



Ndegwa (Suing on his own behalf and the Estate of Samuel Ndegwa Muchiri) v Yusuf Isaack, (Surveyor County Government of Kiambu) & another; Ethics and Anti Corruption Commission (Interested Party) (Civil Application E478 of 2021) [2022] KECA 884 (KLR) (10 June 2022) (Ruling)

Neutral citation: [2022] KECA 884 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E478 OF 2021**

F SICHALE, JA

JUNE 10, 2022

BETWEEN

**JAMES MWAURA NDEGWA APPLICANT
SUING ON HIS OWN BEHALF AND THE ESTATE OF SAMUEL NDEGWA
MUCHIRI**

AND

**YUSUF ISAACK, (SURVEYOR COUNTY GOVERNMENT OF
KIAMBU) 1ST RESPONDENT
STEPHEN MAINA MACHARIA 2ND RESPONDENT**

AND

ETHICS AND ANTI CORRUPTION COMMISSION INTERESTED PARTY

(An Application for Extension of Time to file Notice of Appeal out of time against the Judgment and Decree of the High Court of Kenya at Thika (Gacheru,J) dated 30th September 2021 in ELC Petition No. 1 of 2020)

RULING

1. James Mwaura Ndegwa (Suing on his own behalf and the Estate of Samuel Ndegwa Muchiri) (the applicant herein), has vide a motion dated 17th December 2021, brought pursuant to the provision of Rule 4 of the [Court of Appeal Rules](#) sought the following orders:
 1. The applicant be granted leave to file Notice of Appeal out of time against the judgment and decree of the Environment and Land Court at Thika (Hon Lady Justice L. Gacheru) delivered on 30/9/2021.



2. Costs of the application do abide in the appeal.”
2. The motion is supported by the grounds on the face of the motion and an affidavit sworn by the applicant who deposed *inter alia* that on 30th September 2021, the Environment and Land Court at Thika (Gacheru, J), delivered its judgment and dismissed his petition dated 7th July 2020 and that the order of the Court relating to the date of judgment, was that the Court would deliver the said judgment on 28th October 2021.
3. That, on 28th October 2021, the matter was not listed for judgment and upon inquiry, the applicant discovered that the Court had published a notice indicating that all judgments which had been scheduled for delivery before Gacheru, J on 28th October 2021, had already been delivered on 30th September 2021.
4. He further deposed that he had not received any notice indicating that the Court had changed the date of delivering the judgment or otherwise become aware and therefore did not attend Court on 30th September 2021 when the judgment was apparently delivered and that being aggrieved with the aforesaid judgment, he intends to appeal against the same entirely and that the same had high chances of success.
5. There was no response from the 1st and 2nd respondents. On the other hand, it was submitted for the Interested Party that the High Court in its judgment had found that it was not a necessary party to the petition before it and its participation in this application should be dispensed forthwith.
6. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the Interested Party’s submissions and the law.
7. The applicant’s motion is brought 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.”

8. The principles upon which this Court exercises its discretion under Rule 4 of this Court’s *Rules* 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. In *Fakir Mohamed v Joseph Mugambi & 2 Others* C.A. No. NAI. 332 of 2004, this Court stated as follows regarding discretion under the Rule and the factors that ought to guide its exercise:

“ The exercise of this Court’s discretion under rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time



limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors ...”

9. In the instant case, the impugned judgment was delivered on 30th September 2021 whereas the instant application is dated 17th December 2021. From the circumstances of this case, I do not consider a delay of slightly over 2 months to be inordinate or unreasonable since by the time that the applicant discovered that judgment had been delivered, the period within which a Notice of Appeal ought to have been filed had already lapsed.
10. As regards the reasons for the delay, the applicant contended that the Court had stated that it would deliver judgment on 28th October 2021 but on the said day, the matter was not listed for judgment and upon inquiry, the applicant discovered that the Court had published a notice indicating that all judgments which had been scheduled for delivery before Gacheru, J. on 28th October 2021, had already been delivered on 30th September 2021 and that further he had not received any notice that the Court had changed the date of delivery or otherwise become aware and therefore did not attend Court on 30th September 2021, when judgment was apparently delivered.
11. From the circumstances of this case, I am of the considered opinion that the reason put forth for the delay is reasonable and the same has been explained to the satisfaction of this Court.
12. With regard to the possibility of the appeal succeeding, I have looked at the annexed draft Memorandum of Appeal and I am satisfied that indeed the applicant has established to the satisfaction of this Court that he has an appeal with high chances of success. Of course I will say no more regarding this issue lest I embarrass the bench that will eventually be seized of the intended appeal.
13. As regards prejudice, I am satisfied that the applicant will be greatly prejudiced as his right of appeal will have been completely shut out. Regarding the submission by the Interested Party that it is not a necessary party in this application, I am of the considered opinion that this Court cannot make a determination on this issue at this stage and I will therefore not comment on the same.
14. Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of this Court’s Rules to extend time to file an appeal out of time.
15. Accordingly, the applicant’s motion dated 17th December 2021 is merited and the same is hereby allowed in terms of prayer 1.
16. The costs of the motion shall abide the outcome of the intended appeal. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

