



**Kiteria & another v Kiteria (Civil Application E010 of 2024)  
[2024] KECA 755 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 755 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E010 OF 2024**

**KI LAIBUTA, JA**

**JUNE 21, 2024**

**BETWEEN**

**GIBSON NYANGE KIITERIA ..... 1<sup>ST</sup> APPLICANT**

**REGINA MANGA MNYAMBO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PHILEMON MADEDA KITERIA ..... RESPONDENT**

*(Being an application for extension of time to file and serve the Record of Appeal out of time against the Rulings and Orders of the High Court of Kenya at Mombasa (J. Mativo, J.) and (G. Dulu, J.) delivered on 21st September 2022 and 5th October 2023 respectively in Probate & Administration Cause No. E004 of 2021)*

**RULING**

1. Before me is a Notice of Motion dated February 22, 2024 in which the applicants, Gibson Nyange Kiteria and Regina Manga Nyambo, seek extension of time pursuant to rule 4 of the [Court of Appeal Rules](#) to file “the record of appeal out of time” against the rulings of the High Court of Kenya at Nairobi (J. Mativo, J. delivered on 21<sup>st</sup> September 2022 and of G. Dulu, J. delivered on October 5, 2023 in Probate and Administration Cause No. E004 of 2021.
2. The applicants’ Motion is supported by the 1<sup>st</sup> applicant’s annexed affidavit sworn on 22<sup>nd</sup> February 2024 and is made on 11 grounds set out on the face of the Motion, but to which I need not address myself in extenso, save to take note of the salient grounds on which the application is made, namely: that the impugned rulings were delivered on 21<sup>st</sup> October 2022 and 5<sup>th</sup> October 2023 respectively; that they promptly lodged the respective notices of appeal on 21<sup>st</sup> September 2022 and 6<sup>th</sup> October 2023; that they requested for copies of the proceedings in respect of the two rulings on 30<sup>th</sup> September 2022 and 19<sup>th</sup> October 2023; that certified copies of the proceedings in respect of the ruling delivered on 21<sup>st</sup> September 2022 were received on 2<sup>nd</sup> December 2022, while those in respect of the ruling delivered



- on 5<sup>th</sup> October 2023 were received on 6<sup>th</sup> February 2024; and that the certificate of delay in respect of the first ruling was issued on 23<sup>rd</sup> January 2023 while that in respect of the second ruling was issued on 22<sup>nd</sup> February 2024.
3. The 1<sup>st</sup> applicant deponed further that the delay in filing the respective records of appeal was occasioned by the time taken to obtain copies of the proceedings and leave to appeal in each case; that they obtained leave to appeal against the two rulings on 6<sup>th</sup> November 2023; and that they promptly filed the Motion to enlarge time to file and serve the respective records of appeal on 22<sup>nd</sup> February 2024.
  4. Learned counsel for the applicants filed written submissions, list of authorities and case digest dated 28<sup>th</sup> May 2024 citing the cases of *Ashit Patani & 2 others vs. Dhirajial v. Patani & 2 others* [2014] eKLR, highlighting the guiding principles for granting an application under rule 4 of the *Court of Appeal Rules*; and *Taib vs. Said* [2023] KECA 134 (KLR), contending that the arguability of an intended appeal during an application seeking extension of time to file an appeal is not mandatory; that it is a matter to be determined by a full bench.
  5. I hasten to observe that counsel's contention in this regard is a misconstruction of my decision in *Taib vs. Said* (see paragraph 11, which specifically states that it is the merits of an application for leave to appeal that falls within the jurisdiction of the full Court). Be that as it may, I proceed to examine whether the applicants' Motion meets the requirements for orders under rule 4, mindful of the fact that the respondent has not filed any affidavit in reply or written submissions in response to the applicants' Motion.
  6. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to "... 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 ...," on such terms as it thinks just.
  7. The four basic factors to be considered in exercise of the Court's discretion in determination of applications under rule 4 were enunciated in *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA p231. In determining whether to extend time, the Court takes into account: (i) the length of the delay; (ii) the reason for the delay; (iii) the chances of the appeal succeeding if the application is granted; and (iv) the degree of prejudice to the respondent if the application is granted. In principle, the discretion is unfettered, and there is no limit to the number of factors the court would consider so long as they are relevant.
  8. The Applicant's Motion for extension of time to file an appeal against the two rulings and orders turns on the four basic factors enunciated in the case of *Leo Sila Mutiso vs. Helen Wangari Mwangi (supra)*
  9. With regard to the issue as to whether the intended appeals have a probability of success, it is sufficient for the Applicants to demonstrate that they have an arguable appeal in each case with the likelihood of success. It is noteworthy that the applicants have only exhibited their memorandum of appeal in respect of the ruling dated 21<sup>st</sup> September 2022 by which the learned Judge dismissed their application for revocation of grant made on 18<sup>th</sup> April 2018 and confirmed on 25<sup>th</sup> March 2019.
  10. With regard to that ruling, the applicants fault the learned Judge for, inter alia: failing to find that the respondent had obtained the grant fraudulently; finding that all beneficiaries were present at the hearing for confirmation of grant; holding that the applicants were not left out in the distribution of the estate; failing to consider that the distribution of the estate was not carried out equitably; failing to find that the respondent had concealed from the trial court that the applicants were in possession of the suit property for a period exceeding 20 years; and for failing to find that the applicants stood to



suffer irreparable loss and damage. To my mind, these grounds are arguable. As to whether the intended appeal will succeed is not for me to judge.

11. Turning to the ruling and orders delivered on 5<sup>th</sup> October 2023, it is noteworthy that the applicants did not exhibit any memorandum of appeal to guide me in determining whether the intended appeal on this account was arguable or whether it stood any chance of success. Accordingly, the applicants fail to surmount the first and decisive hurdle for grant of orders under rule 4 and, accordingly, their Motion for orders to extend time to file the record of appeal against the ruling and orders dated 5<sup>th</sup> October 2023 fails and is hereby dismissed.
12. As for the ruling and orders dated 21<sup>st</sup> September 2022, all I need to determine is the length of delay, the reason therefor, and whether the respondent stands to suffer any prejudice should the orders sought be granted.
13. With regard to the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that “... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.”
14. I take to mind the fact that the notice of appeal against the ruling and order dated 21<sup>st</sup> September 2022 was promptly filed on the day of the ruling and served on September 30, 2022, 2 days later than the period prescribed in rule 79(1) of the Rules of this Court; that they requested for proceedings on 30<sup>th</sup> September 2022 with notice thereof to the respondent; that the proceedings were ready and collected on 2<sup>nd</sup> December 2022; and that the certificate of delay was issued on 23<sup>rd</sup> January 2023.
15. A period of More than one year and five months have lapsed since the applicants obtained the proceedings and certificate of delay. Yet, they have taken no steps to file the record of appeal. By any standards, the delay in doing so is, in my considered view, inordinate. It is also noteworthy that no plausible reason has been given for such delay.
16. In view of the foregoing, I form the view that the orders sought to extend time to file the record of what is essentially an interlocutory appeal are unmerited and would, in any event, prejudice the respondent by standing in the way of due administration of the subject estate. Accordingly, the applicants’ Motion does not satisfy the requirements for grant of orders under rule 4 of this *Court’s Rules*. The same fails and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT MALINDI THIS 21<sup>ST</sup> DAY OF JUNE, 2024.**

**DR. K. I. LAIBUTA C.ARB, FCIARB.**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**Signed**

**DEPUTY REGISTRAR**

