



**Kati & another v Ndalila (Civil Application 159 of 2021)
[2022] KECA 822 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 822 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 159 OF 2021**

F TUIYOTT, JA

APRIL 28, 2022

BETWEEN

PATRICK WAFULA KATI 1ST APPLICANT

JOSEPH WAFULA KATI 2ND APPLICANT

AND

ESTHER NANJALA NDALILA RESPONDENT

*(Being an application for leave to appeal out of time against the judgment
of Olao, J, delivered on 25th July, 2021 in ELC Case No. 160 of 2016)*

RULING

1. The applicants, who act in person, have filed a Notice of Motion under Rule 4 of the [Court of Appeal Rules](#) seeking two substantive orders. That leave be granted to them to file an appeal out of time against the whole judgment of Olao, J, delivered on 25th July, 2021 in ELC Case No. 160 of 2016; and that there be stay of execution of the said judgment pending the hearing and determination of the intended appeal.
2. Sitting as a single judge I am unable to consider the application for stay. (See [Kenya Industrial Estates Ltd v Samuel Sang & another](#) [2008] eKLR).
3. Regarding leave to appeal out time, this Court is told that the judgment of the ELC was delivered on 21st July, 2021 via electronic mail yet the two applicants who were acting in person had no email address or addresses. In the affidavit jointly sworn by the two applicants in support of the motion before Court, they depose that they only became aware of the judgment on 14th November, 2021 when they visited the court registry.
4. The respondent did not file any response and what the applicants have told Court is not controverted.



5. I have looked at the attachments to the affidavit. One is a certificate of delivery of the judgment indicating that it was delivered via electronic mail on 21st July, 2021. The email address of one of the applicants, Patrick Wafula Kati, is given as robawamalwa@gmail.com. The applicants have said nothing about this email address and so it is unclear whether it was in fact the email address furnished by the applicants to the ELC or whether the email address was for one or both applicants. What it reveals, however, is that the 2nd applicant, Joseph Wafula Kati, who was the 2nd defendant in the ELC, may not have been notified of the date when judgment was to be delivered nor sent the judgment via email.
6. Pursuant to powers granted under Rule 4 of the Rules of this Court, a single Judge sitting on behalf of the Court, can grant extension of time for the filing of a Notice of Appeal. The power to do so is discretionary, guided by well settled principles. Some of considerations that a Judge will bear in mind are the length of delay, reason for delay, prejudice, if any, that the respondent may suffer if leave is granted and possibly, the chances of success of the intended appeal. (See *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997).
7. I am told that having not been served with notice, the applicants only became aware of the judgment on 14th November, 2021. Accepting that to be true, as there is no material before me to the contrary, then I must also accept that the applicants moved quickly in seeking leave through this application, which they did on 19th November, 2021, five days after becoming aware of the judgment. This Court takes the view that the delay is well explained and will excuse it. In addition, as there was no response to the application, the Court is unable to hold that the grant of leave will substantially or at all prejudice the respondent.
8. My orders in respect to the motion of 19th November, 2021 are as follows;
 - [8.1] Prayers 3 and 4 are disallowed.
 - [8.2] Prayer 1 is allowed to the extent that the applicants shall within fourteen (14) days hereof file and serve a notice of appeal and thereafter, within sixty (60) days of filing and serving the Notice of Appeal, file and serve the Record of Appeal.
 - [8.3] Cost of this application shall be in the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

