



Muviku (Suing as the legal representative of the Estate of Christine Ndanu Kimanzi - Deceased) v Mutemi (Civil Application E004 of 2023) [2023] KECA 240 (KLR) (3 March 2023) (Ruling)

Neutral citation: [2023] KECA 240 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E004 OF 2023
GWN MACHARIA, JA
MARCH 3, 2023**

BETWEEN

DANIEL MUSYOKA MUVIKU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHRISTINE NDANU KIMANZI - DECEASED) .. APPLICANT

AND

MUTUKU MUTEMI RESPONDENT

(Being an application for extension of time to file an appeal out of time from the Judgment of the High Court of Kenya at Kitui (R. Limo, J.) dated 8th November 2022 in High Court Civil Appeal No. E009 of 2022)

RULING

1. Before me is the applicant's application dated January 6, 2023 brought pursuant to section 3A of the *Appellate Jurisdiction Act* and Rules 4, 41 & 44(2) of the *Court of Appeal Rules, 2022* seeking extension of time to file an appeal out of time against the judgment of Limo, J delivered on November 8, 2022, that the draft Notice of Appeal be deemed as duly filed and for costs.
2. The application is supported by the grounds on the face of it and affidavit of Cynthia Omuya, advocate on record for the applicant, who avers that, as advocates for the applicant they were unable to trace him for purposes of seeking further instructions, upon delivery of judgment especially on whether he wished to appeal the said judgment. That they were finally able to get in touch with him and he instructed them not only to appeal the judgment but also file the instant application. It is deposed that the application is brought timeously, the appeal has chances of success and the respondent would suffer no prejudice if the application is allowed.
3. In the brief written submissions by counsel for the applicant, it is posited that they were only able to reach the applicant on the December 20, 2022 when he physically came to their offices and instructed them to file an appeal. Counsel relied on the case law of *Joseph Ouma Onditi v Jane Mung'au* [2020]



eKLR to emphasize the importance of seeking instructions from a client before proceeding with any action. That the period of delay was not inordinate and is therefore excusable, the applicant has a genuine, viable and strong appeal which raises serious points of law especially on the question of liability and that, the ends of justice would only be met if the application is allowed.

4. The respondent did not file a response to the application.
5. I have considered the application, submissions, authorities relied upon and the law. The applicant has invoked Rule 4 of the [Court of Appeal Rules](#), which provides 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.”.

6. The principles that guide the exercise of jurisdiction under the Rule 4 are now well settled by numerous enunciations in case law both binding and persuasive. In [Fakir Mohamed v Joseph Mugambi & 2 others](#); [2005] eKLR Waki, JA 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.”

7. In this case, judgment was delivered on the November 8, 2022 and the application herein is dated January 6, 2023. Under rule 77(2) of the [Court of Appeal Rules](#), the applicant ought to have filed the notice of appeal within 14 days of the judgment which means that the last day of filing was November 22, 2022 and 60 days subsequent to the date file the record of appeal.
8. The explanation given by the applicant’s advocates was that they were unable to get in touch with the applicant for further instructions. I am of the view that it would have been more prudent for the applicant to offer an explanation as to his whereabouts, it is trite that litigation belongs to a party and not his advocate and it was upon the applicant to ensure that he kept track of his case. That notwithstanding, I do find the explanation as offered by his counsel to be reasonable, as in any event, the delay is not so long as to be considered inordinate.
9. As relates to whether or not an arguable appeal exists, it is the applicant’s assertion that he has an arguable appeal which raises serious issues for consideration by this Court. This, in my view, can only be demonstrated by a draft memorandum of appeal. None was annexed to the application, leaving the Court bear-handed to opine whether or not there exists an arguable appeal. Be that as it may, for ends of justice to be met, and taking into account that no prejudice will be occasioned to the respondent, nothing fetters my hands to exercise discretion in favour of the applicant.
10. In light of the assessment and reasoning above, the application dated January 6, 2023 is allowed on the following terms:



- a. The Notice of Appeal dated January 6, 2023 is accordingly deemed to have been filed within the prescribed time and it should be served within seven days of this ruling.
- b. The Record of Appeal shall be filed within 60 days of this ruling.
- c. Costs of the Motion shall abide the outcome of the appeal.

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

