



**Karanja v Wambui & another (Civil Appeal (Application)
E008 of 2022) [2024] KECA 376 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 376 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E008 OF 2022
WK KORIR, JA
APRIL 12, 2024**

BETWEEN

PHELISTER NJOKI KARANJA APPLICANT

AND

SUSAN SALOME WAMBUI 1ST RESPONDENT

JOHN KITUNDU KARANJA 2ND RESPONDENT

*(Being an application for leave to file out of time an application to strike out the appeal from the judgment of (R. Ngetich, J.) delivered on 19th November 2020 in //**Nakuru HC Succession Cause No. 488 of 2003)*

RULING

1. Before me is a notice of motion dated 12th May 2023 filed pursuant to rules 4 and 8(b) of the [Court of Appeal Rules](#). The substantive order sought by the applicant, Phelister Njoki Karanja, is for leave to bring an application out of time for the striking out of an appeal filed by the 1st respondent, Susan Salome Wambui. The background to the application is that the 1st respondent filed a notice of appeal on 8th December 2020 against the judgment delivered on 19th November 2020 by R. Ngetich J in Nakuru High Court Succession Cause No 488 of 2003. On 4th February 2022, the applicant was served with the record of appeal by the 1st respondent which record had been filed in Court on 1st February 2022. It is the applicant's case that the 1st respondent's appeal arises from a succession matter hence leave to appeal was required but the same was not obtained prior to the filing of the appeal. The applicant also avers that she will be prejudiced if the appeal is allowed to subsist in disregard of the rules of the Court. Further, the applicant deposes that the delay in bringing the application is only for about two months and has been occasioned by genuine human error on the part of her counsel. She also deposes that the 1st respondent will not suffer any prejudice if the application is allowed as she will have an opportunity to respond to the main application for striking out the appeal.



2. The application was not opposed.
3. The matter proceeded by way of written submissions. Counsel for the applicant filed submissions dated 21st June 2023. Counsel relied on *Fakir Mohammed v Joseph Mugambi & 2 others* [2005] eKLR and submitted that the applicant had tendered a plausible explanation for the two months' delay. Counsel reiterated that the delay was occasioned by the inadvertent mistake of counsel. In that regard, counsel relied on *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR to urge that the mistakes of counsel should be excused. Counsel also submitted that the respondents will not be prejudiced if the application is allowed. Counsel urged that the main appeal was in itself incompetent due to the absence of leave to lodge the appeal and that the respondents will also be accorded an opportunity to make their case during the hearing of the substantive application to strike out the appeal. Finally, counsel submitted that the application has merit as non-compliance with statutory provisions is fatal. Counsel therefore urged that the application be allowed with costs.
4. I have considered the application and the submissions by counsel. The principles upon which the Court determines an application for extension of time under rule 4 are settled. In discharging my mandate, I am to consider, among other factors, the length of delay, the reasons for the delay and the degree of prejudice that would be occasioned to either of the parties if the application is allowed or declined. These principles are well captured in *Fakir Mohammed v Joseph Mugambi & 2 others* (*supra*).
5. The applicant seeks an extension of time so as to bring an application under rule 86 of the *Court of Appeal Rules*. The rule provides that:

“A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

- a. that no appeal lies; or
- b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.”

6. The above-cited rule is imperative as it forms the basis upon which the period of delay in this application can be assessed. The applicant averred she was served with the record of appeal on 4th February 2022. Under the cited rule, the applicant ought to have moved the Court by 6th March 2022. The present application on the other hand is dated 12th May 2023. The delay period therefore was for approximately 14 months as opposed to the applicant's assertion that the delay was for two months.
7. In my view, a delay of 14 months if not satisfactorily explained would be inordinate as the application necessitating the extension of time is an interlocutory application to be heard when an appeal has been lodged but yet to be set down for hearing. In this case, the delay has been attributed to an apparent mistake of counsel. However, the alleged mistake has not been explained or contextualized. The Court in Kenya
Railways Corporation v Quicklubes E.A. Limited [2015] eKLR pointed out that it is upon the applicant to place sufficient material before the Court which would explain why there was a delay. Unfortunately, in this case, the applicant has failed to deliver on this duty. Even if I were to accept that during that time, the parties were engaged before the trial Court with applications as averred by the applicant, the period



post the ruling of the trial Court remains unexplained. The explanation tendered by the applicant for the delay is therefore unsatisfactory.

8. The other issue for my consideration is the prejudice to be suffered by the respondent were the application to be allowed. On this issue, I observe that the applicant will have an opportunity to address the issue as to whether leave to appeal ought to be obtained in succession matters during the hearing of the substantive appeal. On the other hand, if the application were to be allowed without a satisfactory explanation for the delay, the 1st respondent would be prejudiced as her right of appeal would be defeated at the preliminary stage. Allowing the application will therefore be prejudicial to the 1st respondent.
9. In the end, I find the notice of motion dated 12th May 2023 to be devoid of merit. The same is hereby dismissed. There having been no response to the application, I will make no orders as to costs.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF APRIL, 2024

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

