



REPUBLIC OF KENYA



**Kaumbuthu v Mbugaugia & 5 others (Civil Appeal (Application)
E001 of 2023) [2023] KECA 1621 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KECA 1621 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E001 OF 2023
AO MUCHELULE, JA
MAY 31, 2023**

BETWEEN

CIAMATI KAUMBUTHU APPELLANT

AND

KABURU MBUGAUGIA 1ST RESPONDENT

PIUS MIRITI 2ND RESPONDENT

ALEX NJAGI MUTEGI 3RD RESPONDENT

CYPRIAN NJAGI MUTEGI 4TH RESPONDENT

JOHN PETER N MUTEGI 5TH RESPONDENT

CELIA MUKWAMUGO 6TH RESPONDENT

*(Being an application for extension of time to file and serve a Memorandum
of Appeal and Record of Appeal out of time against the ruling of the High
Court of Kenya at Meru (A. Ong'injo, J) dated 29th November 2018)*

RULING

1. Rule 4 of the *Court of Appeal Rules*, 2022 states that:-

“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 authorised 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.”



2. In dealing with an application seeking extension of time to appeal, the court's unfettered discretion is brought into play.

Such a discretion is a judicial one, and is exercised upon generally settled principles, some of which were ably summarised in *Karny Zabarya & Another –v- Shalom Levi, Civil Application No. 80 of 2018* as follows:-

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reasons(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of the party who has a decision in his or her favour 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 the timely resolution of disputes; the prima facie 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. In taking into account the last consideration, it must be borne in mind that it is not the role of the single judge to determine definitely the merits of the intended appeal. This was for the full court if and when it is ultimately presented with the appeal.”

3. The applicant Ciamati Kaumbuthu was aggrieved by the ruling by A. Ong'injo, J. dated 29th November 2018 that dismissed her claim that the deceased Kaumbuthu M'Mbugaugia was her husband, and that her six (6) children were children of the deceased. The court gave the deceased's land LR No. Muthambi/Igamurathi/96 to his children Kaburu Mbugaugia (1st respondent) and Celia Mukwamugo (6th respondent) in equal shares. The applicant's complaint was that she and her children had been disinherited.
4. The applicant filed a notice of appeal on 8th January 2019. This was 28 days from the date she ought to have appealed. This is because Rule 77(2) of the Court of Appeal Rules, 2022 provides that a notice of appeal should be filed within 14 days from the date of the impugned decision.
5. The present application was dated 13th December 2022 and was substantially brought under Rule 4 of the *Court of Appeal Rules*. It sought –

“Extension of time to file and serve a Memorandum of Appeal and Record of Appeal out of time...”

The applicant deponed that following the filing of the notice of appeal, he developed a mental illness and because of that could not instruct her advocate on time.

6. The 1st to 5th respondents filed a joint response to oppose the application. They informed the court that, following the impugned ruling, the applicant had vide application dated 20th November 2019 sought the review of the ruling, and that the application been had heard and dismissed on 24th September 2020. I consider that applicant was kept busy by that application and that was the real reason why the present application was not brought earlier. It must mean that, up to 24th September 2020 she was well. She had opted to seek review, instead of appealing the ruling. She does not appear to have appealed against the refusal of application for review. About two years were lost between the impugned ruling and the dismissal of the application for review. The present application was brought about two months following the dismissal of the application for review. Although she produced medical chits showing



that she had had some mental illness, she was during this time prosecuting her application for review. She was busy in court. The allegation that she had mental illness cannot therefore be true.

7. The respondent swore that they had since shared out the estate and the respective parcels extensively developed; that allowing the application would unduly prejudice them. The fact that they had each taken possession of the respective parcels which they had developed was not challenged.
8. I consider that there was a long delay between the said notice of appeal and the present application, and that the offered explanation was not truthful.
9. But more important, the applicant does not have a properly filed notice of appeal on record. She did not seek that the notice of appeal be deemed to be properly on record. She did not seek extension of time to file and serve a notice of appeal. It follows that the quest to file and serve a Memorandum of Appeal and Record of Appeal is misconceived and not competent.
10. Consequently, the application is dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF MAY 2023

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

