



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthui v Kendi & another (Civil Application 107 of 2020)  
[2022] KECA 56 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 56 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 107 OF 2020  
S OLE KANTAI, JA  
FEBRUARY 4, 2022**

**BETWEEN**

**JAMES KIMATHI MUTHUI ..... APPELLANT**

**AND**

**MYRIAM MUTHUI KENDI ..... 1<sup>ST</sup> RESPONDENT**

**CATHERINE KINYA MUTHUI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. In the Motion dated 16th November, 2020, the applicant James Kimathi Muthui asks for extension of time to lodge a notice of appeal out of time in respect of a ruling delivered by Ongijo, J. on 27th April, 2020 in Meru Succession Cause No. 398 of 2012.
2. In grounds in support of the motion it is said that the applicant is aggrieved by that ruling; that the applicant did not understand the import of the said ruling as his former advocate was not available to show him the way hence was bypassed by time and that the applicant has filed a notice of appeal because he has been deprived off his property.
3. There is an affidavit in support of the motion where the applicant repeats those averments and he further says paragraph 4, 5 & 6 of the affidavit:

“4. That the said ruling had the implication of distributing my properties as part of the deceased’s estate without any legal or factual basis which properties were decreed as mine vide a decree in Meru ELC Case No. 131 OF 2011. Annexed to herewith is a copy of the said decree marked as “JKM2”

5. THAT the decree in Meru ELC Case NO. 131 OF 2011 decreed that land parcel numbers NYAKI/KITHOKA/1726, NYAKI/KITHOKA/1823 and NYAKI/



KITHOKA/1495 be transferred to me which was done by Linco Stores Limited whose copies of title deeds are here annexed and marked “JKM3a,b&c.”

6. THAT despite the fact that the said decree by the Environment and Land Court has never been appealed against or set aside, the superior court appropriated jurisdiction upon itself and rendered that decree void against the law by declaring my property as part of the estate.”

4. Further that he is greatly aggrieved by those findings and he further says that the High Court unlawfully declared as part of the estate and distributed properties that belonged to a company Muthui Coffee Trade Development Company Limited, which according to him is contrary to law. He says that his former advocates failed to explain to him the import of the ruling which ruling was delivered when Covid 19 pandemic was at its peak and there were movement restrictions. He says that upon receipt of an email informing him about the ruling, he visited his former advocates office but found it closed. It is the lawyers he appointed thereafter who gave him advice and he would like to appeal.
5. There is a replying affidavit by the respondents Miriam Kendi Muthui and Catherine Kinya Muthui who opposed the motion and say that the applicant was always aware of the proceedings before the High Court and was represented by counsel. They say that the applicant sat back for a long period and in their view the mistake in not lodging a notice of appeal is inexcusable and inordinate. They also think that the intended appeal has no chance of success; that the applicant is trying to introduce new evidence which was not availed at the trial; that they had proved to the required standard to the High Court that lands subject to distribution belonged to their late father amongst other argumentative issues they raise in their affidavit.
6. The applicant filed a supplementary affidavit in answer to the replying affidavit where he says that he is looking for fairness in correction and distribution of the estate; that he has defended several law suits to protect the estate; and he prays that I allow the application.
7. The applicant also filed submissions dated 30th November, 2021 which I have considered.
8. The principles that apply in an application of this nature are well known. They were well captured in *Leo Sila Mutiso v Hellen Wangari Mwangi* Civil Appeal No. Nai. 255 of 1997 as follows:

“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.”

9. The applicant is basically saying that although he and his then lawyer were present when ruling was delivered by the High Court on 27th April, 2020, he did not understand the import and full effect of the same. When he visited his former lawyer’s offices for an explanation of the import of the ruling, he found the offices closed due to the Covid 19 pandemic. The ruling was delivered on 27th April, 2020 and I take judicial notice that court premises in Kenya were ordered closed sometime in March 2020 by the Hon. Chief Justice in compliance with directives that had been issued by the Ministry of Health. Law firms also closed their chambers at the same time. The motion is dated 16th November, 2020 and I do not agree with the



respondents that this is inordinate delay in taking the motion when there was interruption of court activities due to the said pandemic.

10. In any event, I note from the issues that the applicant raises that the distribution of the estate may have trespassed on properties that did not belong to the estate and I think the applicant should be accorded an opportunity to canvass those issues in an appeal.
11. In the event, I am satisfied that the applicant should benefit from exercise of my discretion and I allow the motion. Let the applicant file a notice of appeal within 14 days of today. Costs of the motion will be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

