



**Gichuki & another v Riunge & another (Civil Application
E309 of 2021) [2022] KECA 716 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 716 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E309 OF 2021**

DK MUSINGA, JA

JULY 22, 2022

BETWEEN

FRANCIS KIMANI GICHUKI 1ST APPLICANT

DAVID MUNIU RIUNGE 2ND APPLICANT

AND

THERESA WANJIRO RIUNGE 1ST RESPONDENT

JOSEPHINE NJERI RIUNGE 2ND RESPONDENT

(Being an application for extension of time within which to file a Notice of appeal from the Ruling of the High Court of Kenya at Nairobi (Family Division) (A. O. Muchelule, J.) dated 5th July 2021 in H.C. Succ. Cause No. 3079 of 2002.)

RULING

1. The applicants' Notice of Motion dated 26th August 2021 is brought under rule 4 of this Court's Rules. The applicants seeks extension of time to file the notice of appeal out of time, and in the alternative, to deem the notice of appeal dated 23rd August 2021 as duly filed.
2. In the supporting affidavit sworn by the 1st applicant, he states that the trial court delivered the impugned ruling on 5th July 2021 but only the last paragraph of the ruling was read out; that the court directed parties to obtain a copy of the ruling from the judge's secretary, whose name and phone number were displayed on the causelist; that the applicants telephoned the secretary who promised to send the entire ruling by close of business on 6th July 2021 but she failed to do so; that the 2nd applicant sent text messages to the secretary on 7th and 9th July 2021 reminding her about the ruling but there was no response.
3. The applicants state that they were not able to physically go to the registry to look for the ruling because of Covid-19 health restrictions and eventually the ruling was uploaded in the Kenya Law Reports



Website and the applicants perused it on 20th August 2021. On 23rd August 2021 they instructed their advocates to file a notice of appeal, albeit out of time. It is for those reasons that the applicants urge this Court to grant the orders sought.

4. The respondents have not filed any replying affidavit or submissions in response to the application. The respondents were served with the hearing notice on 3rd June 2022 indicating that this application would be heard on 15th June 2022 and were required to file submissions within five (5) days from the date of service.
5. Notwithstanding the respondents' failure to put in a replying affidavit or submissions, I am duty bound to consider the application on its merits.
6. It is trite law that the power to extend time under rule 4 of this Court's Rules is in exercise of discretion and the factors that the Court takes into consideration in such an application are well settled. See *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR.
7. The Court will consider the length of the delay, the reason for the delay; (possibly) the chances of success of the intended appeal and lastly, the degree of prejudice that may be occasioned to the respondent if the application is granted.
8. The impugned ruling was delivered on 5th July 2021 and the notice of appeal was supposed to have been filed by 19th July 2021. However, the applicants filed the notice of appeal on 23rd August 2021, a delay of 34 days. In my view, that delay is not inordinate. The reasons for the delay have been well explained.
9. I have looked at the draft memorandum of appeal and I believe the intended appeal is arguable. That is all I can say as far as the possible chances of success of the same are concerned. Lastly, I do not think that the respondents would be prejudiced by the grant of the orders sought. In the circumstances, it is only just and reasonable that the applicants be given an opportunity to pursue their constitutional right of appeal against the said ruling. Consequently, I allow this application and order that the notice of appeal filed on 23rd August 2021 be and is hereby deemed as duly filed. I make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

