



REPUBLIC OF KENYA



KENYA LAW
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**Njiru (Suing as administrator of the Estate of Alice Muthoni Mugo alias Muthoni Paul) & another
v Njagi (Civil Application 130 of 2019) [2022] KECA 1438 (KLR) (14 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1438 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 130 OF 2019
W KARANJA, JA
OCTOBER 14, 2022**

BETWEEN

**NGINI KITHINJI NJIRU (SUING AS ADMINISTRATOR OF THE ESTATE OF
ALICE MUTHONI MUGO ALIAS MUTHONI PAUL) 1ST APPLICANT**

GRACE WANJA MBURIA 2ND APPLICANT

AND

GRACE WARUGURU NJAGI RESPONDENT

*(Application under Rule 4 of the COA, 2010 seeking extension of time within which to file
a notice, memorandum and appeal from the judgment of the High Court at Kerugoya
(L.W.Gitari, J) dated 13th April 2018 In High Court Succession cause no. 414 of 2015)*

RULING

1. Before me is a notice of motion dated August 2, 2019 brought under rule 4 of the *Court of Appeal rules*. The applicants seek enlargement of time within which to file and serve a Notice of appeal, memorandum of appeal and record of appeal in respect of a judgment of High Court at Kerugoya (L.W.Gitari, J) delivered on the April 13, 2018. The application is premised on the grounds that the judgment was entered against the applicants to the effect that the respondent's protest was allowed. The court held that it would be a travesty of justice to allow the petitioners who were elderly women to go back to the home and disrupt the respondent's occupation (protestor), it would amount to an abuse of the court process. The net estate in land parcel No. Kabare/Njiku/119 was awarded to the respondent herein.
2. The applicants were aggrieved by the entire decision, however, Alice Muthoni Mugo alias Muthoni Paul died on May 14, 2018 before she could file a notice of appeal. Due to the said demise an appeal was not filed in time and the 1st applicant had to obtain letters of administration from the court which were granted on the September 18, 2018 and an application for substitution was filed on November



28, 2018 and heard on June 26, 2019. The applicant states that the instant application has been filed without delay and the intended appeal has high chances of success. Further, that the respondent will not be prejudiced in any way and that it is in the interest of justice that the application be allowed.

3. The application is supported by the affidavits of Grace Wanja Mburia and Ngini Kithinji Njiru. The affidavit of Grace Wanja Mburia states that she filed a Notice of appeal and requested for typed proceedings. That Alice Muthoni Mugo died on May 14, 2018 when the case was still ongoing. She deposes further that the delay is not inordinate; the intended appeal is arguable with a high chance of success and that she is desirous to appeal against the said decision.
4. The second affidavit has been sworn by Ngini Kithinji Njiru. It states that he is the son to Alice Muthoni Mugo alias Muthoni Paul who died before filing an appeal. He basically repeats the depositions made by his co-applicant.
5. The respondents have not filed any response to the application. A hearing notice was duly served upon the parties via email on the September 7, 2022 with directions that parties file submissions. The applicant filed written submissions dated July 18, 2022, but none have been received from the respondents.
6. I have considered the application and the submissions on record. The issue for determination is whether the applicants are deserving of the order sought. The discretion that I am called to exercise in the determination of this application is provided under rule 4 of the [Court of Appeal Rules](#), which provides that:

‘ 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.’

7. The discretion conferred by the above provision is unfettered. The same has to nonetheless be exercised judiciously and not whimsically and within some parameters which have been clearly enunciated in many judicial pronouncements by this Court and also by the Supreme Court. For instance, this court in the celebrated case of *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* [1999]2EA 231, set out the parameters to be followed as hereunder:-

‘ it is now 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 [Njuguna v. Magichu & 73 others](#) [2003] KLR 507.

8. It is within the above parameters that I must consider the application at hand. The first issue for consideration is whether the delay involved in the matter was inordinate. In considering the delay, there is no standard or set timelines to define delay as Rule 4 does not set out the timelines. Each case must, therefore, be considered within its own peculiar circumstances. In [Andrew Kiplagat Chemaringo v. Paul Kipkorir Kibet](#)[2018] eKLR this Court expressed itself thus:

‘ the law does not set out any minimum or maximum period for the 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 favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.'

9. The judgment in the High court was delivered on the April 19, 2018 and Alice Muthoni Mugo alias Muthoni Paul and the 2nd applicant lodged a notice at the registry on April 26, 2018. However, before the appeal was filed, Alice Muthoni Mugo died on May 14, 2018. Further that they had to get a substitution for the deceased and this took quiet some time for the application to be heard and be allowed on the June 26, 2019 and they filed this application as soon as possible after the court allowed the substitution. In my considered view, the delay involved was not inordinate and the same has been sufficiently explained.
10. As regards the chances of the intended appeal succeeding, it must be borne in mind that it is not really the role of a single judge to determine definitively the merits of the intended appeal, unless of course, on the face of it the appeal is blatantly frivolous. That is for the full bench if and when it is ultimately seized of the appeal. In *Athuman Nusura Juma v. Afwa Mohamed Ramadhan*, C.A no. 277 of 2015, this Court stated as follows:

'this court has been careful to ensure that whether the intended appeal has merits or not is not an issue with the finality by a single judge. That is why in virtually all its decisions on the considerations upon which to extend time is exercised, the court has prefixed the consideration whether the intended appeal has chances of success with the word 'possibly'.

The chance of the success of the intended appeal is not my role to determine.

11. On the degree of prejudice to the respondent, in the absence of any deposition by the respondent to demonstrate prejudice, I am unable to conjure any kind of prejudice the respondent is likely to suffer if the order sought is granted.
12. The upshot of this application is that the applicant has demonstrated the existence of the parameters set out in *Leo Sila Mutiso* (supra). Accordingly, I find the application meritorious and allow it with no order as to costs as it was not opposed. I further order the applicants to file and serve the record of appeal within 30 days from the date hereof failing which this order shall automatically lapse.

DATED AND DELIVERED AT NYERI THIS 14TH DAY OF OCTOBER 2022.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

