



REPUBLIC OF KENYA



KENYA LAW
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**Mundia v Karanja & 6 others (Civil Application E182 of 2023)
[2023] KECA 665 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 665 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E182 OF 2023**

KI LAIBUTA, JA

JUNE 9, 2023

BETWEEN

PATRICIA WANJA MUNDIA APPLICANT

AND

JACINTA GATHONI KARANJA 1ST RESPONDENT

LUCY NYAMAITHO MUOHI 2ND RESPONDENT

ALICE WANJIRU KANYI 3RD RESPONDENT

SUSAN WAIRIMU MWAURA 4TH RESPONDENT

SALOME WAMBUI MUNDIA 5TH RESPONDENT

MARGARET WANJIKU MUNDIA 6TH RESPONDENT

SUSAN NJERI WAWERU 7TH RESPONDENT

*(Being an application for extension of time to appeal out of time against
the Ruling and Orders of the High Court of Kenya at Nairobi (M. Thande,
J.) dated 30th November 2021 in Succession Cause No. 934 of 2014)*

RULING

1. Before me is a Notice of Motion dated May 10, 2023 made under rule 4 of the Court of Appeal Rules in which the Applicant, Patricia Wanja Mundia, prays for: leave to appeal out of time against the ruling delivered by Lady Justice M Thande on November 30, 2021 in Succession Cause No 934 of 2014; orders that the draft memorandum of appeal be deemed as duly filed; and costs of the application.
2. The applicant's Motion is supported by her annexed affidavit sworn on May 10, 2023 essentially deposing to the grounds on which the application is made, namely: that the impugned ruling and orders were delivered on November 30, 2021; that the applicant was aggrieved thereby and wishes to



move this Court on appeal; that the applicant, through her counsel, applied for certified copies of the proceedings and ruling, but that the same are yet to be supplied; that due to the non-availability of the required documents, the applicant could not meet the deadline for filing the record of appeal; that the applicant is an elderly woman in her eighties, and that it was difficult for her to source the requisite funds to lodge her appeal; that the delay is not intentional; that none of the parties stands to suffer any prejudice in the event that the orders sought are granted; and that substantive justice demands that the orders sought be granted.

3. In addition to restating the grounds aforesaid, The applicant's supporting affidavit depones further that her intended appeal raises "... a good and arguable case with the likelihood of success".
4. It is noteworthy that none of the respondents has filed an affidavit in reply to the applicant's Motion, save for M/s Kinyua Mwaniki & Wainaina Advocates' email dated June 5, 2023 addressed to the Registrar pointing out the fact that: the applicant's Motion was served late; that it was incomplete; and that they had not been served with any submissions. However, counsel do not indicate whether they represent all or any of the respondents, but urge the Registrar to give them another date.
5. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to "... 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 ...," on such terms as it thinks just.
6. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that "the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, the reason 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."
7. This Court's decision in *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR also lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. In this case, the Court underscored the fact that its discretion is unfettered and observed:

"As it 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, 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."
8. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. In her undated draft Memorandum of Appeal, the applicant advances 7 grounds on which her intended appeal is anchored. According to her, the learned Judge erred in law and in fact by, among other things: failing to consider the applicant's case; finding that her application lacks merit; denying the applicant the opportunity to make her case, and for condemning her unheard; failing to appreciate the facts and circumstances of the matter; failing to consider that the purport of the impugned ruling was tantamount to disinheriting the applicant and her family; for awarding costs to the respondents notwithstanding that this was a family dispute; and by failing to appreciate that there was a valid Will left behind by the deceased, and which remains valid to date.



9. Even though this is not the only basis for consideration, the grounds set out in the Applicant’s draft Memorandum of Appeal point to a reasonable conclusion that the intended appeal is arguable with the possibility of success. In *Joseph Wanjobi Njau vs Benson Maina Kabau*, Civil Application No 97 of 2012 (Unreported), Hon Mr Justice Kathurima M’Inoti held that “...an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court.”
10. In *Muchungi Kiragu vs James Muchungi Kiragu and another* [1998] eKLR, the Court held that:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”
11. It is noteworthy, though, that demonstration by an applicant that he or she has an arguable appeal is not the only requirement or qualification for extension of time under Rule 4 to file an intended appeal. It is merely the first step that must be followed by satisfaction of the other requirements relating to the period of delay; the reasons for the delay; whether such delay is inordinate; and whether the adverse party would be prejudiced by grant of the orders sought under the Rule. In other words, is it too late in the day to approach the Court under Rule 4? Has the applicant explained to the satisfaction of the Court the reason for the delay in filing the intended appeal?
12. I take note of the fact that the impugned ruling and orders were delivered on November 30, 2021; that she filed her notice of appeal on December 7, 2021; that her application for extension of time comes more than eighteen (18) months later, which I consider to be inordinate delay. Moreover, there is nothing on record to show that the applicant has applied for certified copies of the proceedings and of the impugned ruling, or that she (or her counsel) has taken steps to secure them without undue delay.
13. With regard to the period of delay, I am mindful of the decision in *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* [2018] eKLR where this Court observed that “... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.” It is only then that consideration as to whether the intended appeal is arguable would be worthy of the Court’s attention in exercise of its discretion under Rule 4.
14. To my mind, the applicant has not given plausible and satisfactory explanation for the more than eighteen months delay in filing its appeal. Her application for extension of time also comes more than eighteen months after delivery of the impugned ruling.
15. Having carefully considered the applicant’s Motion, the grounds on which it is made, the affidavit filed in support thereof, and having further considered the written submissions by learned counsel for the applicant, I find that the applicant’s Notice of Motion dated May 10, 2023 has no merit. Accordingly, the same is hereby dismissed with no orders as to costs. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

