



**Ihura & another v Hagos Birikirti Tewoldernrehen De La Torre Ramirez Nelly Victoria
(suing as the personal representative of the estate of Mendoza Lopaz Aquilina (Deceased))
(Civil Application E093 of 2022) [2022] KECA 1017 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1017 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E093 OF 2022
MSA MAKHANDIA, JA
SEPTEMBER 23, 2022**

BETWEEN

EVANS IHURA 1ST APPLICANT

EVANS IHURA NJOROGE 2ND APPLICANT

AND

**HAGOS BIRIKIRTI TEWOLDERNREHEN DE LA TORRE RAMIREZ NELLY
VICTORIA RESPONDENT**

**(SUIING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
MENDOZA LOPAZ AQUILINA (DECEASED))**

(An application for extension time within which to file and serve the appellants' record of appeal and memorandum of appeal from the judgment and decree of the High Court of Kenya at Nairobi (Serگون, J.) dated 10th July 2020 in HCCA No. 519 of 2018)

RULING

1. By a motion on notice dated 22nd April 2022 and brought pursuant to the provisions of Section 3A and 3B of the *Appellate Jurisdiction Act*, Rule 1(2) and Rule 4, of the *Court of Appeal Rules*, the applicant seeks the following orders: -
 2. Time of service of notice of appeal and letter bespeaking proceedings be extended.
 3. Notice of appeal and the letter bespeaking proceedings dated 14th April 2021 be deemed as duly served within time.
 4. Time of filing and service of record of appeal be extended.



5. The record of appeal filed on 1st March 2022 and served on 2nd March 2022 be deemed as filed and served within time.
 6. That costs of this application be provided for.”
2. The motion is supported by the grounds on its face which are to the effect that the impugned judgment was delivered without notice to the applicants and in their absence therefor. That they only became aware of the same when they were served with a bill of costs in October 2020. That consequently, being aggrieved with the said decision, they filed a notice of appeal with leave of the trial court on December 28, 2020 and requested for proceedings by a letter dated April 14, 2021. The proceedings were ready by 16th December 2021 and were collected on December 20, 2021 along side the certificate of delay. The delay in requesting for proceedings and filing of the record of appeal was because the judgment was delivered without notice to the applicants and that the counsel who was handling the matter on their behalf left the law firm without proper handover to join the judiciary. That as a result, the record of appeal was filed on 1st March 2022 and served on 2nd March 2022. That the delay was not inordinate and the application had been made without undue delay.
 3. The application is further supported by an affidavit which merely reiterates and expounds on the grounds aforesaid and I therefore need not rehash the same. The respondent did not file any response to the application as gleaned from the record before me.
 4. Both parties were directed by the Registrar of this Court to file written submissions but again only the applicant did so. It would therefore appear that the application is unopposed.
 5. It is the applicants’ submissions that they have made a case and satisfied the principles laid down in the case of *Leo Sila Mutiso Vs. Rose Hellen Wangari* (1999) 2 EA 231 with regard to extension of time and that the mistake of counsel should not be visited on an innocent litigant as was held in the case of *Murai & 79 Others Vs. Amos Wainain* [1979] eKLR. The applicants reiterate the averments in the motion and the supporting affidavit already elaborated above and prays that the application be allowed.
 6. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the submissions by the applicant, the cited authorities and the law.
 7. The motion is brought *inter alia* 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 are firmly settled. This Court has wide and unfettered discretion whether or not to extend time. However, in exercising this discretion, the court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi Civil Application No. Nai 251 of 1997* where the court stated: -

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding



if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

9. In the instant case, the applicants claim that the impugned judgment sought to be appealed against was delivered on 10th July 2020 in their absence, and without their knowledge; that they only became aware of the judgment sometime in October 2020 when they were served with a bill of costs by the respondents; that they filed the notice of appeal with leave of court on December 28, 2020 and that the record of appeal ought to have been filed within 60 days from January 14, 2022. They further contend that following the exit of counsel who was handling the matter from the law firm on record for the applicants to join the judiciary, the file was unattended to for some time. This was mistake of counsel which should not be visited upon them. All these assertions have not been countered and or controverted by the respondent.
10. I have considered the length of the delay herein and it is my view that, the same is not inordinate. Similarly, I do find the reasons for the delay have been reasonably and sufficiently explained to my satisfaction. As to the possibility of the intended appeal succeeding, I have looked at the memorandum of appeal and I am satisfied that the applicants appeal may be arguable. However, with regard to prejudice, I am of the considered view that since the record of appeal has already been filed and served, there will be no prejudice occasioned to the parties save for a little inconvenience that may be suffered by the respondent who will have to await a little longer before the matter is concluded.
11. Taking into totality all the circumstances in this case, I am satisfied that the application is merited. Accordingly, I allow the applicant’s motion dated 22nd April 2022, as prayed.
12. The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

