



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kenyatta & another v Murithi (Civil Application 115 of 2019)
[2022] KECA 419 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 419 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 115 OF 2019**

F SICHALE, JA

MARCH 4, 2022

BETWEEN

MICHENI KENYATTA 1ST APPLICANT

MUSYOKA B. KITHINJI 2ND APPLICANT

AND

M' MKEA M' MURITHI RESPONDENT

(An Application for extension of time within which to file a Record of Appeal against the Judgment of the Environment & Land Court at Chuka Njoroge, J. dated 20th June 2018. in ELC Case No. 107 of 2017)

RULING

1. Micheni Kenyatta and Musyoka B. Kithinji (the applicants herein) have vide a motion dated 23rd July 2019** and brought pursuant to Sections 3A and 3B of the *Appellate Jurisdiction Act* and Rules 4,5 (2) (B), 39,42, 43 of the *Court of Appeal Rules 2010*, sought the following orders:
 1. Spent.
 2. This Honourable Court be pleased to extend time within which the applicants may file the Record of Appeal in the Appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Chuka (The Honourable Justice Peter Muchoki Njoroge) delivered on the 20th day of June 2018, in the Environment and Land Court at Civil Appeal Case No.107 of 2017.”
2. The motion is supported on the grounds on the face of it and an affidavit sworn by the 2nd applicant, Musyoka B Kithinji who deposed *inter alia* that they were aggrieved by the judgment delivered by Njoroge, J. on 20th June 2019, whereupon they instructed their then advocates on record Ms Mwirigi Kaburu and company advocates to pursue an appeal against the same.



3. He further deposed that they filed a Notice of Appeal on 28th June 2018, through their then aforesaid advocates on record and further requested for copies of typed proceedings and judgment vide a letter dated 22nd June 2018 and that from a perusal of the court records, it would appear that their advocates on record paid and collected the typed proceedings on 17th August 2018.
4. That, he was based in the Republic of Uganda and he was not advised by his advocates on record that the proceedings and judgment were ready and that once the Notice of Appeal was filed, his advocates delayed in filing the Record of Appeal within the prescribed period which lapsed on 20th August 2018 and that despite the delay, the said advocates did not apply for a Certificate of Delay.
5. He further deposed that the appeal raised substantive issues of law and it will serve the ends of justice if this Court extended the prescribed time within which to file the appeal.
6. The motion was opposed vide a replying affidavit sworn by the respondent M' Kea Muriithi on 6th December 2021, who deposed *inter alia* that there was a delay of 1 year and 24 days in filing the application; that in today's world, physical distance had been literally eliminated by advancement in technology and hence the reason advanced by the 2nd applicant that he was a resident of the Republic of Uganda had been diluted significantly by development of technology as a primary means of communication and that it had not been demonstrated by the applicant that there was an attempt to communicate with the former advocate electronically who declined or failed to act on the instructions.
7. He further deposed that whereas the 2nd applicant may be domiciled in the Republic of Uganda, the 1st applicant was domiciled in Tharaka Nithi County and hence this explanation was not tenable and that the appeal before the High Court took a whole 15 years to prosecute; that he was now approaching 90 years; that he had already executed the decree of the Magistrate's Court and that as such, he would stand to suffer immense prejudice if the application is granted.
8. It was submitted for the applicants that they had satisfied the conditions for extension of time as set out by the Supreme Court in the case of [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others \[2014\] eKLR](#) as the reason for the delay had been established, a sufficient explanation for the delay put forward; that there had been no inordinate delay and that further the respondent will not be prejudiced if the applicants are given an extension of time in which to file their appeal.
9. The respondent on the other hand did not file submissions.
10. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the applicants' submissions, the cited authorities and the law.
11. The applicant's motion is brought *inter alia*, under Rule 4 of this Court's Rules. The said Rule provides:
 - “4.
Extension of time
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.”
12. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its



discretion the Court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997* where the Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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.”

13. In the instant case, the impugned judgment was delivered on 20th June 2018, pursuant to which the applicants filed a Notice of Appeal on 28th June 2018. The period within which the applicants ought to have filed the Record of Appeal lapsed on 20th August 2018 whereas the instant application was filed on 23rd July 2019, a period of about 11 months** which delay is certainly inordinate.
14. The applicants contended that the delay in filing the Record of Appeal was occasioned by the mistake of their former advocates which should not be visited upon them and the fact that the 2nd applicant is based in Uganda where he plies his trade and that he was not advised by his then advocates when the proceedings and judgment were ready.
15. First of all, save for the 2nd applicant contending that he had instructed his then advocates to pursue an appeal against the impugned judgment there was no evidence to support this contention. Likewise, there was no evidence that there was communication breakdown between the and 2nd applicant and his then advocates or that he had indeed relayed instructions to his former advocates which instructions were not acted upon. Secondly, the mere fact that the 2nd applicant is domiciled in Uganda (a neighboring country) and that as such he was unable to effectively communicate with his then advocates is neither here nor there since the world has now become a *global village* in light of advancement of technology and the 2nd applicant can now not be heard to attribute the delay in filing the Record of Appeal owing to his absence in the country.
16. In any event the 1st applicant is a resident of Tharaka County and in view of the above and from the circumstances of this case, I am of the considered opinion that the delay herein is inordinate and the same has not been satisfactorily explained to this Court.
17. As regards prejudice, the applicants have not demonstrated the prejudice that they would suffer if the instant application is not granted and in any event the respondent has already executed the decree of the Magistrate’s Court.
18. Taking into totality all the circumstances in this case, I find that the applicants have not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court of Appeal Rules as laid out in *Leo Sila Mutiso* case (supra), to extend time and therefore decline to extend time within which to file the Record of Appeal.
19. Accordingly, the applicants’ application dated 23rd July 2019, is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

Orders accordingly.

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

F. SICHALE

.....



JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

