



**Barasa & 2 others v Musundi & 2 others (Civil Application
E015 of 2024) [2024] KECA 628 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KECA 628 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E015 OF 2024
MA WARSAME, JA
MAY 27, 2024**

BETWEEN

**JOYCE SIKHOYA BARASA 1ST APPLICANT
DOROTHY LUSIKE MUYERA 2ND APPLICANT
ESTHER MATING'I WESONGA 3RD APPLICANT**

AND

**PHILIP MATANDA MUSUNDI 1ST RESPONDENT
JOEL LUMBASI 2ND RESPONDENT
STEPHEN FRANCIS MUSUNDI 3RD RESPONDENT**

*(An application for extension of time to file a notice of appeal and
record of appeal against the judgment of the High Court at Kitale
(Chemitei, J.) dated 23rd July, 2019 in Succession Cause No. 12 of 2017)*

RULING

1. Before me is a motion dated 31st January, 2024 filed by the applicants invoking this Court's jurisdiction under Rule 4 of the [Court of Appeal Rules, 2022](#) and Section 3A and 3B of the [Appellate Jurisdiction Act](#) seeking *inter alia* leave to file and serve the notice of appeal and record of appeal against the Judgment of the High Court in Succession Cause No. 12 of 2017.
2. The applicants filed a notice of appeal dated 23rd July 2019.
However, by a ruling of this court delivered on 4th November 2022, that notice of appeal was deemed as withdrawn for failure to institute the appeal, 3 years after lodging their notice of appeal.
3. Aggrieved, the applicants filed an application dated 17th April 2023 seeking to review and set aside the said on the grounds that the ruling was made in error and that the applicants had filed the record of



appeal dated 3rd August 2020 in the Court of Appeal sub registry in Eldoret on 25th August 2020 and that even though the record of appeal had been transmitted to Eldoret for hearing and determination, it was not placed in the file and had escaped the attention of the Judges.

4. The court declined to exercise its jurisdiction to review and was not persuaded that any record of appeal was filed in court as alleged by the applicants. The Court determined that the evidence of service effected on 26th July 2020 could only relate to the notice of appeal and not the record of record of appeal which was allegedly filed on 25th August 2020. The Court maintained that the applicants were simply seeking to have a second bite of the cherry.
5. The applicants now wish to file a fresh notice of appeal and record of appeal. The threshold for this court to exercise its discretion under *Rule 4* remains the same. The applicants must lay a strong foundation for the exercise of the court's discretion in their favour including providing relevant reasons for the delay, the delay must not be inordinate, the arguability of the intended appeal among others.
6. The application is premised on the grounds that; the notice of appeal was lodged on 23rd July 2019, the memorandum of appeal and record of appeal dated 3rd August 2020 were filed in the Court of appeal sub registry in Eldoret on 25th August 2020 and were transmitted to the Court of Appeal in Eldoret for hearing and determination, that the appeal has high chances of success and that the applicants crave a final chance to present their grievance and pray not to be driven from the seat of justice empty handed. The supporting affidavit by Dorothy Lusike reiterates the same sentiments.
7. I have considered the application before me. Judgment was delivered on 23rd July 2019 and consequently the record of appeal ought to have been filed by 4th July 2019. This court has already determined in the ruling of 4th November 2022, that no record of appeal was filed by the applicants.
8. No explanation whatsoever has been given for failing to file the record of appeal on time or for bringing this application so late in the day after the notice of appeal was deemed as withdrawn.
9. In *Ratman v. Cumarasamy* (1964) 3 ALL ER 933 Lord Guest delivering the opinion of the Privy Council at P 935 said:

“The rules of the Court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.
10. The applicants are, in an application such as this is, fundamentally duty bound to show the reasons for delay. Without a valid reason, this court has no jurisdiction to extend time. Discretion cannot be exercised out of impulse or pity or the desire to give an applicant one final shot to prove its case no matter how compelling. It is not by whim but through judicious consideration that such an application is considered. The discretion has to be exercised judiciously and with reason.
11. As it stands this Court cannot make head or tail of the reasons for delay, because none have been put forth. Even if the applicants were to cite their application for review as the reason for delay. This is not a plausible reason, because the filing of the notice of appeal and record of appeal were not dependent on the outcome of the review. Even the overriding objective which confers on the Court considerable latitude in the interpretation of the law and various rules cannot in my view come to the aid of the



applicants. As was stated in *City Chemist (NBI) & Another v. Oriental Bank Limited* Civil Application No. Nai 302 of 2008 (UR 199/2008)

“... the overriding objective thus confers on the Court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the Court that the delay is not inordinate or has been explained to the satisfaction of the Court.”

12. In the end I find that the instant application is incompetent and devoid of merit. I therefore order that the same be dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF MAY, 2024.

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

