



REPUBLIC OF KENYA



KENYA LAW
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**Mithamo v Nyaga (Civil Application E060 of 2021)
[2023] KECA 1642 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1642 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E060 OF 2021
J MOHAMMED, JA
OCTOBER 27, 2023**

BETWEEN

PURITY WANGECI MITHAMO APPLICANT

AND

BERNARD MAINA NYAGA RESPONDENT

(Being an application for extension of time to file and serve the memorandum of appeal and record of appeal out of time in an intended appeal from the judgment of the Environment and Land Court at Kerugoya (Olao, J.) dated 6th October, 2017 in E.L.C. No. 11 of 2015)

RULING

Background

1. In her application dated 24th May, 2021, Purity Wangechi Mithamo (the applicant) prays to be granted leave to file and serve her memorandum of appeal and record of appeal out of time. The application is expressed to be brought under Rule 4 of the Court of Appeal Rules (this Court's Rules) and is based inter alia on the grounds: that a notice of appeal was lodged on 9th October, 2017; that the proceedings were applied for on 11th October, 2017; that the same were ready for collection on 1st March, 2018; that the trial Judge was indisposed and was out of the duty station; and that the applicant has a good appeal with chances of success.

Bernard Maina Nyaga is the respondent herein.

2. Rule 4 of this Court's Rules 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.”

3. In exercising its discretion under this Rule, this Court is required to consider certain factors. These were enunciated in the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 in which the 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.” (Emphasis supplied).
4. The instant application is based on the grounds set out in the application and the affidavit in support sworn by the applicant, on 24th May, 2021. These are that the applicant has a meritorious appeal with high chances of success; that she came to learn of the delivery of the judgment and lodged and served the notice of appeal within time; that her advocate failed to file the appeal within time; that her efforts to reach him bore no fruit as he was engaged in election campaigns; and that she only learnt that the memorandum of appeal and record of appeal had not been filed when she visited the court registry.
5. There is no response from the respondent and neither has either party filed written submissions.
6. From the record, the impugned judgment was delivered on 6th October, 2017. The notice of appeal dated 9th October, 2017 was filed on 12th October, 2017. The instant application was filed on 10th August, 2021. The delay in filing the instant application is approximately 3 years and 10 months. The applicant faults her previous advocates for the delay in filing the record of appeal. The applicant however had the responsibility to follow up on her case even though she was represented by counsel.
7. In *Bi - Mach Engineers Limited v James Kahoro Mwangi* [2011] eKLR this Court held that:

“It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”
8. Further, in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR this Court held that:-

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are

Determination

9. The Court is asked to exercise the discretion granted to it by law under Rule 4 of this Court’s Rules. A discretion which must be exercised within the parameters set out in *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. 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, (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 *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231, *Mwangi vs. 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.”

10. In the instant application, the substantial reason for inaction on the part of the applicant is that her advocate was engaged in election campaigns. In *Trade Bank Ltd (In liquidation) vs. L.Z. Engineering Construction Ltd & Another Civil Appl. No. NAI. 282/98*, this Court stated thus:-

“The inaction which was being overlooked was a delay of nearly three months. We think it is now settled that where there is such a long delay or inaction or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants place before the learned single judge no material upon which he could exercise his discretion

11. The notice of appeal was lodged on 11th October, 2017. The record of appeal ought to have been filed by 10th December, 2017. From the record, counsel for the applicant applied for certified copies of the judgment on 11th October, 2017. There is no evidence of any follow up on the letter. It is also notable that the letter bespeaking proceedings was not copied to counsel for the respondent. The instant application was filed on 10th August, 2021, more than 3 years and ten months after the filing of the notice of appeal. I find that this delay is inordinate and has not been satisfactorily explained to the Court.
12. From the circumstances of the instant application, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso (supra)*.
13. Accordingly, I find no merit in the notice of motion dated 24th May, 2021 and dismiss it with no order as to costs.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF OCTOBER, 2023

JAMILA MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

