



Mwai (suing as administrator of the Estate of Peter Mwai Mburati the administrator of the Estate of the Late Mburati Kaburi) v Njoka & 3 others (Civil Application 29 of 2019) [2021] KECA 11 (KLR) (23 September 2021) (Ruling)

Neutral citation: [2021] KECA 11 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 29 OF 2019
DK MUSINGA, JA
SEPTEMBER 23, 2021**

BETWEEN

ELIZABETH WANGECHI MWAI (SUING AS ADMINISTRATOR OF THE ESTATE OF PETER MWAI MBURATI THE ADMINISTRATOR OF THE ESTATE OF THE LATE MBURATI KABURI) APPLICANT

AND

**JAMLICK MWANGI NJOKA 1ST RESPONDENT
EDWARD NJAGI MURIITHI 2ND RESPONDENT
JOSEPH MUCHIRI 3RD RESPONDENT
LAND REGISTRAR KIRINYAGA 4TH RESPONDENT**

(Being an application for extension of time to file and serve the Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time against the Judgment of the Environment and Land (S. Mukunya, J.) delivered on 25th July 2018 in ELC Case No. 651 of 2013)

RULING

- 1 The applicant’s notice of motion dated 6th March 2019 and brought under rule 4 of this Court’s Rules seeks extension of time to file and serve a notice of appeal, memorandum and record of appeal out of time.
- 2 In her affidavit in support of the application, the applicant stated that the ruling in Kerugoya ELC Case No. 651 of 2013 was delivered on 25th July 2018 and dismissed her case for want of prosecution. She filed a notice of appeal on 7th August 2018 and served the same in time. The applicant also unsuccessfully applied for review of the dismissal order vide an application dated 9th July 2018. Subsequently, she applied for certified copies of the proceedings and the ruling.



3 The applicant states that the delay in filing the appeal was caused by the time it took to prosecute the application for review. The applicant believes that the intended appeal has high chances of success and has attached a draft of the memorandum of appeal to her application.

4 The respondents opposed the application and stated in their replying affidavit that the trial court likely exercised his discretion in dismissing the suit for want of prosecution because the suit having been filed in 2003, the applicant had not taken any meaningful step towards its prosecution.

The respondents further stated that no good reason had been advanced for the delay in pursuing the intended appeal. Instead of pursuing the appeal, the applicant chose to file an application for review and only sought to appeal against the impugned ruling shortly after the dismissal of the review application.

5 The respondents further stated that the applicant, despite having filed the aforesaid suit became a party to a succession matter as a protestor at Gichugu Principal Magistrate's Court Succession Cause No. 31 of 2011 and it is therefore evident that she is only forum shopping. They urged this Court to dismiss the application.

6 The principles upon which this Court determines an application for extension of time are now well settled. The Court considers, inter alia, the length of the delay; the reasons for the delay; possibly the chances of success of the intended appeal and the degree of prejudice that is likely to be occasioned to the respondent if the application is allowed. In the exercise of his discretion under rule 4 the court's discretion is unfettered. However, the discretion has to be exercised judicially, that is on sound factual and legal basis. See *Njuguna v Magichu & 73 Others* [2003] KLR 507.

7 The impugned ruling was delivered on 25th July 2018 and the notice of appeal was filed and served in time. The applicant applied for certified copies of the proceedings and ruling but does not state when the same were supplied to her. However, the applicant was not keen on pursuing the appeal, instead she preferred to lodge an application for review of the impugned ruling. It is only after dismissal of the review application that the applicant decided to pursue the appeal. In my view, therefore, there has been inordinate delay that has not been properly explained.

8 Regarding the possible chances of success of the intended appeal, the applicant's case had remained unprosecuted for about 15 years. The trial court exercised its discretion in dismissing the suit for want of prosecution. No reason was advanced for the inordinate delay in prosecuting the suit. In the circumstances, it is doubtful whether the intended appeal has any chances of success. I find this application lacking in merit and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

