



**Mariga & 2 others v Mariga & another (Civil Application
E026 of 2023) [2024] KECA 470 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 470 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E026 OF 2023
FA OCHIENG, JA
APRIL 26, 2024**

BETWEEN

ANN WANGECI MARIGA 1ST APPLICANT

IBRAHIM THOMAS MARIGA 2ND APPLICANT

ISAAC KIMANI MARIGA 3RD APPLICANT

AND

MARGARET WANJIRU MARIGA 1ST RESPONDENT

MARY WANJIKU MARIGA 2ND RESPONDENT

(for extension of time from the judgment High Court of Kenya at Nakuru (R. Ngetich, J.) dated 20th December, 2022 in Succession Cause No. 14 of 2019)

RULING

1. The applicants have moved the Court with an application made pursuant to Order 46 and rule 6 and Order 50 rule 6 of the Civil Procedure Rules, 2010, as read together with the provisions of Sections 3A and 79(G) of the *Civil Procedure Act*.
2. It is the applicants' plea that they be granted leave to file an appeal out of time.
3. The applicants intend to appeal against the judgment which was delivered on 20th December 2022. It is the applicants' case that the judgment was delivered without any notice being issued to them prior to the said delivery.
4. Although the respondents were duly served, they have neither filed an affidavit in answer to the facts sets out by the applicants, nor have they filed any submissions. In effect, the application dated 30th March 2023 is uncontroverted. Nonetheless, the Court still has a duty to determine whether or not the applicants have met the threshold for the grant of leave to appeal out of time.



5. In the case of *Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR the court held as follows;

“It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension.”

6. The said court emphasised that the extension of time was not the right of a party.
7. The party seeking an extension of time must satisfy the court that there is a reasonable explanation for the delay. Secondly, the applicant ought to satisfy the court that the respondent would not be unduly prejudiced if the orders sought were granted.
8. Thirdly, the applicant must demonstrate that he has an appeal which is arguable. However, at the stage of canvassing the application, the applicant is not expected to satisfy the court that the intended appeal had a probability of success.
9. It is sufficient to show that the intended appeal was not frivolous; and that it was therefore in the interests of justice to give it an opportunity to be canvassed substantively.
10. As already intimated, the respondents did not challenge the applicants’ contention, that the trial court delivered its judgment without any prior notice to the applicants. I find that the lack of knowledge concerning the date when the judgment was to be delivered, is the sole reason why there was a delay in lodging the intended appeal. The said reason is plausible, as the applicants’ could not have filed an appeal against a judgment about which they had not become aware.
11. It is common ground that the application before me has been brought under the wrong provisions of the law. The applicants pray for an order of extension of time to file an appeal out of time.

To do so, the applicants ought to have moved this court under Rule 4 of the *Court of Appeal Rules*, which provides that:

“The Court may, on such terms as may be 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.”

12. However, the applicants have moved this Court under Order 46 rule 6 of the *Civil Procedure Rules* which provides that:

“Every arbitrator or umpire appointed under rule 4 or rule 5 shall have the like powers as - if his name had been inserted in the order of reference.”

13. The applicants also invoked Order 50 rule 6 of the *Civil Procedure Rules*, which provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:



Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

14. Thirdly, the applicants placed reliance upon Section 79(G) of the Civil Procedure Act, provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

15. The Supreme Court when faced with an instance where the applicant filed an application under the wrong provisions of the law in the case of Daniel Kimani Njibia v Francis Mwangi Kimani & Another [2015] eKLR, had this to say:

“In the Hermanus case, this Court had indicated how it should be moved, thus [paragraph 23]: “...It is trite law that a Court of law has to be moved under the correct provisions of the law.” Hence, without thus identifying the proper legal framework for the motion, an application is liable to be struck out.”

16. Similarly, in the case of Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR the court held thus:

“In the case of Hermanus Phillipus Steyn v. Giovanni Gnnechi-Ruscone, Supreme Court, Application No. 4 of 2012, this Court was categorical that a Court has to be moved under a specific provision of the law. The Court stated that: it is trite law that a Court of law has to be moved under the correct provisions of the law. We reiterate that the only legal regime for the Supreme Court is the Constitution, the Supreme Court Act and the Supreme Court Rules, 2012 (as amended). Hence it is preposterous for the applicant to purport to bring his application under other statutory provisions that are not the Supreme Court Act. It is sadder that he has the audacity to even invoke provisions of repealed pieces of legislations. No court can be moved on the basis of a repealed law. What right if at all does a repealed law give? The answer is clear: none”.

17. In this regard, the application is liable to be struck out having been hinged on the wrong provisions of the law.

18. In the result, I find that the application before me is fatally defective and incompetent. The application is therefore struck out with no order as to costs.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF APRIL, 2024.

F. OCHIENG

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

