



**In re Estate of Stephen Nzomo Mwatu (Deceased) (Civil Application  
E454 of 2021) [2022] KECA 659 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 659 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E454 OF 2021  
MSA MAKHANDIA, JA  
JULY 8, 2022  
IN THE MATTER OF THE ESTATE OF STEPHEN NZOMO MWATU (DECEASED)**

**BETWEEN**

**TERESIA MUKUI NZOMO ..... APPLICANT**

**AND**

**ANN SYOKWIA NZOMO ..... 1<sup>ST</sup> RESPONDENT**

**EMILY MUTILE NZOMO ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to file notice of appeal, memorandum of appeal and record of appeal out of time from the ruling and orders of the High Court of Kenya at Machakos (Odunga, J. ) dated 23rd February 2021 in Succession Cause No. 16 of 1990)*

**RULING**

1 By a notice of motion dated 14<sup>th</sup> December, 2021 brought pursuant to the provisions of Section 3A, 3B of the *Appellate Jurisdiction Act*, Rules 4, 39 (b), 41 and 42 of the *Court of Appeal Rules* and paragraph 3 of the Court of Appeal Practice Directions 2015, Teresia Mukui Nzomo, “the applicant” seeks the order that:-

“This Honourable Court be pleased to grant leave to the applicant/intended appellant herein to file her Notice of Appeal, memorandum of appeal and record of appeal out of time against the ruling and subsequent orders thereto by Hon. Justice G.V. Odunga on 23<sup>rd</sup> February 2021 at Machakos High Court on Summons dated 12<sup>th</sup> July 2019 in Succession Cause 16 of 1990 between Teresia Mukui Nzomo Vs. Ann Syokwia Nzomo & Emily Mutile Nzomo.”

2 The motion is supported by the grounds on its face and the affidavit sworn by the applicant. It is the applicant’s case that the ruling was delivered by Odunga, J. on 23<sup>rd</sup> February 2021 in the absence of



her advocates on record and/or who did not inform him of the ruling date. That she made inquiries and when she learned of the ruling, she made a decision to prefer an appeal against the same but due to the conduct of her previous counsel, he opted to terminate his services. That there was a problem in accessing the original file from his advocate as they were embroiled in settlement of legal fees which took considerable time to conclude. That failure to file the notice of appeal within time was not intentional and the reason is genuine as upon receipt of the file, the applicant acted timeously thereafter. That she stands to suffer great prejudice if the application is not allowed as the respondents' misdeeds against the estate of the deceased shall have the sanction of the court and thus deprive the applicant from what is due to her under the applicable laws. The applicant further deposes that she was unable to peruse the court file due to Covid- 19 restrictions.

- 3 The application is opposed by the respondents by way of a replying affidavit of the 1<sup>st</sup> respondent, sworn on her own behalf and on behalf of the 2<sup>nd</sup> respondent. It is the respondents' case that after the applicants' application was dismissed, it took them 10 months to file the current application despite the fact that the ruling date was given in court. That even if there was a misunderstanding between the applicant and his counsel, nothing prevented her from filing a notice of appeal against the said ruling on time. That there is no correspondence before this court to demonstrate the efforts by the applicant to obtain the ruling from court. That notwithstanding, the issue of fees between the applicant and her advocates is not sufficient explanation for the inordinate delay and that 14 years had lapsed since the grant was confirmed, that the respondents will be greatly prejudiced as the deceased estate has wholly been distributed among the beneficiaries. That the application should be dismissed for being frivolous and abuse of the court process. Lastly that litigation ought to come to an end.
- 4 The application was canvassed by way of written submissions, which I have duly considered alongside the authorities cited. The respective submissions, I must say, merely reiterated and expounded on what the parties had deposed in their respective affidavits. There is therefore no need to rehash the same.
- 5 My invitation to intervene on behalf of the applicant has been invoked under Rule 4 of the Court of Appeal Rules, which provides as follows:
  4. 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 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."
- 6 The principles that guide the exercise of jurisdiction in an application of this nature are now well settled following numerous pronouncements of this Court in cases such as *Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi* [1999] 2 EA 231, *Fakir Mohamed vs. Joseph Mugambi & 2 Others*; [2005] eKLR; and *Donald. Raballa vs. Judicial Service Commission & Another* [2018] eKLR.

In the latter case this Court held as follows:

From a long line of authorities including *Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi, Civil Application Nai. 251 of 1997* the single judge has unfettered discretion to consider an application for extension of time and generally the matters taken into account are 'the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted."

- 7 I have given due consideration to the rival pleadings, submissions, and principles that guide the court in the exercise of jurisdiction under Rule 4 of the Court of Appeal Rules. Has the applicant satisfied the prerequisites for granting the relief sought? On delay in seeking the Court's intervention, the parameter I find appropriate to apply is that set out in the case of *George Mwendu Muthoni Vs.*



*MamaDayNurseryandPrimarySchool*, Nyeri CA No. 4 of 2014, (UR), in which extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months. In the instant application, the delay is about ten months. The explanation given is failure by the applicant's counsel to attend Court for the delivery of the ruling, never informed her of the date for the delivery of the ruling nor did he inform her the essence of the ruling. That even after she became aware of the ruling, she was engaged in a tussle with her previous counsel over legal fees and as a result it took sometime before the file was released to her. However, the time and dates when the acts alleged by the applicant happened are not stated at all.

8 I am aware that in cases such as *Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd* [1987] eKLR; *CFC Stanbic Limited Vs. John Maina Gitthaiga & Another* [2013] eKLR; this Court declined to visit wrongs committed by advocates and their staff on innocent clients where it had been sufficiently demonstrated that clients were not to blame for such default. In the circumstances of this application, it has not been demonstrated that indeed the applicant was not to blame for the delay in filing the notice of appeal.

9 There is nothing that has been placed before me to show the effort made by the applicant towards that end. Neither does she provide the details of the tussle between her and previous advocate. I therefore agree with the submissions by the respondent that it was not necessary to wait for the file from her counsel in order to file the notice of appeal as the same could be filed without the said file as it is a simple and mechanical task. I fully agree with the observation in the case of *Bi-Mach Engineers Limited Vs. James Kahoro Mwangi* [2011] eKLR in which this Court held:

The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate. It would also appear that there was unnecessary and unexplained delay after 30<sup>th</sup> December, 2010 and the filing of the motion on 2<sup>nd</sup> February, 2011. Without explanation, there would be no basis for the exercise of any discretion. The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30<sup>th</sup> December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and the principles stated above.”

10 Given that the grant has been confirmed and distribution undertaken, to allow the application will obviously be prejudicial to the respondents and other beneficiaries. The dispute I note has been in the court corridors in excess of 14 years, surely litigation should at some point in time come to an end. Looking at all the circumstances of the case I doubt whether the appeal has chances of success.

11 For these reasons, I am not persuaded to exercise my unfettered discretion in favour of the applicant.

12 Accordingly, I dismiss the application with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2022.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

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



*Signed*

**DEPUTY REGISTRAR**

