



**Kiprop & 4 others v Kipsang & another (Civil Application  
47 of 2020) [2022] KECA 921 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 921 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION 47 OF 2020  
M NGUGI, F TUIYOTT & PO KIAGE, JJA  
JUNE 24, 2022**

**BETWEEN**

**AMBROSE KIPROP ..... 1<sup>ST</sup> APPLICANT  
DAVID K CHEMWOREM ..... 2<sup>ND</sup> APPLICANT  
MOSES KIPNGETUNY KIPKULEI ..... 3<sup>RD</sup> APPLICANT  
SAMSON KIPNGETICH KIBII ..... 4<sup>TH</sup> APPLICANT  
ERICK KIPTUM TEIMUGE ..... 5<sup>TH</sup> APPLICANT**

**AND**

**DAVID KIPYEGO KIPSANG ..... 1<sup>ST</sup> RESPONDENT  
ABRAHAM KIPTARUS KIPTOO ..... 2<sup>ND</sup> RESPONDENT**

*(Being a reference under Rule 55 of the Court of Appeal Rules from a Ruling of a single judge (H. Okwengu, JA) dated 25th September, 2020 in an application for extension of time to file a record of appeal from the judgment of the High Court of Kenya at Eldoret in Petition No. 18 of 2016)*

**RULING**

1. In the letter dated 19<sup>th</sup> May 2021 from their advocate on record, Anassi Momanyi & Company Advocates, the applicants seek a reference under Rule 55(1)(b) of the *Court of Appeal Rules* from the ruling of Okwengu JA dated 25<sup>th</sup> September 2020. In the said ruling, the single judge dismissed their application dated 18<sup>th</sup> March 2020 brought under Rule 4 of the Court of Appeal Rules for extension of time to file their appeal against the decision of S. Githinji, J dated 22<sup>nd</sup> October, 2019.
2. The applicants had filed a notice of appeal dated 30<sup>th</sup> October, 2019 on 1<sup>st</sup> November 2019. Under Rule 82(1) of the Rules of this Court, they were required to file the record of appeal within 60 days of filing the notice of appeal. They did not do so, however, and by their application dated 18<sup>th</sup> March,



2020, they asked for extension of time within which to file the record of appeal. The failure to file the record of appeal on time was laid at the feet of their advocate, and they prayed that their advocate's mistake should not be visited upon them. They averred that upon learning of their advocate's mistake, they promptly moved the Court for extension of time.

3. In their response to the application set out in an affidavit sworn by the 1<sup>st</sup> respondent, the respondents state that the applicants have not met the threshold required for this Court to exercise its discretion in their favour, and that the 85-day delay between the filing of the notice of appeal and the filing of the application was inordinate and unexplained. Further, that the intended appeal had no chances of success as the impugned decision had already been executed.
4. In her determination, the single judge held that an order for extension of time within which to file the record of appeal would not be in the interests of justice as it would result in further delay of the conclusion of the litigation, which would impair the operation of the Serve in Love (SILA) Trust, the subject of the litigation. The single judge noted that the impugned judgment was delivered on 22<sup>nd</sup> October 2019, the notice of appeal was lodged on 30<sup>th</sup> October 2019 which was within the stipulated time and that the record of appeal ought to have been filed by 29<sup>th</sup> December 2019.
5. The single judge noted the applicants' argument that the record of appeal should have been filed by 27<sup>th</sup> January 2020 as time stopped running between late December and early January. In the learned judge's view, however, even if the period between the 21<sup>st</sup> December 2019 and 13<sup>th</sup> January 2020 was excluded from the computation of time, the record of appeal should have been filed by 24<sup>th</sup> January 2020. The present application was filed on 18<sup>th</sup> March, 2020, two months after the expiry of the time within which to file the record of appeal
6. The single judge noted further that the letter dated 1<sup>st</sup> November 2019 bespeaking proceedings does not show that it was ever served on the respondents; nor is it shown when the proceedings were available. While the applicants blamed their advocate's clerk for collecting the proceedings and not informing the advocate, no affidavit by the clerk or the advocate was filed in this regard. A certificate of delay was also not filed and it was therefore not clear when the proceedings were collected. The single judge therefore found the application to be without merit and dismissed it.
7. None of the parties have filed submissions on the reference. At the plenary hearing of the reference, however, Mr. Momanyi, Learned Counsel for the applicants, submitted that contrary to the finding by the single judge, he had filed an affidavit in support of the application. He further submitted that the applicants would not benefit by the litigation coming to an end as the dispute was not one about leadership of the Trust but about membership. He asked this Court to set aside the decision of the single judge and allow their application. There was no appearance for the respondents at the hearing of the reference, though service had been effected upon them.
8. We have considered the application and the ruling of the single judge. An application brought under Rule 4 of the *Court of Appeal Rules* requires that a single judge exercises discretion on behalf of the Court in determining whether the applicant merits the extension of time to do the act in question. In *John Koyi Waluke v Moses Masika Wetangula & 2 others* [2010] eKLR this Court stated as follows:

