



**Munyuki & another (the legal & personal representatives of the estate of the late George Munyoki Mutheke (Deceased)) v Joel & another (Civil Application E453 of 2021) [2022] KECA 658 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 658 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E453 OF 2021  
MSA MAKHANDIA, JA  
JULY 8, 2022**

**BETWEEN**

**BENARD MUTHEKE MUNYUKI ..... 1<sup>ST</sup> APPLICANT**

**MARY MUTHEKE MUNYOKI ..... 2<sup>ND</sup> APPLICANT**

**THE LEGAL & PERSONAL REPRESENTATIVES OF THE ESTATE OF THE  
LATE GEORGE MUNYOKI MUTHEKE (DECEASED)**

**AND**

**NYOIKE JOEL ..... 1<sup>ST</sup> RESPONDENT**

**THOMAS K. GAKONYO ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to file and serve the record of appeal out of time in an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Meoli, J.) dated on 25th June 2021 in HCCA No. 643 of 2016)*

**RULING**

1. The notice of motion before me is brought under Rules 4, & 47 of the *Court of Appeal Rules*, Section 3A & 3B of the *Appellate Jurisdiction Act* and Article 159 (2) of *the Constitution*. The motion is dated November 8, 2021 and in the main it seeks leave to file and serve record of appeal against the judgment and decree issued in High Court Civil Appeal No. 643 of 2016 out of time. The application is supported by the grounds on its face, the affidavit of Pavin Nturibi, learned counsel for the applicants and their written submissions. The application is opposed by the respondents by way of a replying affidavit, and their written submissions.
2. In summary, the applicants' case is that judgment in HCCA 643 of 2016 was delivered on the June 25, 2021 and being dissatisfied with the preferred an appeal by filing a notice of appeal on 30<sup>th</sup> June 2021.



They further sought for certified copies of the proceedings and judgment on June 25, 2021 which they received on September 9, 2021. They extracted the certificate of delay on September 9, 2021 and collected it on 26<sup>th</sup> October 2021. However, the certificate indicated that the proceedings were ready for collection on 26<sup>th</sup> August 2021. That they had been informed of the fact by a letter from the registrar but which letter was never received. That they only became aware of the proceedings being ready on 9<sup>th</sup> September 2021 when they paid for the same.

3. That it is for the above reason that the record of appeal was not filed in time and hence the application. Further that they have an arguable appeal as can be glanced from the grounds in the memorandum of appeal among them being the failure by the High Court to consider the doctrine of re-ipsa loquitor and the failure by the same court to consider the principles applicable in deciding whether the applicant's case was proved. That the applicants will suffer great prejudice if the order sought is not granted. That the mistake of the counsel in computing time was genuine inadvertence error and not mere inaction and therefore the interest of justice ought to prevail. They have cited various authorities to buttress their submissions which I have read and considered.
4. On the other hand, the respondent's states that the proceedings were ready for collection on 26<sup>th</sup> August 2021 but the applicants delayed and refused to follow up and collect them. That no genuine reason has been advanced for their failure to collect the said proceedings in time. That the intended appeal is an abuse of court process as it lacks merit. That the applicants have not given sufficient grounds to warrant the court to grant the order sought. That as per the requirements set out in the case of *Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi* Civil Application No. Nai 251 of 1997, the applicants have not met the threshold set out therein hence the application should be dismissed.
5. My mandate to intervene has been invoked substantively under Rule 4 of the *Court of Appeal Rules*. It provides:
  - “(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 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.”
6. Therefore, by dint of this provision I have wide and unfettered discretion in considering the application. In the case of *Donald O. Raballa Vs. Judicial Service Commission & Another* [2018] eKLR, the Court of Appeal 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. Starting with the period of delay, it is evident from the record that the impugned judgment was delivered on 25<sup>th</sup> June 2021. The notice of appeal was filed on 30<sup>th</sup> June 2021. The application under consideration was filed on 8<sup>th</sup> November 2021, being a period of about five (5) months later. The reason given for the delay was that the applicants were waiting for certified copies of proceedings and when the same were availed on 26<sup>th</sup> October 2021, they noted that the certificate of delay indicated that the



proceedings had been ready for collection since 26<sup>th</sup> August 2021, meaning that the time for filing the record of appeal had long gone. This necessitated the filing of the instant application.

8. In *George Mwendu Muthoni Vs. Mama Day Nursery and Primary School*, Nyeri C.A No. 4 of 2014 (UR), extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in *Aviation Cargo Support Limited Vs. St. Marks Freight Services Limited* [2014] eKLR, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty days stipulated by the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time. In the instant application, the period of delay is much less than what was under consideration in the George Mwendu case [supra]. It is therefore not inordinate. Further, the reasons advanced for the delay are plausible and have not been seriously controverted.
9. On the arguability of the intended appeal, the applicants have addressed some of the grounds they will proffer in the appeal, among them, the failure by the trial court to consider the doctrine of *res ipsa loquitur*. In law, an arguable appeal is one that need not succeed but one that warrants the court's interrogation.
10. Also falling for consideration is the right to be heard on the already initiated appellate process which in law is to be weighed against the prejudice the respondents stand to suffer should the relief sought by applicants be granted. According to the current jurisprudential trend the right to access justice is now constitutionally entrenched. The applicants stand to suffer prejudice if the order is not granted as they have already shown their intend to appeal by filing the notice of appeal in time.
11. On the totality of the above assessment and reasoning, I am satisfied that the applicants have satisfied the prerequisite for granting of the relief sought. Accordingly, I allow the application on condition that the appeal should be filed within the next thirty (30) days from date of this ruling failing which leave hereby granted shall automatically lapse. Costs shall be in the appeal.

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

**ASIKE-MAKHANDIA**

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

**Signed**

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**JUDGE OF APPEAL**

**DEPUTY REGISTRAR**

