



REPUBLIC OF KENYA



KENYA LAW
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**Tanui & 6 others v Talam (Civil Application E066 of 2022)
[2022] KECA 1042 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1042 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E066 OF 2022
M NGUGI, JA
SEPTEMBER 23, 2022**

BETWEEN

**JOSEPH KOECH TANUI 1ST APPLICANT
ESTHER CHEROTICH MISOI 2ND APPLICANT
DAVID KIBET TOO 3RD APPLICANT
BENJAMIN KIMUTAI TONUI 4TH APPLICANT
SALINA CHEPCHIRCHIR KENEI 5TH APPLICANT
PILISTA JERONO 6TH APPLICANT
GRACE CHEROTICH 7TH APPLICANT**

AND

NOAH TALAM RESPONDENT

(Being an application for extension of time to file a notice of appeal out of time against the judgment and decree of the High Court of Kenya at Eldoret (H. A. Omondi J.) dated 28th December, 2021 at Nairobi delivered on 10th February, 2022 by R. N. Nyakundi J. in Succession Cause No. 175 of 2010)

RULING

1. In the application brought by way of notice of motion dated 11th May 2022, the applicants seek leave to file and serve a notice of appeal out of time against the judgment and decree of H. A. Omondi J. (as she then was) in Eldoret Succession Cause No. 175 of 2010 which was delivered on 10th February, 2022 by Nyakundi J. The applicants further pray that the notice of appeal attached to the application be deemed as duly filed upon payment of the requisite fees. They also pray that the costs of the application be provided for.



2. The application is expressed to be brought under the provisions of articles 48 and 159 of *the Constitution* of Kenya, 2010, section 3A (1)(2), 3B (1) and 7 of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya and Rules 4 and 103 of the *Court of Appeal Rules*, 2010.
3. The grounds in support of the application are set out on its face and in the affidavit in support sworn by Joseph Koech Tanui on 11th May, 2022. They are that the judgment that the applicants seek to appeal against was scheduled for delivery on 15th December 2021 in accordance with the notice of delivery of judgment. It was, however, delivered on 10th February 2022 without notice to the applicants or their advocates. The applicants had only come to learn of the judgment on 27th April, 2022, by which date the period for filing the notice of appeal had already lapsed. The applicants had immediately instructed their advocates to seek leave to institute the appeal.
4. The applicants aver that they are aggrieved by the decision of the trial court and wish to appeal against it. Their intended appeal has high chances of success and unless their application is allowed and their appeal heard on merit, they stand to suffer irreparable harm as they are likely to be disinherited from an estate which they are true beneficiaries.
5. The applicants state that their application has been brought expeditiously, without unreasonable delay and that no prejudice will be occasioned to the respondent in any way in the event that the application is allowed.
6. The respondent opposes the application and has filed an affidavit sworn by Eliseba Jepkosgey Koech, the respondent's advocate on record, on 6th July, 2022. Ms. Koech concedes that indeed the judgment was supposed to be delivered on 15th December, 2021. It was however, not ready on that date and was to be delivered on notice. She avers that the notice for delivery of the judgment was physically served upon their office on 9th February, 2022 and also posted on the 'telegram' on the said date. She further avers that the applicants' advocate admits in the affidavit in support of the application that the notice of judgment dated 9th February 2022 was also placed at the High Court Notice Board.
7. The respondent deposes that it is curious that the applicants' Counsel missed all the three notices in good time and are quick to shift blame to the court even in the instances that demanded their own prudence to safeguard their interest. The respondent further observes that the applicants have not put forth a draft memorandum of appeal, nor have they stated the grounds which they wish the court to consider in order to ascertain the chances of success of the appeal.
8. The parties hereto have filed written submissions in support of their respective positions. In their written submissions dated 1st July, 2022, the applicants submit that the delay in filing an appeal in this matter was not their fault. The judgment they seek to appeal against was scheduled to be delivered on 15th December, 2021 but was delivered on 10th February, 2022 without notice to them or their advocates on record. They became aware that the judgment had been delivered on 27th April 2022 and they had instructed their advocates to file the instant application. They have placed reliance on the case of of *Ngoso General Contractors Ltd v Jacob Gichunge* [2005] eKLR.
9. It is their submission that placing a notice at the court's notice board does not constitute proper service of a judgment notice upon parties considering the fact that most court's transactions are now online and virtual and therefore attendances to physical courts are limited.
10. The applicants further submit that they have an arguable appeal with high chances of success and unless the same is heard on merit, they stand to suffer irreparable harm and gross miscarriage of justice as they will be disinherited unfairly.