“[W]e have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court's Rules, a single judge of the Court is doing so on behalf of the whole Court, and the full bench of the Court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion, the single Judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into



account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law.”

9. With regard to the matters to be considered in determining whether or not to grant orders under Rule 4, this Court in *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees* (2020) eKLR held that:

“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. In considering the last principle, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

10. The applicants lodged their notice of appeal on 1<sup>st</sup> November 2019. They did not file their record of appeal within 60 days of the lodging of the notice of appeal as required under Rule 82(1). The single judge found that there was a delay of 85 days in seeking leave to file the record of appeal out of time. We have, however, considered the time lines in the matter and noted that the period of delay was actually 58 days.
11. The applicants filed the application the subject of the reference on 18<sup>th</sup> March 2020. In the said application, the applicants blame the delay in filing the record of appeal on their advocate, and the single judge found that the applicants’ advocate had not filed an affidavit to explain the delay. However, we have perused the application and noted that indeed, as submitted by Mr. Momanyi at the hearing of the reference, he had sworn an affidavit in support of the application.
12. In his affidavit, Mr. Momanyi avers that he had conduct of the matter on behalf of the applicants. He blames the failure to file the record of appeal on his clerk, whom he does not name. He avers that he sought the proceedings and filed a notice of appeal. However, while he was waiting for the proceedings and copy of the judgment, the matter escaped his attention as his clerk, instead of giving him the proceedings, filed them and kept away the file. He forgot the instructions to pursue an appeal till 6<sup>th</sup> March 2020 when the applicants went to his office to inquire about the appeal, and it was then that he requested for the file and noted that the time within which an appeal could be pursued had lapsed.
13. As noted above, there was a 58-day delay between the date when the record of appeal should have been filed and the date when this application was filed. We have noted the blame game between the applicants, their advocate and an unnamed clerk for the delay. It is not indicated when the proceedings in the matter were received, but the advocate only recalled his instruction on 6<sup>th</sup> March 2020 when the applicants visited his office to find out the position of the appeal. He did not file the present application until close to two weeks later.
14. We note that the single judge considered the reasons advanced for the delay and found them implausible. We observe, however, that the single judge based her decision on the finding that the applicants’ advocate had not filed an affidavit to explain the delay, and that there was an 85-day delay



in filing the record of appeal. As emerged at the plenary hearing and confirmed by the record before us, the applicants' advocate had in fact filed an affidavit, whose content we have briefly summarized above.

15. The full bench of this Court will only interfere with the exercise of discretion by a single judge if it is shown, among other things, that the judge failed to take into account a relevant matter which he ought to have taken into account. As the single judge did not get sight of the applicant's advocate's affidavit in support of the application, she did not address her mind to its contents in exercising her discretion under rule 4. The contents of the affidavit were a relevant matter for consideration, and perhaps the single judge would have reached a different conclusion had she had sight of the affidavit.
16. We have, however, looked at the contents of the affidavit. We note that the applicants' advocate places blame for the failure to file the record of appeal on time on an unnamed clerk, who collected the proceedings on a date that he does not state, and kept them away. He also concedes some fault on his part, that he forgot his instructions to file the appeal until his clients went to his office to inquire about their pending appeal. These reasons, in our view, are not plausible and were likely not sufficient to enable the single judge to exercise discretion in the applicants' favour.
17. We observe, however, that the single judge found that there had been a delay of 85 days in filing the application for extension of time. From our own calculation as observed above, the delay was for 58 days. This was a long delay, but perhaps not so long as to militate against the exercise of the Court's discretion in favour of the applicants. Had the single judge considered this lesser period, perhaps she would have come to a different conclusion.
18. In the circumstances, we find that the present reference is merited, and we hereby allow it. The applicants shall file and serve their record of appeal within 30 days from the date hereof.
19. Each party shall bear its own costs of the reference.

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

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed*

Deputy Registrar

