



**Nguyo & another v Gitari & another (Civil Appeal (Application)  
E028 of 2024) [2024] KECA 798 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 798 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL (APPLICATION) E028 OF 2024**

**WK KORIR, JA  
JULY 12, 2024**

**BETWEEN**

**MICHAEL MAINA NGUYO ..... 1<sup>ST</sup> APPLICANT**

**JOACHIM GITONGA NGUYO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MARTIN MANUTHU GITARI ..... 1<sup>ST</sup> RESPONDENT**

**MAURICE NGUYO GITARI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for leave to file a Notice of Appeal out of time against the judgment and decree of the Environment and Land Court at Nyandarua (Y.M. Angima, J) dated 8th February 2024 in ELCA No. 10 of 2023(Formerly Nyahururu ELCA No. E008 of 2023)*

**RULING**

1. Before me is a notice motion dated 8<sup>th</sup> March 2024 lodged pursuant to sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#), rules 1(2), 4, 42, 43 and 77 of the [Court of Appeal Rules](#) and Article 159 of the [Constitution](#). Through the motion, the applicants, Michael Maina Nguyo and Joachim Gitonga Nguyo seek enlargement of time for filing a notice of appeal against the judgment delivered on 8<sup>th</sup> February 2024 by Y.M. Angima J in Nyandarua E&LCA No 10 of 2023 (Formerly Nyahururu E&LCA No E008 of 2023). They also pray that the notice of appeal lodged on 5<sup>th</sup> March 2024 against the impugned judgment be deemed as duly filed. The application is based on the grounds on its face as well as the averments of the 1<sup>st</sup> applicant in the affidavit sworn in support of the application.
2. The applicants' case is that after the impugned judgment was delivered on 8<sup>th</sup> February 2024, they instructed their then counsel on record to file a notice of appeal but it is only when they later visited counsel's chambers that they realized that no notice had been filed. The applicants then proceeded to secure the services of the present counsel who moved to file the notice of appeal, apply for the



record of appeal as well as institute this application. It is the applicants' averment that they have an arguable appeal and that if the leave sought herein is denied, they will suffer great prejudice. Finally, the applicants assert that the delay is not inordinate and it is in the interest of justice that the application be allowed.

3. The respondents, Maurice Nguyo Gitari and Martin Manuthu Gitari, opposed the application through a replying affidavit sworn by the 2<sup>nd</sup> respondent on 12<sup>th</sup> April 2024. It is the respondents' position that no satisfactory reasons have been advanced to warrant an extension of time. The respondents aver that the reason advanced by the applicants for the delay is implausible because throughout the trial, whenever they failed to comply with statutory timelines or court orders, their fall guy was their counsel. It is the respondents' averment that allowing the application will prejudice the estate of their deceased's father as it will be forced to continue paying for legal fees in respect of a matter that has been in court since 2007. Further, that the intended appeal is, in any event, not arguable and leave should therefore not be granted.
4. The application proceeded by way of written submissions.
5. For the applicants, the firm of Ndegwa Wahome filed submissions dated 27<sup>th</sup> March 2024. Therein, counsel cited *Karny Zabarya & another v Salom Levi* [2018] eKLR to point out the factors to be considered in the determination of an application for enlargement of time. Turning to the circumstances of the instant application, counsel submitted that the delay of 11 days was attributable to a genuine mistake of counsel and is thus excusable. Counsel relied on *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR and *Aviation Cargo Support Ltd v St. Mark Freight Services Ltd* [2013] eKLR in support of the submission that genuine mistakes of advocates are excusable and should not be visited upon litigants. According to counsel, if leave is not granted, the applicants will be prejudiced because they will be evicted from the land that they have been living on. Counsel consequently urged that the application be allowed with costs.
6. The firm of F.W. Njoroge & Co. Advocates filed submissions dated 12<sup>th</sup> April 2024 in support of the respondents' case. Counsel relied on the case of *Abdul Aziz Ngoma v Mungai Mathayo* [1976] KLR 61 to urge that the exercise of discretion under rule 4 is subject to a satisfactory explanation of the delay. Counsel urged that the applicants have not adduced any evidence to support their averment that they had instructed their erstwhile advocates to file a notice of appeal and the reasons advanced are thus not conceivable. Counsel also submitted that the respondents will be prejudiced as this is a protracted dispute that has lasted over 17 years. Furthermore, it was counsel's submission that the applicants have not established grounds for extension of time and the timelines in the rules of procedure should be upheld. Counsel reiterated the respondents' averment that the applicants have been indolent for over 17 years and every time the law catches up with them, they advance the same reason; that it was counsel's mistake. Counsel consequently urged for the dismissal of the application with costs.
7. I have considered the pleadings and the submissions of the opposing sides. The issue for determination in this application is whether the applicants have satisfied the conditions for the exercise of the discretionary jurisdiction to extend time under rule 4 of the *Court of Appeal Rules, 2022*. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court laid down the principles to aid in the judicious disposal of applications for extension of time as follows:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:



1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
8. Based on the stated principles, it follows that the issues to be considered are whether the applicants have satisfactorily explained the delay in filing the notice of appeal and whether the 1st respondent will suffer any prejudice in the event the applicants are allowed to appeal out of time.
9. The impugned judgment was delivered on 8<sup>th</sup> February 2024. The notice of appeal therefore should have been filed by 22<sup>nd</sup> February 2024. The present application having been filed on 8<sup>th</sup> March 2024 the delay was for two weeks. The applicants’ explanation for the delay of 14 days is that their former advocates, despite being instructed to file the notice of appeal failed to do so. The applicants contend that they only became aware of the lapse when they visited their former counsel’s chambers. In my view, despite the respondents’ opposition to this explanation, I find the period of delay quite short. Ordinarily as can be gleaned from the decisions of the Court, a delay of 14 days would not be deemed as inordinate. See for example *Kihumba v Kimotho & another* [2024] KECA 345 (KLR). Additionally, the fact that the applicants were able to identify the mistake and move to correct it within that very period, in my view, shows that they were not indolent but were actively following up on the matter and keen on pursuing their appeal. Further, as agreed by both sides, a mistake of counsel should not be visited on a litigant unless the litigant is indolent and complicit in the mistake. That is not the case here. I therefore find that the delay is not inordinate and has been sufficiently explained.
3. Turning to the question of prejudice, the respondents aver that they will be prejudiced as the dispute has been in the corridors of justice for about 17 years. It is their submission that if the litigation is not concluded, the estate of their deceased father will suffer as counsel will have to be paid to defend the intended appeal. On the other hand, the applicants’ prejudice is that they are bound to be evicted from the place they have called home since the 1960s. This Court, being a court of justice, must balance between the applicants’ right of appeal and the right of the respondents to enjoy the fruits of a valid judgment entered in their favour. In this case, the interests of justice would favour letting the applicants ventilate their grievance on appeal. In any event, were the applicants’ intended appeal to fail, the respondents would still be entitled to execute the judgment.
3. In the end, I find the notice of motion dated 8<sup>th</sup> March 2024 has merit and allow it on the following terms:



- i. That the applicants' Notice of Appeal dated 5<sup>th</sup> March 2024 is deemed as properly filed. The same to be served upon the respondents in accordance with the Rules of this Court. Time to run from the date of the delivery of this ruling.
- ii. That the costs of this application shall abide the outcome of the intended appeal.

4. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 12<sup>TH</sup> DAY OF JULY, 2024.**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

