



REPUBLIC OF KENYA



**KENYA LAW**  
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**Githae v Githae (Civil Application 36A of 2019)  
[2021] KECA 50 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 50 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 36A OF 2019  
AK MURGOR, JA  
SEPTEMBER 23, 2021**

**BETWEEN**

**ALBERT NJERU GITHAE ..... APPLICANT**

**AND**

**SYMON WAIRAGU GITHAE ..... RESPONDENT**

*(An application for leave to file and serve an appeal out of time from the Ruling and the order of the High Court of Kenya at Nyeri (T. Matheka, J.) delivered on 12th day of April, 2018 in High Court Succession Cause NO. 43 of 2012)*

**RULING**

- 1 By a Notice of Motion dated 22nd March 2019, the applicant, Albert Njeru Githae seeks leave to file and serve a Record of appeal out of time against the ruling of the High Court delivered on 12th April, 2018. The motion premised on the grounds on its face and the affidavit in support of H.S. Mshila contended that the Notice of Appeal was filed on 24th April, 2018 and on 23rd April, 2018, the applicant requested for certified copies of the typed proceedings which were prepared and collected on 14th September, 2018.
- 2 It was further contended that the applicant also applied for the ruling on 24th April, 2018 which was not supplied to him until 6th February, 2019; that further, the order in respect of the ruling was obtained on 11th February, 2019; that by the time the applicant had compiled all the essential documents, there was a delay of 253 days in filing the of the Record of appeal; that the delay was not in any way caused by the applicant's inadvertence but was occasioned by the delay in supply of the ruling. The applicant further contends that the appeal raises substantial and novel issues of law that of necessity, require to be canvassed before this Court. It is further contended that the respondent will not be in any way prejudiced.



- 3 In a replying affidavit sworn by the respondent on 11th May, 2021, it was deponed that after delivery of the ruling, the applicant filed a Notice of appeal and a Notice of Motion seeking leave to file and serve the appeal out of time; that the applicant has failed to file the memorandum and record of appeal to date or at all; that the applicant's averment that the High Court registry delayed in issuing a certified copy of the ruling is untrue as it is contended that, the respondent's previous advocates had applied for and obtained the ruling on 27th April, 2018 which was shortly after the ruling was delivered on 12th April, 2018. The respondent asserted that the applicant has neglected to act promptly in bringing this application having waited to file an appeal close to one year after the ruling was delivered; that the application is not meritorious as no reasons for delay have been presented; that in any event, the applicant has not demonstrated that the appeal is arguable or why it has a high chance of success; that instead, the application is a time wasting exercise, intended to deny the respondent enjoyment of the fruits of his judgment to his detriment.
- 4 Having considered the application and submissions, under Rule 4 of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997.
- 5 Turning to the length of delay, the ruling was delivered on 12th April 2018. The Notice of appeal was filed on 23rd April 2018. This application is dated 22nd March 2019 giving rise to a delay of about 337 days.
- 6 The applicant has explained that this delay was occasioned by the court registry's delay in supplying the ruling for which a request had been made on 23rd April, 2018. He has attached a copy of the ruling showing that it was certified on 4th February 2019. The respondent on the other hand asserts that the ruling has been available since 27th April 2018, as he had earlier applied for, and obtained a copy of the same ruling. He has attached his copy of the ruling affixed with the registry stamp showing that it was certified on 27th April 2018.
- 7 An analysis of the parties' contestations discloses that whether or not time should be extended turns on the availability of the ruling. The respondent's case is that the copy he received was certified on 27th April 2019 meaning that since it was at all times available to the parties, the delay in filing the record could not be attributed to it. The applicant on the other hand contends that his copy was certified on 4th February 2019, which would explain the delay in filing the record.
- 8 If indeed the ruling was available to the parties since 27th April 2018, I am of the view that it was incumbent upon the applicant to explain who caused the delay in supplying the ruling. At the very least, he should have obtained a letter from the court registry taking responsibility for that delay from 23rd April, 2018 to 4th February, 2019. As it were, there is nothing that explains the almost one year delay. Without any material to support the delay in the ruling being obtained by the applicant, when it is apparent that the same ruling has at all times been available, I find that the delay in filing the record of appeal has not been adequately explained.
- 9 Similarly, the delay in obtaining the order in respect of the ruling has also not been explained.
- 10 The next issue for consideration is whether the intended appeal has any chances of success. In this case, what was before the trial court was the question of whether the grant of letters of administration ad litem issued to the applicant with respect to the Estate of the Late Eva Wangui Githae (deceased) should be revoked. The trial judge revoked the grant for the reason that the applicant had obtained



the letters of administration ad litem without satisfying the requirements of rule 26 of the *Probate and Administration Rules* which required an applicant to notify all persons beneficially entitled prior to making such application. If indeed the applicant failed to comply with the requirements stipulated in rule 26, then there is every likelihood that the intended appeal will not succeed.

- 11 My view on whether or not the respondent will suffer prejudice were time to be extended is that, any continued delay in finalising settlement of the matter of the deceased's estate will be prejudicial to all members of the family.
- 12 In view of the above, the Notice of Motion dated 22nd March 2019 is not merited and is dismissed. I decline to exercise my discretion to extend time to file and serve the Record of Appeal out of time. As the parties are members of one family, I make no orders as to costs.
- 13 It is so ordered.

**Dated and delivered at Nairobi this 23rd day of September, 2021.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original

**DEPUTY REGISTRAR**

