



**Wambui & another v Mwangi (Civil Application E122 of 2022)
[2022] KECA 1005 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1005 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E122 OF 2022
MSA MAKHANDIA, JA
SEPTEMBER 23, 2022**

BETWEEN

MONICAH JACKLINE WAMBUI 1ST APPLICANT

PAULINE MUKUHI NGANGA 2ND APPLICANT

AND

LUCY WAIRIMU MWANGI RESPONDENT

(An application for extension of time to file and serve a record of appeal out of time from the decision of the High Court of Kenya at Nairobi (Nzioka, J.) dated 18th May, 2020 in HCCC No. 185 of 2009)

RULING

1. Before me is a notice of motion dated 16th March 2022, brought under Section 3A and 3B of the [Appellate Jurisdiction Act](#) and Rule 4 of the [Court of Appeal Rules](#) substantively seeking an order that leave be granted to the applicant to file and serve the record of appeal out of time, against the judgment and decree of Nzioka, J. dated May 18, 2020, in High Court Civil Suit No. 185 of 2009 between Lucy Wairimu Mwangi Vs. Monicah Jackline Wambui & Another, together with an attendant order that costs of the application abide the outcome of the appeal.
2. It is supported by grounds on its face, which are that the applicants being dissatisfied with the decision of the High Court, filed a notice of appeal after which they were expected to lodge an appeal within 60 days which did not happen as the typed proceedings were made available to the applicants on May 11, 2021 after the statutory timeline had lapsed. That the 1st applicant could not give instructions to her advocates as she was nursing mental illness hence the delay is excusable though the letter bespeaking typed proceedings and the notice of appeal was filed and served within the stipulated timelines. The applicants also state that the intended appeal from the memorandum of appeal annexed to the application is not frivolous as it raises substantial issues of law. That if, the orders sought are not



granted, the applicants will be prejudiced. That from the time the judgment was delivered to the time of filing this application is approximately two years which is not inordinate. Finally, that the record of appeal was filed on March 9, 2022 and this was because of the long wait for the 1st applicant to be discharged from hospital.

3. The motion is further supported by the affidavit of the 1st applicant which affidavit merely reiterates and expounds on the grounds aforesaid and there is no need for me to rehash them.
4. The application is opposed through a replying affidavit of the respondent. She deposes that the applicants' contention of mental sickness of the 1st applicant is not supported by any medical evidence and in any case the 2nd applicant was available to give instructions to the counsel as she was a party to the suit. That the applicants received typed proceedings on May 11, 2021 and proceeded to file an application for review dated 31st May 2021 and yet they plead incapacity to instruct counsel.
5. Further that the appeal is not arguable at all. According to the respondent, the time for filing the notice of appeal lapsed without the applicants filing the same nor serving her. Thus the notice of appeal purportedly relied on by the applicants offends the provisions of Rule 77(1) of this courts rules. The request for proceedings was never copied to the respondent thus the applicants cannot rely on the provisions of Rule 82(1) and (2) of this courts Rules. That the respondent will be greatly prejudiced if the orders sought are granted as the applicants have kept her in court from 2009 as they continue to benefit from the suit property which had been sold and transferred to her. There is no proper explanation as to the delay of two years in bringing the instant application. She prays therefore that the motion be dismissed with costs.
6. The application was canvassed solely by way of written submissions without oral highlighting. Submissions and authorities for the respondent are on record while those by the applicants are not. It is the respondent's submission that there was an inordinate delay of 598 days which has not been sufficiently explained by the applicants. That the applicants are not bent on prosecuting the appeal therefor. Further, the applicants have failed to comply with timelines set by the law and should not be given audience by this court. She reiterates that there is no evidence that the 1st applicant was suffering from mental infirmity and even if she did, the 2nd applicant was still available to give instructions to their counsel.
7. My invitation to intervene on behalf of the applicants has essentially 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."
8. The principles that guide this Court in the exercise of jurisdiction under the Rule 4 of the Court of Appeal Rules are now well settled by numerous enunciations in this court. See for instance the cases of *Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi* [1999]2E A 231, *Fakir Mohamed Vs. Joseph Mugambi & 2 Others*; [2005] eKLR; *Muringa Company Ltd Vs. Archdiocese of Nairobi Registered Trustees* [2020] eKLR; *Andrew Kiplagat Chemaringo Vs. Paul Kipkorir Kibet* [2018] eKLR and *Athuman Nusura Juma Vs. Afwa Mohamed Ramathan* CA No. 227 of 2015.
9. The principles distilled from the above case law may be enumerated inter alia as follows: -
 - (i) The mandate under Rule 4 is discretionary, unfettered and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the courts unfettered discretion



under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.

- (ii) Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.
 - (iii) The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice.
 - (iv) As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the court.
 - (v) The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.
 - (vi) 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 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.
 - (vii) Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word "possibly";
 - (viii) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favorably exercised.
 - (ix) Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.
 - (x) An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court.
 - (xi) The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.
10. I have given due consideration of the record in the light of the above principles. The only one issue that falls for determination is whether the applicant has satisfied the prerequisites for the granting of the reliefs sought. Delay of two years is conceded to by the applicants but they hasten to add that it is not inordinate. The only reason given for this delay was that the 1st applicant was mentally ill all this time. A perusal of the entire motion does not show any evidence documentary or otherwise to support this contention. In any case and as correctly submitted by the respondent, even if the 1st applicant was



mentally indisposed, there was still the 2nd applicant who could have instructed their counsel to pursue the appeal.

11. It is argued further and which I agree with that the applicants letter requesting for typed proceedings was never copied to the respondent thus they cannot rely on the provisions of Rule 82(1) and (2) of this Courts Rules, even if leave was granted. To me the period of delay is inordinate and the explanation given is not convincing at all. That being my view of the matter this far, I need not go into other considerations. I therefore refuse to exercise my discretion in favour of the applicants. The upshot is that I disallow the application with costs to the respondent.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

