



REPUBLIC OF KENYA



**Nduhiu & another v Nduhiu (Civil Application E094 of 2024)  
[2024] KECA 1718 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1718 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E094 OF 2024  
A ALI-ARONI, JA  
NOVEMBER 21, 2024**

**BETWEEN**

**PETER NDUNGU NDUHIU ..... 1<sup>ST</sup> APPLICANT**

**ELIZABETH NYAMBURA NDIRITU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**WILLIAM GIKANDI NDUHIU ..... RESPONDENT**

*(An application for an extension of time to file a notice of appeal and the record of appeal against the Ruling of the High Court of Kenya at Nyeri (Odero, J.) delivered on 8th August 2024 in Succession Cause No. 616 of 2001)*

**RULING**

1. Before the court is a notice of motion dated 27<sup>th</sup> September 2024 brought under Rule 4 of the [Court of Appeal Rules \(2022\)](#) and Article 159 of the [Constitution](#), seeking an extension of time to file a notice and record of appeal out of time.
2. The application is predicated on the grounds on the face of the application stating that; the applicants are aggrieved by the ruling of the High Court (Odero, J.) that was delivered on 8<sup>th</sup> August 2024 in Nyeri High Court Succession Cause No. 616 of 2001 and instructed their counsel on record to appeal; the applicants sought to know the progress made in the appeal and found that the counsel did not file the notice of appeal and the requisite time had expired on 22<sup>nd</sup> August 2024; the applicants being dissatisfied with the ruling of the superior court wish to challenge the ruling and have a genuine interest in pursuing the appeal; the applicants have written to the deputy registrar of the High Court seeking a certified copy of the proceedings and the ruling; the delay in filing the notice of appeal has been occasioned by counsel on record for the applicants; the intended appeal raises substantial issues, has weighty points of law, and is also highly meritorious; and that the respondent will not be prejudiced if the orders sought are granted.



3. The application is further supported by the affidavit of the applicants' learned counsel on record in which she deposes that on 8<sup>th</sup> August 2024, the High Court (Odero, J.) delivered a ruling in Nyeri High Court Succession Cause No. 616 of 2001, dismissing the summons dated 2<sup>nd</sup> August 2023 as being an abuse of the court the process, and to a waste of judicial time; that immediately after the ruling the applicants' counsel asked to be supplied with a copy of the said ruling and that the applicants being aggrieved by the said ruling instructed counsel to appeal.
4. Learned counsel further deposes that inadvertently, she did not file the notice of appeal in time as the matter escaped her attention until 3<sup>rd</sup> April 2024 (does not seem right) when the 1<sup>st</sup> applicant called to know the progress on the appeal and that time, time to file the notice of appeal had lapsed; the applicants are keen on appealing against the said ruling; the applicants' counsel wrote to the deputy registrar of the High Court for typed copies of proceedings; the application has been filed without undue delay and the respondent will not be prejudiced if the application is allowed as he is in occupation of the suit land.
5. The respondent has not opposed the application, and neither party has filed any submissions.
6. I have considered the application and the affidavit in support. The issue for determination is whether the applicants deserve the orders sought. In the case of *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA, this Court held 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 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”.
7. Learned counsel has candidly explained why she failed to file a notice of appeal on time despite her clients' instructions. To err is human, and the courts have held time without number that the mistake of counsel ought not to be visited on clients. Learned counsel has given a plausible explanation and filed this application timeously upon realizing her mistake. The respondent was served with the hearing notice and did not file a response. In the draft memorandum of appeal, it is stated that the learned judge of the High Court misapprehended and did not analyze the evidence correctly; the trial judge failed to consider important factors, and in finding that the 1<sup>st</sup> applicant had signed the mutation form among other grounds. The said grounds cannot be said to be idle. Further, despite the service of the hearing notice, the application did not attract a response, meaning it is unopposed.
8. As a consequence, I feel inclined to allow the application. The notice of appeal is to be lodged and served within the next seven (7) days, and the record of appeal within the next sixty (60) days. Costs to abide by the outcome of the appeal.

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

**ALI-ARONI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed



**DEPUTY REGISTRAR**

