



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munyi & 2 others v Kivuti (Civil Application E076 of 2024)  
[2024] KECA 1358 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1358 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E076 OF 2024  
S OLE KANTAI, JA  
OCTOBER 3, 2024**

**BETWEEN**

**ANISIA MARIGU MUNYI ..... 1<sup>ST</sup> APPLICANT**

**ERASTUS NYAGA KIVUTI ..... 2<sup>ND</sup> APPLICANT**

**DUNCAN NYAGA KIVUTI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**FRANCIS NJIRU KIVUTI ..... RESPONDENT**

*(and Francis Njiru Kivuti Respondent Ruling (An application for extension of time to appeal from the Judgment of the High Court at Embu (Njuguna, J.) dated 27th June, 2023 in HC Succession Civil Appeal No. E050 of 2021)*

**RULING**

1. The applicants Anisia Marigu Munyi, Erastus Nyaga Kivuti and Duncan Nyaga Kivuti by Motion on notice said to be brought under section 3A and 3B of the *Appellate Jurisdiction Act*, “section 1A and 1B of the *Civil Procedure Act*, Article 59(2) of *the Constitution* and all enabling provisions of law” pray that leave be granted to enable them file an appeal against the judgment of Njuguna, J. delivered on 26<sup>th</sup> June, 2023 in High Court of Kenya, Embu, in High Court Civil Appeal No. E050 of 2021 out of time. In grounds in support of the Motion and in a supporting affidavit of the applicants it is said amongst other things that they were parties in the said appeal at the High Court, Embu, which was decided in favour of the respondent:

- “3. That the judgment was by an error that the Honourable Judge referred the 1st Applicant/Appellant as having withdrawn her protest and went ahead to record her judgment on that erroneous evidence



4. That due to that error, the Hon. Judge entered into wrong and illegal judgment for the case.
  5. That though the error would have been rectified by the Hon. Judge through a Notice of Motion filed by the Applicants/Appellants the Hon. Judge dismissed and or disallowed the application.”
2. Further, that after delivery of judgment on 27<sup>th</sup> June, 2023 they filed an application for review but the same was struck out as they had filed a notice of appeal; that they had applied for copies of proceedings and judgment to enable them appeal but that they had been caught up by timelines and could not file an appeal on time; that they are advised by unnamed legal experts that courts today do not apply the law mechanically but substantially; that delay in appealing is not inordinate. Attached to the application is a homemade draft Memorandum of Appeal which raises 4 grounds of appeal; proceedings before the High Court and judgment delivered on 27<sup>th</sup> June, 2023.
  3. Although the link for this matter shows that there is forwarded a replying affidavit and the respondent’s submissions I was informed by the Court Registry that the respondent had not responded to the application.
  4. I note the hearing notice dated 2<sup>nd</sup> September, 2024 at 12.46 p.m. where parties were notified of hearing date and were required to file written submissions within stipulated time. Neither side filed written submissions despite being required to do so.
  5. The principles that apply in an application for extension of time were well set out in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2 EA 231 as follows:
 

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well stated 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.”
  6. The applicants say that after judgment was delivered on 27<sup>th</sup> June, 2023 they filed an application for review before the High Court at Embu. It would appear that they also filed a notice of appeal. I say so because I can see proceedings of 29<sup>th</sup> April, 2024 where it is recorded that the applicants were pursuing a review application where they had also appealed. Njuguna J. ordered:
 

“The Court does not have jurisdiction to entertain an application for review where there is a notice of appeal. The application is hereby struck out and file marked as closed.”
  7. I have not seen that notice of appeal but it must be somewhere because the High Court acted on it and struck out the application for review. That striking out was on 29<sup>th</sup> April, 2024 and the application before me for leave to extend time is dated 14<sup>th</sup> August, 2024.
  8. Although the applicants talk of legal experts who are advising them in the matter those unnamed experts remain in the shadows and have not shown their face or legal credentials. I will take it that the applicants have no legal experts at all; they are unrepresented and appear in person, a position which appears to also have obtained in the High Court.
  9. I do not think that there is inordinate delay in the circumstances which I have described and I accept the explanation that the applicants who were busy pursuing the application for review at the High



Court did not obtain proceeding or judgment on time to enable them appeal to this Court within the timeliness required by our rules. I entertain a doubt on the possibility of the appeal succeeding. I say so because the proceedings at the High Court involved a succession matter and I have no evidence whether leave to appeal was sought or obtained as required. The respondent can take that point elsewhere.

10. I am satisfied that the applicants are deserving of my exercise of discretion. I allow the Motion. Let the applicants lodge a notice of appeal within ten (10) days of today and file record of appeal within twenty one (21) days thereafter. Costs will be in the appeal.

**DATED AND DELIVERED AT NYERI THIS 3<sup>RD</sup> DAY OF OCTOBER, 2024.**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

