



**Githinji v Mugo & another (Civil Application E064 of 2024)
[2024] KECA 1723 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1723 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E064 OF 2024
JW LESSIT, JA
NOVEMBER 28, 2024**

BETWEEN

MATHEW KARIUKI GITHINJI INTENDED APPELLANT

AND

NAOMI WAIRIMU MUGO 1ST INTENDED RESPONDENT

SCHOLASTICA WAIRIMU MUGO 2ND INTENDED RESPONDENT

(Being an intended appeal from the Judgment of the Environment and Land Court of Kenya at Nyeri (Olola, J.) dated and delivered on 8th May 2023 in E.L.C Case No. 634 of 2014)

RULING

1. The intended applicant, Mathew Kariuki Githinji, by a notice of motion dated 4th July 2024, brought under rule 4 of the Court of Appeal Rules (Rules) seeks orders:
 - a. That the time given for lodging the notice and record of appeal against the judgment of the Honourable J. O. OLOLA, J. delivered in the Environment and Land Court at Nyeri on the 5th May 2023 in Civil Suit No. 634 of 2014.
 - b. That the honourable court be pleased to grant the intended appellant leave to file an appeal against the judgment of Honourable J. O. OLOLA J. delivered in the Environment and Land Court at Nyeri on the 8th May 2023 in Civil Suit No. 634 of 2014 out of time.
 - c. That the costs of the application be in the cause.”
2. The application is supported by an affidavit sworn by the applicant on the following grounds; that the impugned judgment was delivered on 8th May, 2023; that the applicant was dissatisfied with the said judgment and instructed his advocates then on record to prefer an appeal, who instead advised him to file an application dated 18th July, 2023, seeking a review of the judgment by the Court under Section



80 of the Civil Procedure Act, Cap 21 of the Laws of Kenya. That the application was subsequently dismissed by the trial court; that the applicant has an arguable appeal with probability of success and that it will serve the interest of justice to allow the appeal and have the dispute between the parties resolved on the basis of substantive justice.

3. The 2nd respondent has sworn an affidavit in response to the application. It was deposed that the applicant having opted to file a review against the judgment, it was not open for him to file an appeal challenging the same judgment.
4. I have considered the application, the affidavit in support, the various annexures to the supporting affidavit; as well as the response from the 2nd respondent on behalf of the respondents. The application is brought under rule 4 of the Court of Appeal Rules, which provides:

“ 4. Extension of time

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.”

5. What is sought under order ‘No. 1.’ is not clear, and appears to be incomplete as the applicant seeks: ‘THAT the time given for lodging the notice and record of appeal against the judgement...’ It is not disclosed what is being sought regarding the time for lodging the two documents. There is a want of form. However since the applicant has invoked rule 4 of the Rules, I will take it that what he meant to seek is an extension of time to lodge the notice and record of appeal. I invoke the provisions of Article 159 (2)(b) of the Constitution and incline in favour of considering substantive justice as opposed to procedural technicalities, being convinced that it is not in the interest of justice to apply technicality to defeat the application. This is in line with the non-technicality principle in Article 159 (2)(d) of the Constitution of Kenya, 2010 which provides:

“ 159

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles.

(d). Justice shall be administered without undue regard to procedural technicalities;

6. The factors to consider in an application for extension of time like this one have been discussed by various Judges and I wish to go by the ruling of Waki, JA, as was confirmed by the full court in the case of Fakir Mohamed vs. Joseph Mugambi & 2 Others in Civil Application No. 33 of 2004 where the learned Judges analyzed factors to be the following:

“ The exercise of this court’s discretion under Rule 4 has followed a well beaten path since the stricture ‘sufficient reason’ was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Application No.



Nai. 255 of 1997 (ur), Mwangi vs. Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Igweta vs. Mulika M’Ethare and Attorney General, Civil Application No. Nai 8/2000 (ur) and Murai vs. Wainana (No. 4) [1982] KLR 38.”

7. The Supreme Court gave guiding principles on the power of the Court to extent time in Mombasa County Government vs. Kenya Ferry Services & Another [2019] eKLR, where the Court held that;

“25] Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if 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. The two decisions above are clear that the power to extent time to file notice or record of appeal is unfettered, however, it is an equitable right and is not automatic.

9. The applicant has a duty to satisfy the Court why his application should be allowed. In this case, the applicant has explained that he first went for review of the judgment under section 80 of the [Civil Procedure Act](#), which application dated 18th July 2023, was filed 70 days of the date of the judgment. That application was heard and was dismissed on the 9th May 2024. He then opted to file this application on 4th July 2024, 60 days later. The applicant blames his advocate on record then for the delay in filing the appeal, for failing to follow his instructions to file the notice of appeal within the time prescribed under the rules. He says that he then instructed another advocate he guided him to seek a review of the judgment first.



10. The respondent, in her replying affidavit has opposed the application, deposing that the applicant did not explain the delay involved of six months. I did not understand how the six months were calculated. Let me start by stating that it was within the applicant right to seek a review of the judgment of the judgment under the Civil Procedure Rules. As for the reason for the delay, I do find that the applicant has explained the reason for the delay in filing the appeal, noting that he was not idle but first sought to seek a review before finally filing this application. The delay, in my view is not inordinate, the application for review having been filed 10 days late from the date of judgment. This application was filed within 60 days of the date of ruling on review. I find the explanation given reasonable and acceptable.
11. As to the chances of the appeal succeeding if application is granted, I note that the applicant has annexed his memorandum of appeal in the intended appeal. The issue before the ELC, where this appeal emanates is ownership of the suit property. I see the applicant's argument that the suit property belonged to him, but gave his title to the deceased as security for a 'soft loan' he took from him. That after he paid off the loan, the deceased took over his property. The estate of the deceased is represented in this application by his personal representatives', the respondents in this application. Considering the memorandum of appeal, I am satisfied that the appeal has a likelihood of success, it is not idle.
12. As to the degree of prejudice to the respondents if the application is granted, none has been alleged by the respondents. I see no serious prejudice to the respondents. The applicant on the other hand has a large stake, as he claims to have used the suit land as security only to lose it after he met his obligation. He should be given a chance to pursue his appeal.
13. The respondents have raised issued challenging the validity of the appeal against judgment after an application of review of the same judgment. That is not the matter before me. If there is such an issue to be raised, the respondents can still have an opportunity to raise it.
14. Having considered this application, I am satisfied that the applicant is deserving of the order sought. Accordingly I make the following orders:
 - i. The application dated 4th July, 2024 has merit and is allowed;
 - ii. The applicant is granted 14 days within which to file the notice of appeal, and 7 days to serve it upon the respondents from the date of filing;
 - iii. The applicant has 30 days to file the record of appeal from the date hereof, and 14 days thereafter to serve it upon the respondents;
 - iv. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF NOVEMBER, 2024.

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

