



REPUBLIC OF KENYA



**Rugendo & another (Suing as the legal representative of Alfred Mutwiri Njoka - Deceased) v Mawira (Civil Appeal (Application) 115 of 2018) [2024] KECA 1724 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1724 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 115 OF 2018  
A ALI-ARONI, JA  
NOVEMBER 21, 2024**

**BEING AN APPLICATION FOR AN EXTENSION OF TIME TO FILE  
THE RECORD OF APPEAL AGAINST THE JUDGMENT OF THE HIGH  
COURT AT CHUKA (LIMO, J) DELIVERED ON 20<sup>TH</sup> JUNE 2017**

**BETWEEN**

**ANNWHILLER MWENDE RUGENDO ..... 1<sup>ST</sup> APPELLANT  
NJOKA BARUTHI ..... 2<sup>ND</sup> APPELLANT  
SUING AS THE LEGAL REPRESENTATIVE OF ALFRED MUTWIRI NJOKA -  
DECEASED**

**AND**

**JENEBY MAWIRA ..... RESPONDENT**

*(Being an Application for an extension of time to file the Record of Appeal against the Judgment of the High Court at Chuka (Limo, J) delivered on 20th June 2017) in HCCA No. 28 of 2016)*

**RULING**

1. Before the court is a notice of motion dated 23<sup>rd</sup> October 2018 brought under sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rule 4 of the [Court of Appeal Rules](#), 2010 (2022) seeking an extension of time to file the record of appeal out of time.
2. The application is predicated on the grounds on the face of the application stating that; the applicants lodged a notice of appeal arising out of the judgment of 15<sup>th</sup> June 2017 of the High Court (Limo, J.) at Chuka HCCA No. 28 of 2016; that on 20<sup>th</sup> June 2017 the applicants' counsel requested for typed proceedings in the superior court by a letter dated 19<sup>th</sup> June 2017; the letter was copied to and received by the respondent's counsel on 21<sup>st</sup> June 2017; the applicants' counsel was supplied with typed



proceedings on 30<sup>th</sup> April 2018; the certificate of delay was issued on 28<sup>th</sup> May 2018; the certificate of delay, however, was confirmed to be defective before the lodging of the record of appeal, necessitating a new one to be issued; the High Court then issued a proper certificate of delay on 26<sup>th</sup> June 2018; subsequently the record of appeal was lodged on 10<sup>th</sup> July 2018 which was approximately 11 days out of time by an error on the part of counsel which is highly regretted; the applicants are desirous of ventilating their appeal against the High Court's decision, but in the absence of an extension of time, the appeal is at risk of collapsing even before it commences.

3. The application is further supported by the affidavit of the appellants' counsel on record, who rehearses the grounds and in addition deposes that; on 30<sup>th</sup> April, 2018 they were supplied with typed proceedings and also prepared a certificate of delay to enable them prepare the record of appeal; that on the same day, 30<sup>th</sup> April, 2018, they were also issued with the decree; the appellants' counsel prepared a record of appeal for filing at Nyeri Court of Appeal registry, but upon presentation he was informed that the certificate of delay had an error; the appellants' counsel then prepared a fresh certificate of delay and the same was signed by the High Court on 26<sup>th</sup> June, 2018; by error of principle, the appellants' counsel believed that the 60 days within to lodge the record of appeal had not lapsed noting the various holidays and taking to account that Saturdays are not computed; due to the error which the appellants' counsel entirely takes responsibility of, he finally lodged the record of appeal on 10<sup>th</sup> July, 2018 ; the appellants are genuinely desirous of ventilating the appeal and ought not be punished for mistake of counsel; the respondent will not suffer any prejudice that cannot be redeemed by cost as per his own confession through counsel and that the record of appeal was lodged 11 days out of time.
4. Learned counsel for the respondent, through a replying affidavit dated 9<sup>th</sup> November 2018, opposes the application. He deposes that; the application dated 23<sup>rd</sup> October, 2018 is frivolous, vexatious and a flagrant abuse of the court process as the applicants want to access justice through the rear door since the prayers seek to circumvent the issues raised in the application dated 8<sup>th</sup> August, 2018 which is yet to be determined; the application is misconceived as it should have been made before filing of the record of appeal; the certificate of delay issued on 26<sup>th</sup> June 2018 is defective as it discloses the date when the certified copy of proceedings and judgment were availed as 30<sup>th</sup> April 2018, whereas they were certified ready on 12<sup>th</sup> January 2018, yet no notice was served upon the respondent; it is ambiguous as the proceedings at page 242 of the record of appeal were certified as a true copy on 17<sup>th</sup> January 2018 but at page 21 of the applicants' application the date has been pen corrected to 26<sup>th</sup> June, 2018; nevertheless, in accordance with the certificate of delay issued on 26<sup>th</sup> June 2018 the typed proceedings and judgment in Chuka HCCA No. 28 of 2016 were availed and collected on 30<sup>th</sup> April 2018 a period of 314 days after the request was made; upon collecting the typed and certified copies of the proceedings and judgment, the time within which to file the appeal began to run and the appellants ought to have filed the appeal within 60 days, on or before 29<sup>th</sup> June, 2018; it is not in dispute that by 29<sup>th</sup> June, 2018 the applicants had not filed their appeal as required by law; the applicant has not presented the date nor proof that there was an attempt to present the record of appeal at the Court of Appeal registry at Nyeri and the alleged rejection of the of the same at the registry on an unknown date, neither ha the applicant demonstrated when the fresh certificate of delay was filed in court.
5. He further that the proceedings, which were ready by 12<sup>th</sup> January 2018 were only collected on 30<sup>th</sup> April 2018; the burden to file and serve documents as per rules of the court lies with the applicant in line with timely and expeditiously disposal of suits; there is no basis for extending the time for filing the appeal because there was no notice of appeal, the one on record having been deemed withdrawn after the applicants failed to file the appeal within the prescribed period; the excuse for the delay given by the advocate for the applicant is implausible as ignorance of the procedures of the court is not a defence.



