



**Ngugi & another v Kanogo & 2 others (Civil Application  
E637 of 2021) [2022] KECA 1019 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1019 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E637 OF 2021  
W KARANJA, JA  
SEPTEMBER 23, 2022**

**BETWEEN**

**JOSEPH NGUGI ..... 1<sup>ST</sup> APPLICANT**

**THE STANDARD GROUP PLC ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHN RITHO KANOGO ..... 1<sup>ST</sup> RESPONDENT**

**MARGARET RITHO ..... 2<sup>ND</sup> RESPONDENT**

**GEOFFREY AVUGWI RITHO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time within which to file and serve  
record of appeal against the decree and judgment of the High Court at  
Nairobi (L. Njuguna, J.) dated 6th December 2017 in HCCC No. 589 of 2012)*

**RULING**

1. In their Notice of motion dated February 2, 2022 made under rules 4, 42, 82 and 90 of the [Court of Appeal Rules](#) (the Rules), the applicants seek an order that the memorandum of appeal and the record of appeal lodged on November 1, 2021 be deemed as properly filed and correctly on record. The appeal is from the judgment and decree of the L. Njuguna, J delivered on December 6, 2017 in Nairobi HCCC No. 589 of 2012.
2. The motion is premised on the grounds that the Notice of appeal was lodged in time on the December 15, 2017 and a letter requesting for typed proceedings was sent to the Deputy Registrar of the High Court on the December 14, 2017; stay was sought and it was granted and they have complied with the conditions ordered by the court; all this was done by the firm of Makhecha & Gitonga Advocates, advocates then on record for the applicant.



3. Later there was change of advocates to Ng'ania & Co. Advocates. The newly appointed advocates firm failed to regularize their appearance in the matter and on February 25, 2021 the former firm (which was still officially on record) was asked to pay court fees and collect typed proceedings and judgment but they could not do so as the applicants had already instructed another firm.
4. According to the applicants the newly instructed advocates were not aware of this notification till the application to strike out the Notice of Appeal dated June 3, 2021 was filed and served on them hence the delay of 6 months. The applicants state they had to instruct another firm of advocates which lodged the appeal on November 1, 2021.
5. Further that their appeal raises weighty issues such as whether the single evidence of a witness (plaintiff) could apply to the rest and be used to establish liability and assessment of damages in a defamation case; the respondents shall not suffer any prejudice in the event the order is granted since the half of the decretal sum has been paid and half is deposited in a joint interest earning account and should the appeal be unsuccessful, then they can access the same. Finally, the Court has been asked to exercise its discretion in favour of the applicants.
6. In support of the Motion is an affidavit dated February 2, 2022, sworn by Millicent Ngetich, the head of Legal and Company Secretary of the 2<sup>nd</sup> applicant. She has largely reiterated the grounds on the body of the application and further deposed that the applicants were ordered to pay a sum of Ksh. 27,000,000/= in damages; that the former firm of Makhecha & Gitonga failed to inform the applicants nor Ng'ania & Co Advocates on the notification to pay court fees. The firm of Limo & Njoroge advocates were then instructed to regularize representation, however, they had incomplete documents; the firm collected the said documents from court on the September 20, 2021 as indicated in the certificate of delay and filed a memorandum of appeal and a record of appeal on November 1, 2021. It is her averment that the appeal is arguable and the respondents shall not suffer any prejudice in the event the orders being sought are granted.
7. The respondents opposed the application vide a replying affidavit sworn by the 2<sup>nd</sup> respondent on the May 13, 2022 on behalf of the other respondents. He strongly opposes the motion and avers that he is a neurosurgeon practicing neurosurgery in United Kingdom; that having instituted the Notice of appeal and not filed a record of appeal, the same is deemed to have been withdrawn; the applicants have failed to explain the reason for the delay of 6 months; the applicants have failed to follow up on the matter after the request to have the typed proceedings until they made an application to have the Notice of appeal struck out vide a notice of motion dated June 3, 2021, which they responded to after a period of 7 months.
8. In addition, the applicants have failed to give an explanation as to why they failed to make this application once they became aware of the application to strike out the Notice of motion. The respondents deny the applicants argument that there was a communication breakdown with the firm of Makhecha & Gitonga advocates yet they were actively involved in seeking stay at the High Court; payment of the decretal sum and taxation of the bill of costs and that there was a consent to come on record between the firm of Makhecha & Gitonga and Limo & Njoroge advocates.
9. Further that the applicant's appeal is not arguable for the reason that the 2<sup>nd</sup> respondent was granted authority to appear, plead and act on behalf of the other respondents and upon service of the same, it was not opposed, therefore, it cannot be a ground on appeal.
10. The Court is being asked to find that the applicants have shown laxity in prosecuting their appeal; the application has been made in bad faith and the respondents will be greatly prejudiced noting that judgment was delivered on December 6, 2017 and even further laxity is that once their application to



strike out the Notice of appeal was filed on June 17, 2021, this application was not filed until February 3, 2022a clearly unexplained delay of eight (8) months hence the same be dismissed with costs.

