



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kithure & others v Nculubi & 3 others (Civil Application  
116 of 2019) [2022] KECA 400 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 400 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 116 OF 2019**

**F SICHALE, JA**

**MARCH 4, 2022**

**BETWEEN**

**MOSES MUTUMA KITHURE & OTHERS ..... APPLICANT**

**AND**

**JULIA NCULUBI ..... 1<sup>ST</sup> RESPONDENT**

**GRACE KANINI IMARIA ..... 2<sup>ND</sup> RESPONDENT**

**MARY AKUI IMARIA ..... 3<sup>RD</sup> RESPONDENT**

**ESTHER KAINDA IMARIA ..... 4<sup>TH</sup> RESPONDENT**

*(An Application for extension of time to lodge and serve a Notice of Appeal  
against the Judgment and Decree of the High Court of Kenya at Meru (Gikonyo,  
J.) dated 5th November 2018. IN (HC. Succession Cause No. 353 of 2004)*

**RULING**

1. Moses Mutuma Kithure & 8 Others (the applicants herein), have vide a motion dated 18<sup>th</sup> July 2019, brought under the provisions of Rule 4 of the [Court of Appeal Rules](#), Section 3A and 3B of the [Appellate Jurisdiction Act](#) and Article 159 (2) of [the Constitution](#) of Kenya sought an extension of time to lodge and serve a Notice of Appeal against the judgment of the High Court of Kenya at Meru (Gikonyo, J), given on 5<sup>th</sup> November 2018, in High Court Succession Cause No. 353 of 2004.
2. The motion is supported on the grounds on its face and an affidavit sworn by Nicholas Kirimi Kaberia (the 1st applicant) herein who deposed inter alia that they were aggrieved by the judgment of Gikonyo, J. delivered on 5<sup>th</sup> November 2018, whereupon they instructed their then advocates, Mr. Okubasu & Munene to file a Notice of Appeal before the expiry of the 14 days. That the said advocates (Okubasu & Munene) indicated that indeed, they had filed the Notice of Appeal but were subsequently unable



to retrieve a copy of the same as they seem to have lost it and that upon perusal of the court file, the applicants were unable to find the filed copy of the Notice of Appeal.

3. He further deposed that they were aggrieved with the judgment of the High Court and wished to appeal against the same, despite the fact that time for lodging and serving the same had lapsed and that the intended appeal had high chances of success.
4. The application was opposed vide a replying affidavit sworn by the 3rd and 4th respondents Mary Akui Imaria and Esther Kainda Imaria on 12<sup>th</sup> September 2019, who deposed inter alia that the 1st and 2nd respondents were deceased, a fact that was well within the applicants' knowledge and that the judgment of the High Court was delivered on 5<sup>th</sup> November 2018 and typed copies of the same supplied to all the parties on the same day and that the inordinate delay in filing the Notice of Appeal and the instant application for a whole 9 months after delivery of judgment was inexcusable.
5. It was further deposed that the blame by the applicants against their previous advocates was suspicious as they had not sworn an affidavit and that in any event, there was no record whatsoever before this Court's registry or within the High Court file of such a Notice of Appeal.
6. It was submitted for the applicants that the delay in filing the Notice of Appeal was not inordinate; that the same was not filed within the stipulated period of 14 days as a result of the delay/mistake by the previous counsel for the applicants; that the mistakes of their previous advocates should not be visited upon them; that they had an arguable appeal and further that the respondents would not suffer any substantial prejudice if the application was allowed.
7. The respondents on the other hand did not file submissions.
8. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the applicants' submissions, the cited authorities and the law.
9. The applicants' motion is brought under Rule 4 of this Court's Rules. The said Rule provides:

“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.”

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.”



10. In the instant case, the impugned judgment was delivered 5<sup>th</sup> November 2018 whereas the instant application was filed on 24<sup>th</sup> July 2019, a period of approximately 8 months from the date of the impugned judgment. The delay herein therefore is certainly inordinate.
11. The applicants contend that after judgment was delivered, they instructed their previous advocates on record to file a Notice of Appeal before expiry of 14 days and that their previous advocates indeed indicated that they had filed the same but subsequently indicated that they were unable to retrieve a copy of the same as they had lost it. They further contended that upon perusing the court file, they were unable to trace the said Notice.  
  
It is imperative to note that save for the applicants generally stating that they had instructed their advocates to file a Notice of Appeal before expiry of 14 days, they did not state exactly when they instructed their aforesaid advocates to file the Notice of Appeal and this contention has not been supported by any evidence. Similarly, the circumstances under which the alleged Notice of Appeal was lost has not been stated and it has not even been stated when the same was allegedly lost. The Notice could also not be traced in the Court file and from the circumstances of this case it is highly doubtful that the same was ever filed within 14 days as contended by the applicants.
12. In my considered opinion, the delay herein is inordinate and unreasonable and the same has not been explained to the satisfaction of this Court.
13. As to whether there is a possibility of the appeal succeeding, and as regards the contention by the applicants *inter alia* that the learned judge erred in law and fact in failing to appreciate the evidence of the Interested Parties given at the trial, this Court is not seized of the record and cannot make a determination on the issues raised in the Memorandum of Appeal. Of course I am mindful of the fact that I cannot say more regarding these issues as a single Judge and I will make no further comment regarding the same.
14. As regards prejudice, the applicants have not demonstrated to the satisfaction of this Court that they will suffer any prejudice if the instant application is not allowed.
15. 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 this Court's Rules as laid out in *Leo Sila Mutiso case (supra)*, to extend time and therefore decline to extend time within which to file a Notice of Appeal.
16. Accordingly, the applicants' motion dated 18<sup>th</sup> July 2019, is without merit and the same is hereby dismissed in its entirety with costs to the respondents.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MARCH, 2022.**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR.**

