



REPUBLIC OF KENYA



KENYA LAW
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**Ndonye v Munzyu (Civil Appeal (Application) E473 of 2020)
[2022] KECA 844 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 844 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E473 OF 2020**

AK MURGOR, JA

MAY 27, 2022

BETWEEN

AIDA MUTHAMBI NDONYE APPELLANT

AND

MICHAEL MAWEU MUNZYU RESPONDENT

*(An appeal from the Judgment of the Environment and Land Court at Makueni
(Mbogo, J.) delivered on 21st October 2019 in Makueni ELC No.1 of 2019)*

RULING

1. By a Notice of Motion dated 6th July 2021, brought pursuant to rules 4 and 84 of this Court's rules and section 3A and 3B of the *Appellate Jurisdiction Act*, the applicant, Michael Maweu Munzyu, seeks (i) an order to strike out the respondent's Notice of appeal dated 21st October 2019 and filed on 29th October 2020 and Record of appeal dated 26th day of November 2020 for non-compliance by the respondent with the directions of this Court and (ii) leave to extend the time for filing an application to strike out the Notice and Record of appeal.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by counsel for the applicant, Osike Daniel Ombasa on 6th July 2021, wherein the applicant contended that by way of a letter dated 15th April 2021, this Court directed the parties to this appeal to file and serve their written submissions within 30 days; that the respondent never bothered to prosecute her appeal, and neither did she file her written submissions as ordered; that further, the respondent is yet to issue security for costs, but is intent on using the appeal to frustrate the applicant who has a valid judgment in his favour; that the applicant is aware that an application to strike out an appeal should be made within 30 days from the date of receipt of the appeal, which time has since lapsed; that the respondent's actions amount to an abuse of the court process and the rules of natural justice; that in the interest of



justice the applicant pleaded that time be extended to file the application to strike out the Notice and Record of appeal as prayed.

3. Though served with the hearing notice, there was no appearance from the respondent, and neither did they file any written submissions. Under rule 4 of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if the extension was not grant. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997.
4. At the outset, before I determine the application for extension of time which is rightly before this Court, it is observed that the applicant also seeks for orders to strike out the respondent's appeal. As this is not a matter that is within the remit of a single judge, I decline the invitation to deal with this prayer.
5. Turning to the prayer for extension of time, the applicant has requested for time to be extended to file an application to strike out the respondent's Notice and Record of appeal out of time. As he rightly observes, pursuant to rule 84 of this Court's rules, such application ought to have been filed 30 days after the Record of appeal was filed. In this case the Record was filed on 26th November 2020, and this application was brought on 6th July 2021 which was 7 months after the Record was filed. In effect, for an order of extension to be granted, the applicant must explain the 6 months delay in filing this application.

I have carefully considered the application, and cannot find any explanation for the 6 months delay. It becomes apparent that the applicant has failed to explain to the Court how the 6 months' delay came about.

In the case of *Trade Bank Ltd In liquidation vs LZ engineering Construction Ltd and another* Civil Appln NAI. 282/98, this Court observed;

“The inaction” which was being overlooked was a delay of nearly 3 months. We think it is now settled that where there is such a long delay or in action or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”

6. Without such explanation, I have no material upon which to exercise my discretion to extend time for filing of the application.

Having so found on the question of delay, I consider the remaining principles of whether or not the intended appeal will be successful, or whether any prejudice will be occasioned to the respondent to be superfluous having regard to the circumstances of this case.

In sum, I decline to exercise my discretion to grant the orders sought in the Notice of Motion dated 6th July 2021. Since the respondent did not participate in the proceedings, I make no orders as to costs.

It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF MAY, 2022

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

