



REPUBLIC OF KENYA



**Murere v Nyongesa (Civil Appeal (Application) E150 of 2023)
[2024] KECA 130 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 130 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E150 OF 2023
JM NGUGI, JA
FEBRUARY 9, 2024**

BETWEEN

JOSEPH WANJALA MURERE APPELLANT

AND

FRANCIS TINDI NYONGESA RESPONDENT

(Being an Application for enlargement or extension of time to file Record of Appeal out of time from the Judgment of the High Court of Kenya at Bungoma, (Kemei, J.) dated 29th September, 2022 in H.C. Succ. Cause No. 137 of 2005)

RULING

1. The application before the Court is dated 21st June, 2023. It is supported by the affidavit of the applicant and that of his advocate, both deponed on 21st June, 2023. The singular substantive prayer in the application is:

“That the Honourable Court be pleased to grant the Applicant extension of time to lodge and serve the memorandum of appeal and record of appeal out of time.
2. The background to the application is that the applicant was an objector in Bungoma High Court Succession Cause No. 137 of 2005. The controversy involved both who the *bona fide* beneficiaries to the estate of the late Juma Matayo Murere were, as well as the fair mode of distribution among the beneficiaries. The learned Judge, Kemei J. rendered his judgment on 29th September, 2022. The applicant was dissatisfied by that judgment.
3. The applicant was late in lodging his Notice of Appeal before this Court. He approached the High Court with an application for leave to file the Notice of Appeal out of time. His application was allowed by Kemei J. in a ruling dated 20th March, 2023. The learned Judge permitted the applicant to file his Notice of Appeal within fourteen days of that day.



4. The applicant timeously lodged his Notice of Appeal, pursuant to that order, on 23rd March, 2023. Through his advocates, he then requested for a certified copy of the proceedings to enable him to file the record of appeal. The letter to the Deputy Registrar in this regard is dated 24th March, 2023. It is attached to the applicant's affidavit. There are also follow up letters attached to the affidavit.
5. The certified copy of the proceedings was not received until 26th May, 2023. The Deputy Registrar issued a Certificate of Delay indicating that it took 62 days to get the proceedings ready. Meanwhile, the 60-day period allowed under Rule 84 of the *Court of Appeal Rules* for the filing of the Record of Appeal had lapsed. The present application seeks leave to file the Record of Appeal outside that period.
6. The respondents did not file any documents in opposition to the application.
7. Rule 84 stipulates that the Record of Appeal shall be lodged within 60 days of the filing of the Notice of Appeal. In this case, the Notice of Appeal was filed on 23rd March, 2023. The applicant had until 23rd May, 2023 to lodge the Record of Appeal. He has displayed a letter from the Deputy Registrar and a Certificate of Delay which show that the proceedings were not ready until 26th May, 2023.
8. The applicant wrote to the Deputy Registrar to supply the proceedings on 24th March, 2023. If the applicant had copied that letter to the respondents, he would have been entitled to rely on the proviso to Rule 84 of the *Court of Appeal Rules*: that proviso, in essence, tolls the time from the date an appellant requests for proceedings to when they are actually received provided that such an appellant copies the respondents on their request to the Deputy Registrar.
9. In the present case, the applicant's advocate did not copy the letter to the respondents. The applicant is, therefore, not entitled to rely on the proviso to Rule 84 which would have automatically tolled the time that was required to prepare the and deliver the certified copy of the proceedings. This explains the present application for extension of time.
10. This Court is empowered to grant extension of time under Rule 4 of the *Court of Appeal Rules* which 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.”
11. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”
12. In the present case, the certified copy of the proceedings was availed to the applicant on 26th May, 2023 – three days after the time allowable under the Rules for lodging the Record of Appeal lapsed. The present application was filed within twenty-five days of the receipt of the proceedings. That delay is not, in any way inordinate. Consequently, I find the application deserving of the Court's discretion. Indeed,



as pointed out above, the application has only been made necessary by the applicant's advocates' failure to copy the letter requesting for a copy of proceedings to the respondents.

13. The upshot is that the application dated 21st June, 2023 is allowed. The applicants shall lodge and serve the Record of Appeal within fourteen (14) days hereof. Since there was no response to the application, I shall not award costs to the application.
14. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR _____

