



**Kitare & another v Kitera (Civil Application E010 of 2024)  
[2026] KECA 91 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KECA 91 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E010 OF 2024  
AK MURGOR, J MOHAMMED & GW NGENYE-MACHARIA, JJA  
JANUARY 30, 2026**

**BETWEEN**

**GIBSON NYANGE KITARE ..... 1<sup>ST</sup> APPELLANT**

**REGINA MANGA MNYAMBO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PHILEMON MADEDA KITERA ..... RESPONDENT**

*(In the Matter of the Reference of the Ruling and Order of a single Judge  
(Hon. Dr. K.I. Laibuta, J.A.) dated 21<sup>st</sup> June 2024 in the application  
dated 22<sup>nd</sup> February 2024 in Civil Application No. E010 OF 2024)*

**RULING**

1. The appellants, Gibson Nyange Kitare and Regina Manga Mnyambo filed an application dated 22<sup>nd</sup> February 2024 under Rule 4 of this Court's Rules seeking extension of time to file and serve their record of appeal out of time against the Ruling and Order (Mativo, J.) (as he then was) delivered on 21<sup>st</sup> September 2022 and the Ruling of (Dulu, J.) dated 5<sup>th</sup> October 2023 in High Court Probate and Administration Cause No. E004 of 2021.
2. The appellants' application was supported by the 1<sup>st</sup> appellant's affidavit dated 22<sup>nd</sup> February 2024. He deposed that the application in the High Court at Mombasa seeking to revoke the Grant of Letters of Administration issued to Philemon Madeda Kitera (the respondent) was dismissed by the ruling (Mativo, J.) (as he then was) dated 21<sup>st</sup> September 2022. Later, the appellants filed an application dated 15<sup>th</sup> March 2023 seeking an injunction against the orders issued on 21<sup>st</sup> September 2022, but that the said application was dismissed by a ruling (Dulu, J.) dated 5<sup>th</sup> October 2021.
3. It was further deposed that the appellants filed in this Court Civil Application No. E088 of 2022 under Rule 5(2) (b) of this Court's Rules, 2022; that when the application came up for hearing on 18<sup>th</sup>



October 2023, it was withdrawn on the basis that the appellants' counsel inadvertently failed to seek leave to appeal; that the appellants' counsel then filed an application dated 27<sup>th</sup> October 2023 in the High Court seeking leave to appeal against the decisions of 21<sup>st</sup> September 2023 and 5<sup>th</sup> October 2023, which application was allowed by a ruling dated 6<sup>th</sup> November 2023; that by the time leave was granted, the appellants had applied for certified copies of the proceedings, and a Certificate of Delay was issued on 21<sup>st</sup> February 2024; that, as at the time the typed proceedings were issued, sixty (60) days had lapsed from the date of filing the Notice of Appeal dated 5<sup>th</sup> October 2023, hence the need to extend time to file the appeal; and that the delay in filing the appeal was beyond the appellants' control.

4. The appellants' application dated 22<sup>nd</sup> February 2024 being for extension of time, under Rule 4 of this Court's Rules, 2022 was heard by a single Judge (Laibuta, JA.) who rendered his ruling on 21<sup>st</sup> June 2024 dismissing the application upon finding that:

“A period of more than one year and five months have lapsed since the applicants obtained the proceedings and certificate of delay. Yet, they have taken no steps to file the record of appeal. By any standard, the delay in doing so is, in my considered view, inordinate. It is also noteworthy that no plausible reasons have been given for such delay. In view of the foregoing, I form the view that the orders sought to extend time to file the record of what is essentially an interlocutory appeal are unmerited and would, in any event, prejudice the respondent by standing in the way of administration of the subject estate. Accordingly, the applicants' Motion does not satisfy the requirements for grant of orders under Rule 4 of this Court's Rules. The same fails and is hereby dismissed with costs to the respondent.”

5. Aggrieved, and pursuant to Rule 57(1) (b) of this Court's Rules, 2022, the appellants preferred a reference against the decision of Laibuta, JA. by way of a letter dated 25<sup>th</sup> June 2024. The appellants prayed that the order, direction or decision of the single Judge be varied or reversed by the Court.
6. At the hearing of this application on 4<sup>th</sup> June 2025, learned counsel Ms. Mwasawa appeared for the applicants. The firm of Christine Munasye Advocates for the respondent did not appear despite being served with a hearing notice, neither did they file written submissions. Ms. Mwasawa informed us that there was no objection to the application.
7. The appellants filed written submissions dated 26<sup>th</sup> May 2025. They referred to the decisions of *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi Civil Application No. 251 of 1997 (UR)*; and *Githiaka v. Nderiri (2004) 2 KLR 67* where this Court held that in exercising discretion to extend time, the Court has to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the respondent.
8. Counsel orally highlighted that there was a delay in filing the record of appeal, the primary reason being that the application filed under Rule 4 was filed without seeking leave as required in probate and administration matters; and that, this occasioned them to withdraw that application so that they could revert to the High Court to seek leave to appeal to this Court. We pose here and make an observation that the said application was not annexed to the instant Reference. However, from the Notice of Withdrawal dated 18<sup>th</sup> October 2023, we note that that application was dated 24<sup>th</sup> January 2023 and was filed vide Civil Application No. E003 of 2023.
9. Counsel submitted that the High Court granted leave to appeal on 6<sup>th</sup> November 2023; that the procedural mishap was explained in the affidavit supporting the Motion before the single Judge, but that it was not considered by the learned Judge (Laibuta, JA.); and that the only ruling which the appellants will be appealing against is the one dated 21<sup>st</sup> September 2021 by Mativo, JA. (as he then was).