6. Learned counsel for the applicant has filed submissions dated 21<sup>st</sup> March 2023. He reiterates the grounds on the face of the application and the affidavit in support. The applicant's counsel submits that; since the record of appeal was rejected it was never stamped to prove their intention to file it; thereafter a record of appeal was lodged on 10<sup>th</sup> July 2018 in the belief that the action was proper taking into consideration that between 26<sup>th</sup> June 2018 to 10<sup>th</sup> July 2018, 14 days had passed thus within the 60 days provided for under rule 82 while in reality the same was lodged 11 days after the expiry of the time for filing which action is truly regretted; upon service of the record of appeal, the respondent filed the application dated 7<sup>th</sup> August 2018 seeking to strike out their appeal for being filed out of time and further praying that the notice of appeal be marked as withdrawn which triggered the instant application; indeed counsel was of the mistaken belief that that the computation of time within which to file an appeal began on the date a certificate of delay was issued and they truly regret their mistake; that the appellant has always been desirous of pursuing their appeal as can be discerned from the steps taken to have their appeal lodged and believe that it is arguable as it raises various issues among them, whether the deceased, one Alfred Mutwiri Njoka can be held liable when he was a pillion passenger on a motorcycle that collided with the appellant's motor vehicle.
7. Learned counsel for the applicant further submits that the respondent has the right to enjoy the fruits of the decree but at the same time, the appellants have a constitutional right to appeal and noting that the impugned decree is one for dismissal of a suit and the respondent will not be so prejudiced by allowing the present application since he will still have the opportunity to argue in support of the impugned decree when the appeal shall be heard.
8. I have considered the application, the affidavit in support, the replying affidavit, and the submissions. The issue for determination is whether the applicant deserves the orders sought. Rule 4 of the *Court of Appeal Rules* allows this Court to exercise discretion to extend the time limited by the Rules for doing any act authorized or required by the Rules. In the case of *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA, this Court confirmed that the decision on whether to extend the time for filing an appeal out of time is discretionary, taking into account the length of the delay and the reason for the delay. The Supreme Court has stated that several key issues must be considered when considering an application for an extension of time. In the case, *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others* [2014] eKLR, it reiterated that an extension of time is an equitable remedy only available to a deserving party at the discretion of the court; a party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court and provide the reasons for the delay; the application ought to be brought without undue delay, and further due regard must be taken as to whether the respondents will suffer any prejudice if the extension is granted.
9. The applicants' counsel has extensively explained why the record of appeal was filed 11 days late and has taken responsibility for the late filing. I am convinced that the reasons advanced by counsel are plausible, and I find the 11-day lateness excusable in the circumstances. Furthermore, the counsel's mistake should not be visited upon by his clients who are anxiously awaiting their appeal. It has also not been demonstrated how the respondent will be prejudiced if the orders are granted.
10. I, therefore, allow the application. 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

