



Case Number:	Civil Application E262 of 2020
Date Delivered:	09 Jul 2021
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Daniel Kiio Musinga
Citation:	Lydia Gachambi Ndung'u v Dominic Ngugi Waithiru [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	Hon. G.M.A Ong'ondo
County:	Nairobi
Docket Number:	-
History Docket Number:	ELC Case 68 of 1996
Case Outcome:	Application dismissed with costs to the respondent
History County:	Kiambu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. E262 OF 2020

BETWEEN

LYDIA GACHAMBI NDUNG'U (Suing as the personal representative of the Estate of MILKA

WANJIRU MUIGAI & VERONICA WANJIRU MUIGAI (Deceased)APPLICANT

AND

DOMINIC NGUGI WAITHIRU.....RESPONDENT

(Being an application for leave to appeal out of time against the Judgment of the Environment and Land Court at Thika (Hon. G.M.A Ong'ondo) delivered on 7th November, 2018 in **ELC Case No. 379 of 2017 (O.S) formerly Nairobi ELC Case No. 68 of 1996**

RULING

1. This is an application dated 24th August 2020 for extension of time to file an appeal out of time. The judgment sought to be appealed from was delivered on 7th November 2018. The application was brought under **Article 159** of the **Constitution of Kenya 2010, section 3A** and 3B of the **Appellate Jurisdiction Act** and **rules 4 and 41** of the **Court of Appeal Rules 2010**.
2. The brief background of the case is that the respondent by originating summons dated 8th January 1996 filed a suit against **Milka Wanjiru Muigai** and **Veronica Wanjiru Muigai** (both deceased) for ownership of 0.35 acres of land in land title **L.R. GithungurijKanjari/1163** by way of adverse possession.
3. On 7th November 2018 the learned Judge, **G.M.A Ong'ondo**, entered judgment jointly and severally against Milka Wanjiru Muigai and Veronica Wanjiru Muigai and granted ownership of the suit property to the respondent.
4. Aggrieved by the judgment, a notice of appeal dated 14th November, 2018 was filed with intention to appeal against the entire judgment.
5. The instant application is supported by the grounds set forth on the face of the application together with those laid down in the supporting affidavit sworn by the applicant on 24th August, 2020.

6. It is the applicant's case that Milka Wanjiru Muigai and Veronica Wanjiru Muigai died on 21st September 2000 and 9th January 2020 respectively; that she has since obtained letters of administration ad litem issued on 7th November 2001 and on 20th August 2020 in relation to the estates of the deceased for purposes of enabling her proceed with the intended appeal.

7. The applicant depones that notice of appeal was filed within the prescribed time; subsequently, an application for copies of proceedings was also done in time, but the memorandum of appeal was not filed. It is her averment that the time for appeal has run out hence, necessitating the filing of the instant application.

8. The applicant's reason for failure to file her appeal in time are delay by the registrar to issue a certified decree and typed proceedings in time; secondly, on the health condition of Milka and Veronica who have since passed on and; thirdly, that she did not have the financial capability of instructing an advocate to deal with the appeal.

9. The applicant argues that she has an arguable appeal that raises important issues of law and fact and that no prejudice will be suffered by the respondent that cannot be adequately met by way of costs.

10. In response to the application, the respondent has filed his replying affidavit sworn on 9th October 2020. It is his reply that the applicant's application is vexatious and an abuse of court process and that the applicant is forum shopping as seen in her filed application in this Court, Civil Application No. 85 of 2020 in respect of the judgment the subject matter of this case. The same was slated for ruling on 6th November 2020 and, a subsequent application in the Senior Principal Magistrate's Court at Githunguri; ELC Case No. 14 of 2020 in respect to the suit property in which he had raised a preliminary objection that came up for hearing on 15th October 2020.

11. The respondent avers that the applicant is guilty of laches, the delay is inordinate and the Court in exercise of its discretionary power must not aid her indolence. It is contested that the impugned judgment was delivered way back on 7th November 2018, certificate of delay was ready for collection on 12th February 2019 but collected on 15th March 2019 yet, the applicant has not furnished the court with any credible reason as to why it has taken close to two (2) years for her to file the instant application.

12. It is the respondent's contention that the reason for delay as advanced by the applicant that of ailment of Veronica Wanjiru for more than ten (10) years cannot stand as no medical reports have been tendered as evidence.

13. The respondent indicates that he will suffer grave prejudice for reason that he is elderly and the applicant has been dragging him into unending litigation; and that in the event the application is allowed, it will lead to reopening of the case which he will have to defend after a period of close to two (2) years.

14. In conclusion, the respondent claims that the applicant has come to court way too late in the day - a period of close to two (2) years - after delivery of the impugned judgment.

15. The matter was canvassed by way of written submissions. The applicant having filed her submissions dated 7th October 2020 whereas the respondent's are dated 12th October 2020.

16. I have carefully considered the notice of motion, supporting affidavit, the replying affidavit and the rival written submissions and the legal authorities cited by all parties.

17. **Rule 4** of this *Court's Rules* provides that: -

"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

18. It is now settled law that the principles this Court should consider in granting extension of time under **rule 4** are: the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed. The expressed principles have severally been applied to many decisions of this Court in applications of the same nature. See *LeoSila Mutiso v Rose Wangari Mwangi* (supra); *Karny Zaharya & Another v Shalom Levi [2018] eKLR*; and *Patel v Waweru & 2 Others [2003] eKLR*.

19. In the instant application, the applicant has explained why there was a delay in filing the memorandum of appeal and subsequent record of appeal. Her explanation is threefold; firstly, that the delay was as a result of the registrar not issuing a certified decree and typed proceedings in time; secondly, the health condition of Milka and Veronica who have since passed on and; lastly, that she did not have the financial capability of instructing an advocate to deal with the appeal.

20. On the first limb as advanced by the applicant, from the attached certificate of delay, it is noted that application for copies of proceedings was done on 14th November, 2018 well within the time required to lodge an appeal. The same were ready by 12th February, 2019. However, the applicant collected them on 15th March, 2019. The applicant is silent on the one (1) month's delay between when the copies of proceedings were ready and when they were collected.

21. Secondly, with regard to the health condition of Milka and Veronica, no medical records have been provided as evidence. I tend to agree with the respondent that in the absence of medical reports, the same are mere allegation which this Court cannot consider.

22. Lastly on the issue of financial incapacitation, the applicant had averred that she had utilized most of her *resources* to take care of Veronica when she was sick, hence, she could not instruct an advocate to take conduct of the intended appeal. I find this reason not plausible.

23. It is not in doubt that the impugned judgment was delivered on 7th November, 2018, certificate of delay was collected on 15th March, 2019 and the instant application filed on 25th August, 2020. No explanation has been given by the application for the delay in excess of seventeen (17) months between the time she received the certificate of delay and the time of filing the instant application.

24. In *Abdul Azizi Ngoma v Mungai Mathayo [1976] eKLR*, this Court stated:

"We would like to state once again that this Court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered."

25. Having regard to the circumstances of this case, I find that there is no adequate and reasonable explanation for the delay on the

part of the applicant. Guided by the principle held in the above mentioned case, I shall not proceed to the other considerations such as prejudice to the respondent and the chances of success of the intended appeal. Consequently, I dismiss the application with costs to the respondent.

DATED AT NAIROBI THIS 9TH DAY OF JULY, 2021

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR



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