10. We have considered the Reference, the written and oral submissions of the applicants. Our singular task is to determine whether the learned Judge (Laibuta, J.A.) properly exercised his discretion in dismissing the applicants' application seeking extension of time to file an appeal out of time.
11. Rule 57(1) (b) of the Court of Appeal Rules, 2022 provides that:

Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge-

  - (b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the court, that person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.
12. A reference from the decision of a single Judge, invokes the full bench to limit itself to consider whether the single Judge properly exercised his unfettered and wide discretion under Rule 4 of this Court's Rules, 2022. We take cue, and are properly guided by the decision of this Court in *Kimathi & Another v. Muriuki & 12 Others* (2023) KECA 666 (KLR) where it was held that:

“At the outset, we underscore that a reference is not an appeal and, as a fully constituted bench, we may only interfere with the exercise of the wide discretion bestowed on a single judge under rule 4 of this Court's Rules on the basis of sound principles. The court has to consider whether the single judge took into account an irrelevant factor which he ought not to have taken into account; whether he failed to take into account a relevant factor which he ought to have taken into account; whether he misapprehended or failed to appreciate some point of law or fact applicable to the issues at hand; or whether the decision on the available evidence and law is plainly wrong.”
13. In an application for extension of time, the single Judge is expected to consider among other factors, the reasons for the delay, the length of the delay, the chances of the appeal succeeding and the prejudice to be occasioned to the respondent as was well enunciated in this Court's decision of *Fakir Mohammed v. Joseph Mugambi & 2 Others* (2006) KECA 240 (KLR) that:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it 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 the 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 v Mwangi*, Civil Application No. NAI. 255 of 1997 (UR), *Mwangi v Kenya Airways Limited* [2003] KLR 496, *Major Joseph Mwereri Igweta v Murika Methare & Attorney General* Civil Application No. NAI 8 of 2000 (UR) and *Murai v Wainaina* (No. 4) 1982 KLR 38.”
14. We have understood the applicants' contention to be that the delay to file the appeal was occasioned by the fact that their counsel failed in the first instance, to seek leave to appeal against the impugned ruling of 21<sup>st</sup> September 2022. The appellants' counsel was forced to back-track his steps and move the High Court for leave to appeal, which leave was granted on 6<sup>th</sup> November 2023.



15. A perusal of the ruling of the learned single Judge attests that the good Judge failed to take into account this crucial consideration despite the averment being deposed to at paragraphs 12 and 13 of the appellants’ supporting affidavit. That affidavit was sworn by the 1<sup>st</sup> applicant who stated as follows:
- “ 12. That further the application COACAPPL/E088 OF 2022 – Gibson Nyange Kietria & Regina Manga Mnyambo v Philemon Madeda Kiteri came up for hearing before the court of appeal on 18<sup>th</sup> October, 2023 where my advocates informed the court of our inadvertent failure to seek leave from the High Court and we therefore sought out to withdraw the application in order to first seek for leave from the High Court and further move the court appropriately as the Honourable Court’s record would show and support.
13. That consequently my advocates on recorded proceeded to file an application dated 27<sup>th</sup> October, 2023 before the High Court seeking leave to appeal the Rulings dated 21<sup>st</sup> September, 2022 and 5<sup>th</sup> October, 2023.”
16. It is trite that the appellants’ appeal would not have seen the light of the day in this Court for want of leave to appeal. The only plausible move to undertake was to first seek leave in the High Court before proceeding with the appeal; and this is exactly what the applicants did.
17. We further note that after the Certificate of Delay was issued on 21<sup>st</sup> February 2024, the applicants promptly filed the application dated 22<sup>nd</sup> February 2024 which gave rise to the impugned ruling, which is an indication that they did not want to delay their appeal any further.
18. In view of the foregoing, we find and hold that this Reference is meritorious. We find that the learned judge in failing to extend time to the applicants to file the appeal, failed to consider that the delay was occasioned by the time taken to revert to the High Court to seek leave to appeal to this Court. Consequently, we respectfully disagree with the outcome of the ruling of the single Judge, and accordingly allow the Reference. We set aside the ruling of the learned Judge (Laibuta, JA.) dated and delivered on 21<sup>st</sup> June 2024. We make no order as to costs.

**DATED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JANUARY, 2026.**

**A. K. MURGOR**

**JUDGE OF APPEAL**

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**JAMILA MOHAMMED**

**JUDGE OF APPEAL**

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**G. W. NGENYE-MACHARIA**

**JUDGE OF APPEAL**

