



**Munikah (Appealing as one of the Personal Representatives and the Executor/
Administrator of the Will of the Estate of Alfred Josse Nakaya) v Wangai & another
(Civil Application E472 of 2022) [2023] KECA 223 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 223 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E472 OF 2022
GWN MACHARIA, JA
MARCH 3, 2023**

BETWEEN

**SAMSON MASABA MUNIKAH (APPEALING AS ONE OF THE PERSONAL
REPRESENTATIVES AND THE EXECUTOR/ADMINISTRATOR OF THE
WILL OF THE ESTATE OF ALFRED JOSSE NAKAYA) APPLICANT**

AND

NANCY WANJIRU WANGAI 1ST RESPONDENT

ELINA MWAYITSI NAKAYA 2ND RESPONDENT

*(Being an application for extension of time to file an appeal out of
time from the Ruling of the Environment and Land Court in Nairobi
(Wabwoto, J.) dated 28th March 2022 in ELC Case No. E258 of 2020)*

RULING

1. Before me is the applicant's application dated December 8, 2022 brought under rule 4 of the [Court of Appeal Rules](#), 2022 for orders that the time for filing and serving a notice of appeal and memorandum/record of appeal be extended for 14 days and 60 days respectively and the costs of the application do abide the outcome of the appeal.
2. The application is supported by the grounds on the face of it and affidavit of the applicant, who avers that himself, the 2nd respondent and one Michael Mulama Nakaya (deceased) were appointed as the personal representatives and executors of the last Will of the deceased, one Alfred Josse Nakaya. That the suit property Tasia Block D.97/2347 also known as Nairobi/Block/97/2347 was part of the deceased's estate and it was brought to his attention that it may be fraudulently transferred to the 1st respondent. The matter was reported to the DCI and as a team, they instituted the suit, ELC No. 258 of 2020. He swore the verifying affidavit in support of the suit. However, later the 2nd respondent



turned rogue and hostile and swore an affidavit averring that she never gave instructions or her consent for the institution of the suit. That with or without the 2nd respondent's consent, he has reasonable cause of action in the case as his name was used to advance alleged fraudulent land transaction in what he considers to be a criminal offence of forgery. That he has an arguable appeal as demonstrated in a draft memorandum of appeal supporting the application.

3. The applicant filed submissions dated 6th February 2023. His view is that, since he had filed a verifying affidavit that accompanied the Plaint as a legal requirement, there was no need for a second verifying affidavit. Thus, whether or not the 2nd respondent reneged to have given instructions for the filing of the suit, the suit was still competent with support of only one verifying affidavit. In support of this proposition, the applicant relied on the case of *Ruth Damaris Wambui Mbiyu & 3 others v Moses Lesiamon Ole Mpoie & 4 others* [2005] eKLR where Kimaru, J. (as he was then was) held that;

“where more than one administrator has been appointed to administer an estate of a deceased person, then any one of them can swear an affidavit to verify a plaint filed on behalf of an estate of a deceased person.”

4. The applicant further submitted that when the ruling was delivered on March 28, 2022, he was in hospital indisposed from March 22, 2022 to September 2022 under the care of Doctors William Sigilai and Robert Mathenge and thus, was incapable of giving diligent instructions to his counsel. That he has an arguable appeal which raises a novel legal point requiring a consideration by this court, namely whether a suit filed on behalf of an estate of a deceased person must be verified by one or all the administrators where the administrators are more than one. Further that, the dismissal of the suit was not judicious, no prejudice will be suffered by either of the respondents and the delay in bringing the application was not inordinate and should be excused.
5. The 1st respondent opposed the application vide a replying affidavit dated February 10, 2023 averring that; the application is incompetent, frivolous, vexatious, lacks merit and is a gross abuse of the court process; the applicant has failed to explain the inordinate delay as his advocate was present during delivery of the ruling and the suit was struck out for want of instructions from the 2nd respondent who did not want to be a party to the proceedings; there are no triable issues worthy of consideration by this court and, the suit involved interested parties, namely Ephraim Miano Thamani and Patrick Kangeri Nyamu who are not parties to the application herein.
6. The 1st respondent also filed submissions of even date, which are a regurgitation of the averments in her replying affidavit for which reason I will not recall them.
7. I have considered the application, the affidavit in support of, and opposition to, the application, respective submissions and the law. The only issue arising for determination is whether the application should be allowed. The discretion that I am called upon to exercise in the determination of this application is provided under rule 4 of the *Court of Appeal Rules*, 2022 which states as follows:

“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 were well expounded in *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No 190 of 2019 where this Court differently constituted stated that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favor against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

9. Also in *Fakir Mohamed v Joseph Mugambi & 2 others*; [2005] eKLR, this court stated that;

“The exercise of this court’s discretion under Rule 4... 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 the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of 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 v Mwangi* Civil Appl NAI 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl NAI 8/2000 (UR) and *Murai v Wainaina (No 4)* [1982] KLR 38.”

10. In this case, judgment was delivered on the March 28, 2022 and the application is dated December 8, 2022. Under rule 77(2) of this *Court’s Rules*, 2022 the applicant ought to have filed a notice of appeal within 14 days of judgment which means the last date of filing was April 11, 2022 and 60 days subsequent to this date, file a record of appeal.

11. The explanation given by the applicant is that he was indisposed, having been in hospital from the 22nd March to September 2022, thus he was unable to give his counsel instructions. While sickness would be a reasonable ground for the Court to exercise its discretion, it is clear that he raised this ground in the submissions and not in the application itself or the supporting affidavit. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Evidence ought not to be introduced by way of submissions, as was echoed in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR that:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

12. Further, the applicant in his submissions alludes to an annexure marked as ‘SMM2’ which is a medical note, to buttress the assertion that he was sick. Upon combing the submissions, no note is annexed therewith. There is however an annexure ‘SMM2’ to the Supporting Affidavit which is a copy of the title to the suit property. From these facts, I deduce that the applicant merely makes a statement that he was sick, but fails to substantiate the fact and nature of indisposition; he should not expect the court



to make guesses in this regard. He owes the court a duty of explanation, and convincingly so. There is no doubt that the ruling was delivered in the presence of his advocate and so the questions that begs are; did his indisposed mean that he was not informed that the ruling had been delivered? Is it that he was informed but he was not able to communicate further instructions to his counsel? No answer is provided to these questions.

13. Even assuming that the court were to excuse the delay on account of the alleged illness, the period after the alleged indisposition is still not explained. The applicant submitted that he was indisposed from 22nd March to September 2022. The application is dated December 8, 2022, which is 3 months after the purported indisposition. He glosses over the period in question without much to offer by way of evidence for the reason of the delay to come to court timeously. I am not convinced that he has attempted to offer a plausible explanation for the delay.
14. I am therefore not satisfied that the contumelious delay or default on the part of the applicant has been satisfactorily explained. As the applicant has failed in satisfying the first ground for extension or enlargement of time to file an appeal out of time, this application must fail. Accordingly, the same is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

G W NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

