that he established that judgment had been delivered on 14th February 2019.
5. I have considered the application and the submissions. Whereas the applicant has explained the reasons for the delay in the filing of the notice of appeal on 11th April 2019, there is no explanation why the present application was not filed until 23rd August 2019. That is a delay of over four months that is not explained. There is however a veiled attempt to justify that delay by presenting a certificate of delay issued by the Deputy Registrar of the ELC on 17th July 2019 which suggests that counsel was waiting to receive the typed proceedings and the certificate of delay before filing the present application. That was however no need to wait for that for purposes of the present application which ought to have been filed expeditiously. That as it may and given nature of the matter and the proposed grounds of appeal as set out in the draft memorandum of appeal, I am inclined, reluctantly, to exercise the court's discretion in favour of the applicant and allow the application having regard to the applicable legal principles in that regard. See *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014 [2014] eKLR.*
6. Accordingly, the application dated 23rd August 2019 is hereby allowed. The time for filing and serving the notice of appeal and memorandum and record of appeal is hereby extended. The notice of appeal dated 11th April 2019 and lodged on 18th April 2019 is deemed as duly filed and served. The applicant shall file and serve her memorandum and record of appeal within 45 days from the date of delivery of this ruling.
7. Costs of the application shall abide by the outcome of the appeal.

Dated and delivered at Nairobi 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.

DEPUTY REGISTRAR

