



**Gichuhi & another v Gacheri & another (Suing as the Legal Representatives of the Estate of Sammy Mburugu Gitobu (Deceased)) (Civil Application 048 of 2024) [2024] KECA 1236 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1236 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 048 OF 2024  
J MOHAMMED, JA  
SEPTEMBER 20, 2024**

**BETWEEN**

**JOSEPH GICHUHI ..... 1<sup>ST</sup> APPLICANT**

**GLADYS GACERI GICHOGA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JANE GACHERI ..... 1<sup>ST</sup> RESPONDENT**

**PURITY KARAMBU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SAMMY  
MBURUGU GITOBU (DECEASED)**

*(An application for extension of time to file and serve the Memorandum of Appeal and Record of Appeal out of time in an intended appeal against the judgment of the High Court of Kenya at Meru (T.W. Cherere, J.) dated 7th March, 2024 in High Court Civil Case No. 11 of 2020)*

**RULING**

**Background**

1. Before me is an application dated 29<sup>th</sup> May, 2024 by Joseph Gichuhi and Gladys Gaceri Gichoga (the 1<sup>st</sup> and 2<sup>nd</sup> applicants) expressed to be brought under Sections 3A and 3B of the *Appellate Jurisdiction Act*, Rule 84 of the *Court of Appeal Rules, 2022* (this Court's Rules) where the applicants seek for orders:
  1. Spent
  2. That this Court be pleased to issue an order for extension of time for filing and serving the memorandum of appeal and record of appeal respectively out of time;
  3. That this Court be pleased to make any other orders as it may deem just;



4. That costs of this application be provided for.  
Jane Gacheri and Purity Karambu (Suing as the legal representatives of the Estate of Sammy Mburugu Gitobu (deceased) are the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.
2. The application is premised on the grounds on the face thereof to wit: that judgment was entered for the respondents against the applicants in the High Court on 7<sup>th</sup> March, 2024; that the applicants challenged the judgment vide a notice of appeal filed within time on 21<sup>st</sup> March, 2024; that the applicants' erstwhile advocates applied for typed proceedings on time; that the applicants opted to change advocates and on 27<sup>th</sup> March, 2024 their current advocates applied for leave to come on record after judgment before the High Court; that leave was granted on 20<sup>th</sup> May, 2024 and the current advocates officially came on record on 21<sup>st</sup> May, 2024; that upon coming on record, the advocates applied for a decree from the High Court on 21<sup>st</sup> May, 2024; that, unfortunately, the 60 day period for filing the memorandum and the record of appeal lapsed on the same date, 21<sup>st</sup> May, 2024; that the delay in filing the memorandum and record of appeal is attributed to the change of advocates and failure to obtain the decree within time; that the applicants have an arguable appeal, which ought to be determined on merits; and that the instant application was brought without unreasonable delay on 29<sup>th</sup> May, 2024 as the time for filing the memorandum and record of appeal lapsed on 21<sup>st</sup> May, 2024.
3. The application is supported by an affidavit of the 2<sup>nd</sup> applicant, which rehashed the grounds in support of the application.
4. The respondent despite having been duly served with a hearing notice filed no reply or written submissions.
5. During the hearing of the application, the applicant was represented by Messrs. Kinyua Mwaniki & Wainaina Advocates who had filed written submissions. Counsel relied on this Court's decision of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] where it was stated that:

“In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the cause of the delay. In the end, the explanation must be reasonable enough to excuse the default.”
6. Counsel submitted that the notice of appeal and the letter bespeaking proceedings were filed and served upon the respondents on time. That the applicants opted to instruct new counsel to represent them for the purpose of prosecuting the appeal and instructed the firm of Messrs Kinyua Mwaniki & Wainaina to come on record. That the application for leave was filed on 27<sup>th</sup> March, 2024 and was allowed on 20<sup>th</sup> May, 2024, a period of approximately two (2) months. Counsel further submitted that upon coming on record for the applicants, they applied for a copy of the decree on 21<sup>st</sup> May, 2024 for purposes of lodging the appeal but the 60 day period for filing the appeal lapsed on 21<sup>st</sup> May, 2024 before the decree was made available. Counsel submitted that they filed the instant application on 30<sup>th</sup> May, 2024 immediately upon receiving the decree. Counsel further submitted that the delay in filing and serving the memorandum and record of appeal out of time has been sufficiently explained to warrant the grant of the orders sought.



## Determination

7. I have carefully considered the application, the grounds and affidavit in support thereof, written submissions, authorities cited and the law. The discretion that I am being called upon to exercise in this application is provided under Rule 4 of this Court's Rules which states that:

“The court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

8. The principles governing the exercise of the discretion to extend time under Rule 4 of the [Court of Appeal Rules](#) were well stated in the case of *Leo Sila Mutiso v Rose Hellen Wangare Mwangi*, [1999] 2 EA 231 as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: First, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted.”

9. Rule 4 of this Court's Rules requires me to exercise my discretion judiciously. There has to be valid and clear reasons upon which discretion can be favourably exercised.

10. Rule 84 of the [Court of Appeal Rules, 2022](#) provides for institution of appeals as follows:

1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
  - a. a memorandum of appeal, in four copies;
  - b. the record of appeal, in four copies;
  - c. the prescribed fee; and
  - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the

11. The Supreme Court decision in *Fabim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR laid down guidelines for exercise of discretion in extending time:

- “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 extension of time has the burden of laying a basis, to the satisfaction of the Court;



2. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
  2. Where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the Court;
  2. Whether there will be any prejudice suffered by the respondents if extension is granted;
  2. Whether the application has been brought without undue delay; and
  2. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” (Emphasis supplied.)
12. The applicants attributed the delay in filing the memorandum and record of appeal to a change of advocates and obtaining a decree from the High Court. The application for leave to come on record before the High Court was filed on 27<sup>th</sup> March, 2024 and was set down for hearing on 20<sup>th</sup> May, 2024. The applicant’s advocate came on record officially on 21<sup>st</sup> May, 2024 and filed the instant application on 29<sup>th</sup> May, 2024 which is a delay of about 9 days.
13. I find that in the circumstances of this case, the reasons advanced by the applicants for the delay in filing the memorandum and record of appeal are satisfactory.
14. As regards the success of the intended appeal, the applicant contend that the appeal has overwhelming chances of success. However, I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated as follows:
- “This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”
15. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the judgment of the ELC and is desirous of appealing against the said judgment out of time. In the case of *Richard Nchapi Leiyagu v IEBC & 2 others*, Civil Appeal No 18 of 2013, this Court expressed itself as follows:
- “The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
16. From the circumstances of the application before me, the applicants have demonstrated the existence of the parameters set out in *Leo Sila Mutiso* (supra). The upshot is that the notice of motion dated 29<sup>th</sup> May, 2024 is allowed.
17. Accordingly, I make the following orders:



- a. That leave is hereby granted to the applicants to file and serve the record of appeal and memorandum of appeal out of time within fourteen (14) days from the date hereof;
- b. Costs of this application to abide by the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

