



REPUBLIC OF KENYA



**KENYA LAW**  
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**Musa v Mustafa & another (Civil Application E001 of 2023)  
[2023] KECA 656 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 656 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E001 OF 2023**

**M NGUGI, JA**

**MAY 26, 2023**

**BETWEEN**

**MARIAM SAID MUSA ..... APPLICANT**

**AND**

**MIRAJ MUSTAFA ..... 1<sup>ST</sup> RESPONDENT**

**SWALEH MUSTAFA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time within which to file the notice of appeal out of time, to lodge the appeal and to serve the record of appeal out of time arising from the ruling/order of the High Court at Kakamega (W. Musyoka J.) dated 13th May 2022 in Kakamega High Court Civil Appeal No. 80 of 2019 and Kakamega High Court Civil Appeal No.69 of 2019)*

**RULING**

1. The applicant has filed the present application dated December 30, 2022 seeking extension of time within which to file and serve the notice of appeal and the record of appeal against the ruling of Musyoka J dated May 13, 2022 in Kakamega High Court Civil Appeal No 80 of 2019 and 69 of 2019. She also prays that the costs of the application be provided for.
2. The application is brought under ‘Rules (2) and 41 of the [Court of Appeal Rules 2010](#)’. I observe that the [Court of Appeal Rules 2010](#) and 2022 provide for applications for extension of time under Rule 4.
3. In the grounds on which the application is based, the applicant states that she was dissatisfied with the judgment of the Hon. Ally W. Bakari in Vihiga Kadhi’s Court Civil Case No 1 of 2019 and had appealed to the High Court in Kakamega in High Court Civil Appeal No 80 of 2019. A consent had been entered on February 26, 2020 between the applicant and the respondent, Musa Chepkoech Said in the Vihiga Kadhis Court Succession Cause No1 of 2019. On March 3, 2020 the respondents filed an application for review of the consent orders of February 26, 2020. The court ordered that



the application be canvassed by way of written submissions, and that it would inform them when the ruling will be delivered.

4. The applicant avers that on December 13, 2022, it came to her attention that the ruling had been delivered on May 13, 2022 without her knowledge. She avers that she was not informed by the court about the delivery of the ruling as required by Order 20 Rule I of the *Civil Procedure Rules*. It is her contention that as a result of the failure to notify her of the date of the ruling, she was unable to lodge her appeal within the stipulated timeframe, hence the present application.
5. The applicant avers that in the memorandum of appeal annexed to her application, she raises arguable issues touching on jurisdiction and locus standi. She further makes various arguments in respect of the substantive matters the subject of the intended appeal.
6. The application is supported by two affidavits. The first is sworn by the applicant and rehashes substantially the grounds set out in the application. The second affidavit is sworn by her counsel, Kimaiyo Keroney Arap Sego. The date on which it is sworn is not indicated. Mr. Sego avers that he was acting for the applicant and had filed submissions on her behalf as directed by the court. He had waited to be informed of the date on which the ruling on the application was to be delivered but received no notice. He had written a letter on September 15, 2022 to inquire about the ruling. A copy of the letter is not annexed to his application.
7. Mr. Sego echoes the averment of the applicant that on December 13, 2022, while the applicant was prosecuting her case in Kapsabet ELC No 89 of 2021, the advocate of the defendant in the matter produced a copy of a land certificate showing that the 4<sup>th</sup> and 5<sup>th</sup> respondent and others had been registered as the proprietors of the suit land, Nandi/Kamobo/5275.
8. Mr. Yego avers that the failure to file the appeal on time was due to the failure by the High Court to notify him and his client about the date of the ruling of the court.
9. I have considered the application and the submissions filed on behalf of the applicant. I have also considered the applicant's memorandum of appeal containing all of forty three grounds against the ruling of Musyoka J. that she intends to appeal against.
10. There is no response to the application by the respondents, though they have filed submissions dated February 28, 2023 through the firm of Maobe Mukhwana & Co Advocates. While citing the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* - (Civil Application No Nai 251 of 1997 (UR)), they submit that a case belongs to a litigant and not her Advocate and it is the duty of the litigant to track the progress of the case. The applicant in this case has not stated what steps she took in following up the progress of her matter, more so since May 13, 2022 when the ruling was delivered. The respondents' submission is that the application is unmerited and should not be allowed.
11. The factors that this Court should consider in determining an application under Rule were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (supra) in which this Court stated:

“It is now well settled that the decision whether or not to extend 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 reasons 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.”



12. In her submissions, the applicant reiterates her averments and those of her counsel that she only learnt that the High Court had delivered its ruling on December 13, 2022. While the Court had indicated that its ruling on the applications would be delivered on notice, no notice had been given either to the applicant or her counsel. She had learnt on December 13, 2022 that the ruling had been delivered on May 13, 2022. She had filed the present application on December 30, 2022, seventeen days after she learnt about the ruling. Taking into account the fact that the period between 13<sup>th</sup> and 30<sup>th</sup> December also contains the Christmas break, I am satisfied that the delay is not inordinate. I make this finding having considered also the reasons for failing to file the notice of appeal in time, and for filing the application for extension of time some seven months after the date of the ruling.
13. While it is correct that a matter belongs to a litigant and a litigant should follow up his or her case to know its fate, it is also correct that a litigant is entitled to notice from the court when it is expressly directed that the decision of the court will be delivered on notice. I therefore find the reasons for the delay and the period of delay is reasonable.
14. This Court is also required to consider, under Rule 4, the chances of success of the appeal. In considering this factor, I remind myself that it is not the role of the single judge to consider the merits or otherwise of the intended appeal, a duty which lies with the full court in considering an appeal. I note, however, that in this case, the ruling of Musyoka J dealt with two applications, one dated March 3, 2020 and another dated May 18, 2020. The issue in the first was whether or not the court should set aside a consent entered into between the appellant and one of the respondents, to the exclusion of the other respondents, on February 26, 2020 in Kakamega HCCC No 80 of 2019. The second issue, raised in the second application before him, was whether he should grant an order for the furnishing of security for costs. He found the first application to be merited, and dismissed the second.
15. In her affidavit and submissions however, the applicant argues that her appeal raises, inter alia, issues relating to the jurisdiction of the Vihiga Kadhi's Court to entertain a succession dispute regarding a non-existent estate, and who has the jurisdiction to revoke the title of a proprietor under sections 24-26 of the Land Registration Act.
16. In the 43 grounds of appeal set out in her memorandum of appeal attached to the application, the applicant raises, only peripherally, the issues relating to the applications before Musyoka J.
17. While I have reservations about the possibility of success of the intended appeal, having found in favour of the applicant on the first two factors under Rule 4 of the Court of Appeal Rules, I hereby grant her leave to file her notice of appeal and record of appeal out of time. The notice of appeal shall be filed within 14 days hereof, and the record of appeal forty-five (45) days thereafter, failing which the leave granted herein shall lapse.

**DATED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF MAY, 2023**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

