



REPUBLIC OF KENYA



Kalo v Kalo (Civil Application E002 of 2024) [2024] KECA 764 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 764 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E002 OF 2024
HA OMONDI, JA
JUNE 21, 2024**

BETWEEN

EZEKIEL KALO APPLICANT

AND

JOHN MWANZI KALO RESPONDENT

(Being an application for extension of time to file an appeal out of time against the decision of the High Court at Kakamega (W. Musyoka, J.) dated 10th June 2022 in Succ. Cause No. 593 of 1999)

RULING

1. The application dated 3rd January 2024, brought pursuant to rule 4 *Court of Appeal Rules*, 2010 seeks leave to file and serve Notice and Record of Appeal against the judgment of Musyoka, J, delivered on 10th June 2023 out of time. The application is supported by a certificate and supporting affidavit of even date as the application by the applicant, Ezekiel Kalo.
2. The background to this matter begins with the demise of the late Jackson Katesi Kalo, who was a polygamous individual, and was the father of both the applicant and respondent, who were from two different houses. Despite sharing out his estate before exiting the earth, after his demise, a dispute arose culminating in an application for confirmation of grant filed by the applicant which was duly served, heard and determined without any objection and the estate was transmitted.
3. However, sometime in 2015 the respondent filed another objection seeking revocation of the grant. Ultimately upon hearing the matter, the grant was revoked; and confirmation set aside. Both the applicant and respondent were appointed administrators; and directing them to petition for grant of letters of administration-this outcome provoked the intended appeal; and the applicant then filed a Notice of Appeal dated 1st July 2022, and filed on 22nd September 2022; and an application for leave to appeal out of time, but the said application was not acted on by the court which instead gave directions on the application for confirmation of grant.



4. The applicant believes that the members of the 1st house had already been given their share, also want a share of the 2nd house's portion as the same was still registered under the name of the deceased at the time; so the applicant then instructed his advocate to file an application for the judge to recuse himself, which application was denied. As a result of the applications there was delay in filing the appeal in time.
5. The replying affidavit dated 24th January 2024; sworn by the respondent John Mwanzi Kalo, the respondent points out that the impugned judgment was delivered on 10th June 2022; and the applicant filed the Notice of Appeal on 9th September 2022 already out of time; that the applicant filed an application for stay and not for leave to appeal out of time; the delay of over 18 months has not been satisfactorily explained; no harm or loss shall be occasioned to the applicant as the court did not distribute the estate, but only appointed new administrators who were to file fresh summons for confirmation; once the succession process proceeds to its logical conclusion, and the applicant is aggrieved with the outcome, he still has an opportunity to proceed to appeal; and that in any event, the application has belatedly and deserves no assistance from the court.
6. Has the applicant met the prerequisites for granting relief under rule 4 of the [Court of Appeal Rules?](#) Rule 4 of the [Court of Appeal Rules](#) gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In [Leo Sila Mutiso v Rose Wangari Mwangi](#) Civil Application No. Nai. 255/97 (unreported) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in [Julius Kamau Kithaka v Waruguru Kithaki & 2 Others](#) (2013) eKLR.
7. M'Inoti, J, had this to say concerning Rule 4 in [Imperial Bank \(IR\) & anor. v Alnashir Popat and Others](#) [2018] eKLR

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favor. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”

8. Discretion also depends on circumstances of each case as per [Mongira & another v Makori & another](#) [2005] eKLR

The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of [Nicholas Kiptoo Korir Arap Salat v IEBC](#) [2014] eKLR sets down these principles as follows:

- i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
- iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
- iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.



- v. Whether there will be any prejudice suffered by the respondent if extension is granted.
- vi. Whether the application has been brought without undue delay.
- vii. Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of Julius Kamau Kitheka (*supra*) is whether *prima facie* the intended Appeal/Appeal has chances of success or is a mere frivolity.

- 9. The applicant in my view has in the supporting affidavit failed to explain the delay in serving the notice of appeal as well as the instant application, being over 18 months later after the impugned decision. Once he decided to busy himself with multiple applications intended to derail the directions given by the High Court, he cannot cry wolf! I share the same sentiments as the respondent that since the court is yet to distribute the estate, the applicant has the option of waiting to see how the court will rule then appeal if need be.
- 10. The upshot is that the applicant has not met and satisfied the principles set out for this Court to exercise its discretion in his favor and grant the extension. The application is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE 2024.

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H. A. OMONDI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

