



REPUBLIC OF KENYA



**Mirikwa & 3 others v Mirikwa & 2 others (Civil Application  
E151 of 2021) [2022] KECA 372 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 372 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E151 OF 2021  
PO KIAGE, JA  
FEBRUARY 18, 2022  
IN THE MATTER OF THE ESTATE OF MIRIKWA WERIMO**

**BETWEEN**

**PETER MAKOKHA MIRIKWA ..... 1<sup>ST</sup> APPELLANT  
FRANCIS ONG'ONG'A MIRIKWA ..... 2<sup>ND</sup> APPELLANT  
WAKWANALO MIRIKWA WERIMO ..... 3<sup>RD</sup> APPELLANT  
JOSEPH ONYANGO MIRIKWA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**GEORGE WERIMO MIRIKWA ..... 1<sup>ST</sup> OBJECTOR  
FRANCIS ONG'ONG'A MIRIKWA ..... 2<sup>ND</sup> OBJECTOR  
ROBERT KULUMBANI MIRIKWA ..... 3<sup>RD</sup> OBJECTOR**

*(Being an appeal from the Judgment and Decree of the High Court at Kakamega  
(Musyoka, J) dated 18th June 2021) in Succession Cause No. 294 of 2004)*

**RULING**

1. By a Motion dated 1<sup>st</sup> November 2021, the applicants seek the following order in the main;
  - B. THAT this Honourable Court be pleased to grant the Applicant leave to appeal out of time approximately 14 days.
2. I have contemplated this Rule 4 application, the grounds in support thereof, the replying affidavit jointly filed by the respondents and the applicable law. In the exercise of my free and unfettered



discretion, I recall the old hat case that aptly captures the principles as devised by this Court over the years, namely *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi (1999) 2 EA 231*, that;

“It is now well settled that the decision whether or not to extend the 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 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.” (Emphasis stated)

3. The motion was based on 12 grounds and the supporting affidavit sworn by Peter Makokha Mrikiwa, the 1<sup>st</sup> applicant. He deposed that on 18<sup>th</sup> June 2021, the judgment was delivered without their knowledge as no notice was served upon the applicants or their advocate. Thereafter, the court proceeded to confirm the grant within record time which deprived them of the opportunity to halt the process in time. He complained that due to the COVID-19 pandemic, none of them were able to access the file to enable them to establish the timelines required to file an appeal as required by law. He pleaded that if this application is not allowed, they stand to be deprived of their right to inherit.
4. The respondents filed a replying affidavit deposed by Helen Auma Mirikwa, the wife of the late Francis Ong’ong’a Mirikwa, the 2<sup>nd</sup> respondent, following whose death she was substituted. She retorted that this application was an abuse of the court process. She asserted that since the matter was heard inter parties, there was no need for a notice of entry of judgment. She maintained that the applicants were issued with a judgment date and failed to inform her Counsel. She urged us to dismiss the application with costs to the respondents.
5. Even though there is no set period beyond which delay becomes inordinate, the Court must be satisfied that any delay has been reasonably explained. A plausible and satisfactory explanation is the key that unlocks the Court’s flow of discretionary favour. See, [\*Andrew Kiplagat Chemaringo -vs- Paul Kipkorir Kibet \[2018\] eKLR\*](#).
6. The applicants blamed the court and the pandemic for their predicament. They even audaciously tried to paint the court in bad light to give the effect of a deliberate malicious plan to cause an injustice to them. I think the claim that the judgment was delivered with no notice to them and that the grant was confirmed with utmost speed is unconscionable and reckless. The respondents debunked this notion by confirming that indeed the applicants were aware of the judgment date hence such allegations are unwarranted.
7. The Chief Justice issued practice directions on 4<sup>th</sup> April 2020 which provided for e-filing and e-service system. Additionally, the Court of Appeal through its then president issued complementary directions to govern this Court on 21<sup>st</sup> April 2020. By the 18<sup>th</sup> of June 2021, the courts had a well-established the e-system and appellants were able to access the file and the documents therein electronically. Hence, the use of the pandemic as an excuse is unpersuasive.
8. In the end, I find the reason proffered for delay as unsatisfactory, littered with exaggeration and a lack of candour. The delay was not only inordinate but also inexcusable. I therefore decline to grant the prayer to extend time and accordingly dismiss the application with costs.

**DATED AND DELIVERED AT KISUMU THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022**

**P. O. KIAGE**

.....



**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