11. In the submissions in response dated 6th July, 2022, the respondent contends that the delay in bringing this application is not excusable. The judgment was delivered on 10th February 2022 and to date no substantive appeal has been filed. He asks the Court to note that the nature of the proceedings being a succession cause, the estate of the deceased ought to be administered and distributed in finality without any further delay considering that the succession cause was filed in the year 2010.
12. He further notes that the present application was filed on 11th May 2022, about three months from the date of the judgment, and the delay has not been explained by the applicants. As for the reasons for the delay, it is his submission that it should not be shifted to the court as a diligent party ought to have known of the delivery of judgment much earlier considering that it was about five months since 15th December, 2021 when the judgment was initially scheduled for delivery.
13. Finally, the respondent submits that he will suffer prejudice in the event that the orders sought are granted as the matter is a succession cause filed in 2010 for administration and distribution of the estate of the deceased, a cause which has been in court for the last twelve years, and it ought to be brought to rest in the interest of the estate of the deceased.
14. I have considered the application and the submissions of the parties in this matter. In *Leo Sila Mutiso vs Hellen Wangari Mwangi* (1999) 2 EA 231, this Court set out what should be considered in an application for extension of time under Rule 4 of this Court's Rules. This Rule gives the Court unfettered discretion to determine whether or not to extend time for the doing of any act required under the Rules. The Court is required to consider the length of the delay, the reasons for the delay and (possibly) the chances of success of the appeal.
15. Judgment in the matter that the applicants seek to appeal against was delivered on 10th February 2022. It had been scheduled for delivery on 15th December 2021. A notice dated 9th February 2022 was posted on the court's notice board. The appellants did not get to know that the judgment had been delivered until 27th April 2022, and they aver that they instructed their advocates to file an application for extension of time. There was thus a delay of three months in filing the notice of appeal.
16. The applicants explain that they did not know that judgment had been delivered until 27th April 2022, and they filed the present application on 11th May 2022, about two weeks later. They aver that the notice of delivery of judgment was not served on them, and that they did not get to know about the delivery of judgment until two months after its delivery. In the case of *Ngoso General Contractors Ltd v Jacob Gichunge* (supra) relied on by the applicants, the Court held that:

“Was there any misdirection on any matter of fact or law which led to a wrong exercise of discretion in this matter? We think there was, and the most serious is the failure to consider, as a matter of law, whether the appellant, who was admittedly absent when the judgment was delivered, was served with notice of delivery of the judgment.

...

A judgment which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates. It is common ground in this matter that it was only the advocate of the respondent, the successful party in the judgment, who had prior knowledge of the delivery date. No apparent reason was advanced for failure to serve or attempt to serve the appellant or his advocate...” (Emphasis added)

17. I take the view that the applicants in this case have given a plausible explanation for the delay in filing and serving the notice of appeal. The judgment in this case was delivered almost two months after the



date it was scheduled to be delivered. Notice of the date of delivery was placed on the court's notice board. It was dated 9th February 2022, with the judgment scheduled for delivery the following day, 10th February 2022. The applicants aver that they were not served.

18. While it is averred on behalf of the respondent that his advocate was served with a notice; that service was also effected by 'telegram', and a notice placed on the court's notice board, it seems to me that such notice as was given by the court registry was inadequate. When a notice is placed on the court's notice board and allegedly served via 'telegram' the day before its delivery in the Covid period when most of the court's functions had gone virtual, it is not surprising that the applicants may have failed to be aware that the judgment had been delivered until a few months later. While there was delay in filing and serving the notice, the delay was not inordinate, and the reasons for the delay are plausible.
19. Accordingly, the application dated 11th May 2022 is allowed. The applicants are hereby granted leave to file their notice of appeal out of time, and the notice of appeal dated 11th My 2022 attached to the application shall be deemed as duly filed and served. The applicants shall file their appeal within 45 days hereof.
20. There shall be no order as to costs.

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

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

