



REPUBLIC OF KENYA



KENYA LAW
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**Gichira v Gichira (Civil Application 135 of 2019)
[2023] KECA 1581 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KECA 1581 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 135 OF 2019
AO MUCHELULE, JA
MAY 16, 2023**

BETWEEN

JOHN GITHINJI GICHIRA APPLICANT

AND

BERNARD MUNGE GICHIRA RESPONDENT

(Being an application for extension of time to file and serve a Notice and Memorandum of Appeal out of time against the ruling of the High Court of Kenya at Kerugoya (L. Gitari, J) dated 8th December 2017. In Civil Appeal No. 10 of 2012)

RULING

1. The background of this application is that, on 11th October 2012 the subordinate court delivered a judgment in the succession proceedings in respect of the estate of the late father of the applicant John Githinji Gichira. The estate was distributed. The applicant was aggrieved by the distribution and on 12th November 2012 preferred an appeal to the High Court at Kerugoya. The respondent moved the court to dismiss the appeal for want of prosecution. The court directed that if the applicant did not within 21 days prosecute the appeal the same would stand dismissed. On 14th May 2015, following an ex parte order, the appeal was dismissed for want of prosecution. On 8th December 2017 the High Court dismissed with costs the applicant's application to review the orders dismissing his appeal for want of prosecution.
2. The applicant has come to this Court by way of Notice of Motion dated 17th July 2019 under sections 1A, 1B, 3A, 66 and 95 of the *Civil Procedure Act*, Order 51 rule 1 of the *Civil Procedure Rules* and Rule 4 of the *Court of Appeal Rules* seeking leave to file and serve a Notice of Appeal out of time against the whole of the ruling delivered on 8th December 2017 by L. Gitari, J. in the High Court at Kerugoya. He further sought that leave be granted for him to file and serve a Memorandum of Appeal against the decision. He stated in the grounds that his advocate did not inform him of the ruling. This was because



they had disagreed. It was the same advocate who had failed to prosecute the appeal in the High Court, leading to its dismissal. The advocate failed to file a Notice of Appeal to challenge the ruling dated 8th December 2017. He stated that he was aggrieved by the unequal distribution of his late father's estate and that was what had led him to challenge it in the High Court.

3. In the Draft memorandum of Appeal, his grounds were that the learned Judge had erred in law and fact by dismissing his appeal on a technicality without according him the opportunity to be heard on this matter that involved family members. Secondly, that the learned Judge had blamed him for the mistakes of his counsel and thereby not considered the salient issues that the appeal had raised.
4. The applicant swore that he would suffer substantial and irreparable loss and prejudice if he is not granted leave to appeal out of time.
5. There was no response to the application which had been served on the respondent. The direction by this Court that the parties do exchange written submissions was not heeded, even by the applicant.
6. An application under Rule 4 of the [Court of Appeal Rules](#) is a prayer to a single judge of this Court to exercise his/her discretion to grant the relief of extension of time. The Rule states as follows:-

“The Court may, on such terms as may be 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.”

7. Going by the various decisions of this Court, it is now settled that the discretion given to the Court by the Rule is wide and unfettered, the only interest being to do justice to the parties given the particular circumstances of each case. For instance, in *Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi* [1999] 2 EA 231, it was noted that some of the matters to be considered when dealing with such application include the length of the delay, the reasons of the delay, the possible chances of the appeal succeeding, and the degree of prejudice, if any, that the respondent may suffer if extension of time is granted. In [Andrew Kiplagat Chemarigo –v- Paul Kipkorir Kibet](#) [2018]eKLR, this Court observed that there was no minimum or maximum period of delay set out in the law; that each case has to proceed on its peculiar facts; and that the explanation for the delay has to be reasonable and plausible.
8. The history of this dispute shows that the applicant is not a diligent litigant. When he filed the appeal in the High Court, how was not able to prosecute it on time. In opposing the application dated 25th March 2013 filed by the respondent to dismiss his appeal for want of prosecution, he swore a replying affidavit to state that he had been disabled by his mother's sickness and that was why he had not prosecuted the appeal. Even after he was given 21 days to prosecute the appeal, he took no action. In the affidavit to support the instant application, he swore as follows:-

“4. That indeed it is my then advocate on record who had failed to prosecute the appeal and the same was dismissed.”

Was it his mother's sickness or failure by his advocate that had led to the non- prosecution of the appeal?



9. He swore that his advocate did not inform him that the application for review of the dismissal order had been dismissed. The advocate did not take steps to appeal on time. He had stated as follows in the grounds:

“2. There was counsel on record on my behalf of the applicant who never informed him of the decision as he had fallen out after a disagreement and as a result, there was no Notice of Appeal lodged within the stipulated time.”

His did not repeat this claim of disagreement in the sworn affidavit. It meant that there was no disagreement. In any case, if there was disagreement how did he expect the same advocate to file the appeal?

10. This application was brought about one year and eight months after the delivery of the impugned ruling. Even assuming that the advocate was not diligent, and considering the history of the matter, what action did the applicant take to check both at the registry and with his advocate, now that he says that he was all along interested in the suit?

11. I have considered the facts that this application has presented. I am of the view that there was inordinate delay in bringing this application, and that the explanation for the delay was neither reasonable nor plausible. I dismiss the application.

DATED AND DELIVERED AT NYERI THIS 16TH 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

