



REPUBLIC OF KENYA



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

**Mwangi v Muthoni (Civil Application 112 of 2019)  
[2022] KECA 420 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 420 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 112 OF 2019  
F SICHALE, JA  
MARCH 4, 2022**

**BETWEEN**

**MIRIAM WANJIRU MWANGI ..... APPLICANT**

**AND**

**IRENE IMMACULATE MUTHONI ..... RESPONDENT**

*(An application for extension of time to file an appeal against the Ruling of the High Court of Kenya at Nyeri (Matheka, J.) dated 18th October 2018.in (H.C. Succession Cause No. 715 of 2009))*

**RULING**

1. Miriam Wanjiru Mwangi (the applicant herein) has vide a motion dated 18<sup>th</sup> July 2019 and brought pursuant to Rule 4 of the *Court of Appeal Rules, 2010* sought the following orders;  

“1. THAT the Honourable Court be pleased to extend time in which the applicant may file and serve her Memorandum of Appeal out of time.  
2. THAT costs of this application be in the appeal.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant Miriam Wanjiru Mwangi who deposed inter alia that she was aggrieved by a ruling delivered on 18<sup>th</sup> October 2018, by Matheka J whereupon she issued a Notice of Appeal on 1<sup>st</sup> November 2018 and served the same upon the respondent on 7<sup>th</sup> November 2018.
3. That, she subsequently applied for certified copies of proceedings on 30<sup>th</sup> October 2018 and was supplied with the same on 28<sup>th</sup> January 2019 and a Certificate of Delay on 4<sup>th</sup> February 2019; that the Court did not supply her with Forms P & A 41 and 54 because they were not ready until 21<sup>st</sup> May 2019; that the said Forms were supplied to her on 14<sup>th</sup> June 2019\*\* and as such, the applicant was not



able to file the appeal within time. She further deposed that the delay in filing this application was not inordinate and that the intended appeal had great chances of success.

4. The motion was opposed vide a replying affidavit sworn by the respondent, Irene Immaculate Muthoni on 1<sup>st</sup> December 2021, who deposed *inter alia* that the applicant was guilty of inordinate delay; that no appeal lies without leave of the Superior Court or this Honourable Court under Section 72 and 75 of the *Civil Procedure Act*; that no leave was sought or given on 18<sup>th</sup> October 2018, when the ruling sought to be appealed from was delivered, bearing in mind it culminated from a Summons for Confirmation of Grant.
5. It was submitted for the applicant that the delay occasioned herein was not inordinate nor deliberate as the applicant had given good reasons for the same; that the intended appeal was arguable with high chances of success as it was aimed at challenging the mode of distribution passed by the Trial Judge, her considerations and interpretation of the law in arriving at the said ruling and that further no prejudice will be occasioned to the respondent as *status quo* had been maintained during the existence of the suit.
6. On the other hand, it was submitted for the respondent that the applicant was not a deserving party to the discretion of the Court being exercised in her favour; that it was not clear why the Certificate of Confirmation was issued on 21<sup>st</sup> May, 2019, nearly a year after the Grant had been confirmed on 18<sup>th</sup> October, 2018 and that in absence of evidence to the contrary, the delay was a direct result of the applicant failing to request for the same from the registry in good time.
7. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
8. 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.”
9. 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 ruling was delivered on 18<sup>th</sup> October 2018, whereas the instant application was filed on 17<sup>th</sup> July 2019 a period of about 9 months from the date of the impugned



ruling which period is no doubt inordinate. The applicant contends that the delay in filing the appeal was occasioned by the fact that *inter alia* the Court did not supply her with Forms P & A 41 and 54 because they were not ready until 21<sup>st</sup> May 2019 and that further the same were supplied to her on 14<sup>th</sup> June 2019.

11. Whereas the applicant contends that the Court did not supply her with Forms P & A 41 and 54 because they were not ready until 21<sup>st</sup> May 2019, no evidence was tendered by the applicant to prove that indeed these forms were not ready until 21<sup>st</sup> May 2019 as contended by the applicant. As a matter of fact, the only time that the applicant requested for these forms was on 13<sup>th</sup> June 2019 8 months after the ruling had been delivered by the Court on 18<sup>th</sup> October 201, as evidenced in her letter annexed to her application as “MWM-5”.
12. Consequently, I am of the considered opinion that the delay herein is inordinate and the same has not been satisfactorily explained to this Court.
13. As to whether there is a possibility of the appeal succeeding, I have looked at the annexed copy of the Memorandum of Appeal and I am not satisfied that the intended appeal has high chances of success as no appeal lies to this Court as of right without leave of the High Court or this Court under the Law of Succession Act, and it is evident in this case that none was sought either in the High Court or in this Court.
14. As regards prejudice, the applicant has not demonstrated the prejudice that she would stand to suffer in the event that this application is not allowed.
15. Taking into totality all the circumstances in this case, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in Leo Sila Mutiso case (*supra*), to extend time and therefore decline to extend time within which to file the Memorandum of Appeal out of time.
16. Accordingly, the applicant’s application dated 18<sup>th</sup> July 2019, is without merit and the same is hereby dismissed in its entirety with costs to the respondent.
17. Orders accordingly.

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

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

*Signed*

DEPUTY REGISTRAR