11. In support of the application, the applicants urge this Court to be guided by the principles in *Liberato Kivanga Manga v. Prime Bank Limited* [2021] eKLR which include the length and reasons for the delay; the chances of the appeal succeeding and the degree of prejudice to the respondent. The applicants submit that the delay in lodging this application is not inordinate and if it is, they have given a reasonable explanation for the delay. They also urge that they have a good appeal with high probability of success.
12. I have considered the application, the grounds in support thereof, the rival affidavits, submissions by the applicants and the applicable law. Rule 4 of this Court's Rules gives the Court unfettered discretion to extend time limited by these rules to extend such time as it deems just. The Court in *Leo Sila Mutiso v. Hellen Wangari Mwangi* [1999] 2 EA 231 set out the principles that guide this court in such an application as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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.”

See also the decision in *Fakir Mohammed v. Joseph Mugambi & 2 Others* [2005] eKLR.

13. These principles have been reiterated and expounded in many subsequent decisions of this Court and even by the Supreme Court. The principles were clearly elucidated in *Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustess*, [2020] eKLR as follows:

“Some of the consideration, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

14. Have the applicants demonstrated the above ingredients to warrant my exercise of discretion in their favour? Judgment in the High Court suit was delivered on the December 6, 2017. The Notice of appeal was filed on time. The applicants were then required to file the record under rule 82 within sixty days of the date when the notice of appeal was lodged. In this case, the applicants made an application for typed proceedings on the December 14, 2017, which was within 30 days of the date when the decision was made. However, I note that for 4years, there was no follow up made with the registrar of the High Court to find out if the proceedings had been typed.
15. I note further, that contrary to the averments by the applicants that there was a breakdown of communication between the firm of Makhecha & Njoroge and Ng'ania & Company Advocates, the matter was not static and the parties' lawyers were in constant communication as there were other proceedings that were going on before the High Court in respect of the same matter. The applicants were represented by the firm of Makhecha & Njoroge company advocates even as at the time taxation



was done and Milicent Ng'etich was in communication with the counsel on taxation as late as the July 29, 2021 as deposed. This was way after the respondents had in fact filed their application to strike out the Notice of appeal on the June 3, 2021. The firm of Makhecha & Njoroge was still on record and the communication from the High Court to the effect that proceedings were ready was, therefore, sent to the right firm of Advocates.

16. Even when the applicants purported to change advocates, the record shows that counsel for the respondents wrote to the firm of Ng'ania and Co. Advocates asking them to regularise their coming on record by filing a Notice of Change of Advocates but that was not done. Apparently concerned about the manner the applicants were handling the matter, the respondents filed the application to strike out the Notice of appeal on June 4, 2021. Although duly served with the application, the applicants did not respond to that application until 8 months later when they filed the replying affidavit.
17. Interestingly, instead of filing the application for extension of time, the respondent proceeded to file the record of appeal without leave of the Court notwithstanding the fact that the application to strike out was still pending. From the depositions in the replying affidavit it is clear to me that the supporting affidavit sworn by Ms Ng'etich does not present the true picture as to what was happening in this matter. The collective delay of 4 - 5 years is in my considered view inordinate and I am unpersuaded on the plausibility of the explanation for the delay proffered by the applicants.
18. The respondents aver that they shall be prejudiced in the event the order for extension is granted, the judgment having been delivered way back in 2017. It is not in dispute that the respondents have already been paid half of the decretal sum and the other half is deposited in a joint interest earning account. That in my view does not excuse the applicants' conduct in this matter. The respondents have been holding a judgment for the last 5 years and they should be allowed to enjoy the full fruits of their judgment. In my view keeping the respondents in court longer as they wait for the prosecution of the appeal by the applicants who have hitherto exhibited unwarranted lethargy in regularising this appeal will be prejudicial to the respondents.
19. Ultimately, therefore, I find the applicants undeserving of this court's exercise of discretion in their favour. Accordingly, this application is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**W. KARANJA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

