



**Kichula & another v Kichula (Suing as the administrator of the Estate of the Late Philemon Kichula Pondo) & 4 others (Civil Application E219 of 2021) [2022] KECA 927 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 927 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E219 OF 2021  
PO KIAGE, JA  
JUNE 24, 2022**

**BETWEEN**

**TOBIAS ONYANGO KICHULA ..... 1<sup>ST</sup> APPLICANT**

**MARY KICHULA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SAMUEL OLER KICHULA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PHILEMON KICHULA PONDO) ..... 1<sup>ST</sup> RESPONDENT**

**LUCAS OKOTH KICHULA ..... 2<sup>ND</sup> RESPONDENT**

**ELISHA OCHIENG KICHULA ..... 3<sup>RD</sup> RESPONDENT**

**EDWARD AKONGO OYUGI ..... 4<sup>TH</sup> RESPONDENT**

**KICHULA PONDO ..... 5<sup>TH</sup> RESPONDENT**

*(An application for extension of time for the filing and service of the Notice of Appeal, Memorandum and the Record of Appeal from the Judgment and Decree of the High Court at Migori (A. C. Mrima, J.) dated 15th October, 2019 in Misc Civil Application No. 274 of 2018 (Os))*

**RULING**

1. The applicants Tobias Kichula and Mary Kichula have filed a Notice of Motion dated 9<sup>th</sup> February, 2022 seeking the following orders;
  1. The Record of Appeal filed in court on 29<sup>th</sup> November 2021 and served upon the Respondents on 02<sup>nd</sup> December 2021 be deemed as duly filed and served.



2. The costs of this application be provided for.
2. The application is based on fourteen grounds on the face of it and is supported by an affidavit sworn by the 2<sup>nd</sup> applicant. She deposed that the impugned judgment was delivered on 15<sup>th</sup> October, 2019. Aggrieved, the applicants instructed M/s Kwanga Mboya & Company Advocates to proffer an appeal. The notice of appeal was timely filed on 22<sup>nd</sup> October, 2019.
3. Nonetheless, the applicants then sought a second opinion from M/s Bruce Odeny & Company Advocates who are their current advocates on record, advised them that since the suit emanated from an Originating Summons, it was prudent that leave is sought from the High Court before proceeding with the appeal. The said application for leave was made and was granted by Mrima, J on 28<sup>th</sup> May, 2020.
4. As a result, another notice of appeal was lodged on 9<sup>th</sup> June, 2020. Thereafter an application for certified proceedings was made on 18<sup>th</sup> August, 2020. The said proceedings were ready for collection on 24<sup>th</sup> February, 2021 and a certificate of delay of even date was issued by the Deputy Registrar of the High Court at Migori. The advocates proceeded to compile the record of appeal only to find that the proceedings were incomplete. They made several verbal enquires at the Registry in Mogori on the issue of the incomplete proceedings to no avail. The advocates then made a formal enquiry into the issue via a letter dated 11<sup>th</sup> May, 2021 to the Deputy Registrar. Unfortunately, no response has been given to date.
5. Due to the strict timelines provided for in the Court of Appeal Rules (Rules), the advocates made a decision to file the memorandum and record of appeal as they waited for directions from the Deputy Registrar of the High Court. The 2<sup>nd</sup> applicant contended that the delay was occasioned by circumstances beyond their control and urged this Court to allow this application.
6. After carefully considering this matter, I am cognizant that my free and unfettered discretion must be exercised in consonance to the well known principles that govern a Rule 4 application. These principles were well articulated in *Muringa Company Limited -vs- Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 as follows:

"Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."
7. In the exercise of my discretion, I shall be guided by the foregoing sound principles bearing in mind the peculiarity of the circumstances in this matter. Furthermore, this being an equitable relief, the conduct and candor of the applicants is relevant for consideration for he who seeks equity must do equity. See my ruling in *Attorney General -vs- Kariuki Kingaru Murebu & 8 Others* [2016] eKLR.
8. From the record, the applicants did not exude complacency in seeking to file and prosecute this appeal. They sought a second opinion in order to ensure that they adhered to the Rules prior to appealing against the impugned judgment. It is clear that part of the delay was occasioned by the Registry at the High Court at Migori and the certificate of delay is proof enough of that. Once they discovered that the proceedings were incomplete, they made several trips to the Registry to follow up on the matter. When it was clear that the said Registry was not responding to their queries, Counsel decided to proactively



lodge the memorandum and record of appeal and served it prior to seeking time extension. This to me is a good indicator that they were not indolent but rather were conscious of the timelines as set by the Rules. The applicants kept in motion in the right direction and I therefore cannot read any indolence on their part.

9. Furthermore, Rule 4 gives applicants the right, alas, one not much taken advantage of, to file the memorandum and record of appeal albeit out of time then seek for time extension after the fact. The said Rule specifically provides;
10. 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. (my emphasis)
11. I hailed the foregoing provision in my ruling in *Michael Muriuki Ngibuini -vs- East African Building Society* [2016] eKLR as follows;

"It is clear from the rule that an applicant has a choice to apply for extension of time before or after he does the act for which extension is sought. I would opine that it is good practice and conduces to time economy for a party to file a notice of appeal, albeit out of time, without waiting for extension of time by the Court on application. I dare add that such a filing provides proof that indeed the applicant did act with alacrity or reasonable speed upon discovery of error or omission. It may also reduce or soften opposition by very fact that the delay is shortened and all the Court needs to do, in appropriate cases, is validate what has already been filed, thereby saving time."
12. I am aware of the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral And Boundaries Commission & 7 Others* [2014] eKLR which stated;

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do." See also *Agatha -vs- Azad & 3 Others* (Application 11 (E020) of 2021) [2022] KESC 1 (KLR) (Civ) (10 February 2022) (Ruling)
12. I take the view that the foregoing cannot apply herein as our Rules, in Rule 4 specifically, clearly provide that an applicant can seek for time extension in respect of an act already performed. Thus, before this Court there is nothing untoward about first doing the act before seeking extension. On the contrary, it is a thing to be lauded.
13. It is my conviction that the applicants, by their conduct, have satisfactorily explained the cause of delay. They have demonstrated that they tried as much as possible to comply with the Rules even when faced with challenges. Bearing in mind the dictates of Section 3A of the Appellate Jurisdiction Act, I find that the delay was excusable as the applicants were not to blame for the delay. I would find effect to the overriding need for substantive justice to not only be done, but also be manifestly seen to be done. See *Attorney General -vs- Law Society of Kenya & 5 Others* [2018] eKLR. I find that the applicants are deserving of this equitable relief.
14. Being of that mind, I allow the motion as prayed. The record of appeal filed on 29<sup>th</sup> November, 2021 and served on 2<sup>nd</sup> December, 2021 is accordingly deemed to have been filed and served within the prescribed time.
15. Costs of the motion shall be in the appeal.



DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

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

*Signed*

DEPUTY REGISTRAR

