



In re Estate of Joshua Mbira Githehu (Deceased) (Civil Application E079 of 2021) [2022] KECA 1141 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1141 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E079 OF 2021**

F SICHALE, JA

OCTOBER 21, 2022

IN THE MATTER OF THE ESTATE OF JOSHUA MBIRA GITHEHU (DECEASED)

BETWEEN

JOSIAH WANENE NDUTA APPLICANT

AND

WILFRED MUKOMA MBIRA 1ST RESPONDENT

JANE MUMBI KABOCHA 2ND RESPONDENT

MARY NJERI KABOCHA 3RD RESPONDENT

DAVID KARIRU NGIGI 4TH RESPONDENT

JOSIAH KABOCHA NGIGI 5TH RESPONDENT

ANTHONY MBIRA NGIGI 6TH RESPONDENT

(An Application for Extension of Time to file an appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (Muchelule, J) dated 8th April 2020 in High Court Succession Cause No. 131 of 1984)

RULING

1. Josiah Wanene Nduta (the applicant herein), has vide a motion dated 10th March 2021, brought pursuant to the provisions of Sections 3, 3A, 3B of the *Appellate Jurisdiction Act* and Rules 3,4, 82, and 83 of the Court of Appeal Rules sought extension of time within which to lodge Memorandum and Record of Appeal.
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that the delay herein was occasioned by the fact that the Honourable Court had closed down due to Covid-19 pandemic which occasioned delay in obtaining a copy of the



ruling in preparation for filling the appeal and that further there had been no inordinate delay that had lapsed since the proceedings were availed to his advocate so to cause prejudice to the respondent.

3. The motion was opposed vide a replying affidavit sworn by Hottensia Wangari Mukoma, legal representative of the 1st respondent on 9th May 2022, who deposed inter alia that there had been inordinate and inexcusable delay in filing the present application since the subject ruling was delivered on 8th April 2020 whereas the instant application was not filed until 2021 and that further the applicant was always aware of delivery of the ruling.
4. It was submitted for the applicant inter alia that this Court was clothed with inherent powers in ensuring that justice is served to the parties and that that the intended appeal was merited as per the annexed Memorandum of Appeal and that further no prejudice would be visited upon the respondent if the instant application was allowed.
5. On the other hand, it was submitted for the respondents inter alia that the applicant was seeking extension of time to lodge only the Memorandum and Record of Appeal out of time and that the documents could not be lodged if there was no proper Notice of Appeal in place and that in the instant case there was no proper Notice of Appeal in place and as such no Memorandum and Record of Appeal could be filled.
6. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties the cited authorities and the law.
7. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion the Court should do so judiciously. See *Fakir Mohamed vs. Joseph Mugambi & 2 others C.A. No. NAI. 332 of 2004* where the Court laid out some of the considerations to be taken into account by Court in deciding applications of these nature as follows; the length of the delay, the causes of the delay, the possibility of the appeal succeeding and prejudice to be occasioned to the parties.
8. In the instant case, the impugned ruling was delivered on 8th April 2020, whereas the instant motion is dated 10th March 2021. There has therefore been a delay of about 11 months which delay is certainly inordinate. Additionally, Notice of Appeal herein is dated 10th November 2020, meaning the same was filed after 7 months from the date of the impugned ruling which delay is once again inordinate. It is not clear from the record if the same was ever filed/lodged in Court.
9. Regarding reasons for the delay, the applicant has contended that the same was occasioned by the fact that the Court had closed down due to Covid 19 pandemic and that as such there was a delay in obtaining a copy of the ruling for purposes of appeal. It is instructive to note that the applicant does not state when the Courts allegedly closed down due to Covid19 and neither does he state when he finally obtained a copy of the ruling.
10. This Court is alive to the fact that sometimes during month of March 2020, Court operations had been scaled down owing to Covid19. it is instructive to note that the applicant is seeking extension of time to lodge Memorandum and Record of Appeal out of time. There is no mention of Notice of Appeal in the prayers being sought. As I had alluded to earlier on, it is not clear if the Notice of Appeal was ever filed in Court, the same is however dated 10th November 2021, which is 7 months from the date of the impugned ruling and as such there in no valid Notice of Appeal that is on record.



11. The Court cannot therefore grant extension of time to lodge Memorandum and Record of Appeal when there is no valid Notice of Appeal on record. Consequently, and due to the afore stated reasons, I am of the opinion that this delay has not been explained to the satisfaction of this Court.
12. With regard to the possibility of the appeal succeeding, I have looked at the annexed draft Memorandum of Appeal and I cannot make a definitive finding on this issue sitting as a single Judge.
13. As regards prejudice, it has not been demonstrated to the satisfaction of this Court, the prejudice that that the applicant will stand to suffer if the instant motion is not allowed.
14. Taking into totality all the circumstances in this case, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time to file an appeal out of time and I hereby decline the same.
15. Accordingly, the applicant's motion dated 10th March 2021, is without merit and the same is hereby dismissed with no order as to costs this being a succession matter.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

