



**Kamiti v Kirugu & another (Civil Appeal (Application) E470 of 2021)
[2021] KECA 158 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 158 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E470 OF 2021
MA WARSAME, JA
NOVEMBER 19, 2021**

BETWEEN

KURIA KAMITI APPLICANT

AND

MARY WANGARI KIRUGU 1ST RESPONDENT

ANNE WAITHERA 2ND RESPONDENT

(An application for extension of time to file and serve a notice of appeal and record of appeal out of time in an intended appeal from the judgment of the High Court of Kenya at Kiambu (E.N. Maina J.) delivered on 9th March, 2021 in Civil Appeal No. 108 of 2018)

RULING

1. The Notice of Motion dated 13th August 2021 placed before me, is premised on Rule 4 and 42 (1) of this Court's Rules, Article 159(2) of the *Constitution of Kenya, 2010*, Section 1A, 3A and 3B of the *Civil Procedure Act* Cap 21 of the Laws of Kenya for orders;
 - a. That, this Court is pleased to grant leave to extend time limited for filing and serving the Notice and Record of Appeal against the judgement of Hon. E.N. Maina J. in the High Court at Kiambu in Civil Appeal No. 108 of 2018.
 - b. That, there be stay of execution of the whole judgement/orders of the High Court in Civil Appeal No. 108 of 2018 pending the hearing and determination of this application and the intended appeal to this Court.
 - c. That, costs of and incidental to this application do abide the result of the said appeal.



2. An order of stay of execution invoked under Rule 5(2) (b) of this Court must be anchored on a valid Notice of Appeal and such prayers cannot fall for consideration before a single Judge. Hence the prayer for stay is accordingly struck out. (See [*Moroo Polymers Limited v Wilfred Kasyoki Willis \[2019\] eKLR*](#).)
3. What is left for consideration is the motion for extension of time to file the Notice and Record of Appeal against the challenged judgement of the High Court delivered on 9th March 2021. The said judgment dismissed the applicant's appeal against a ruling delivered by the Senior Principal Magistrate's Court in Succession No. 91 of 2009 on the determination on the rights of the 2nd respondent to the estate of Nduati Kamiti and revocation of a confirmed of grant in favour of the 2nd respondent. The High Court upheld the ruling of the trial court and ordered that the confirmation of grant be undertaken in 2 months from the delivery of judgement.
4. Although the applicant being aggrieved by those findings, filed a notice of appeal on 23rd August 2021 within the prescribed time, the applicant's advocates failed to follow up on filing and serving the intended appeal citing failure by a court clerk to follow instructions to file and serve as well as the advocates being indisposed. As a result, the application is brought on the grounds that the appeal is arguable and has overwhelming chances of success, that the delay is not inordinate having been occasioned by the applicant's advocates and a technical glitch at the registry at the High Court in Kiambu, that it is in the interest of justice that the time for filing and serving the record of appeal is extended and finally that the respondents shall not be prejudiced is the application is allowed.
5. I have considered the application along with the arguments made in support thereto and note that the respondents failed to participate in the present application in addition to the absence of proof of service from the record. The sole issue for consideration is whether the explanation given by the applicant is satisfactory and that the mistake was inadvertent to warrant the orders sought.
6. In exercising its discretion under Rule 4, the Court must consider, inter alia, the period of delay, the reasons for the delay, the degree of prejudice to the respondent, and (possibly) the chances of the appeal succeeding. (See *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. NAI. 255 of 1997.*) So long as it does not disentitle an applicant to the discretion of the Court being exercised in its favour, a genuine mistake on the part of counsel may be excused. However, the exercise of the court's discretion which is generally unfettered must be grounded on reason and cannot be exercised on a whim or sympathy. (See *E C N G vs. F N N [2004] eKLR.*) The Court in [*Habo Agencies Limited vs. Wilfred Odhiambo Musingo \[2020\] eKLR*](#) while distinguishing an excusable mistake from plain indolence and dilatoriness, observed that if this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify exercise of discretion, otherwise the exercise of discretion will be perceived as capricious or whimsical.
7. The main purpose of litigation, namely the hearing and determination of disputes should be fostered and not hindered. Granted that, mistakes by an advocate should not be visited on a client, the administration of justice should normally require that the substance of all disputes should be investigated on their merits. Errors and lapses should not necessarily debar a litigant from the pursuit of his rights unless lack of adherence to rules renders the appeal process difficult or inoperative. Whereas the delay of 5 months may not be inordinate, the explanation given to justify the orders for extension of time in my view are not satisfactory bearing in mind the subject confirmation of grant was scheduled for hearing on 15th July 2021.
8. The imperatives of Article 159 of the Constitution and the overriding objective decry undue regard to technicalities. However, it is equally an important principle of the Constitution that justice must be dispensed without undue delay. (See *Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR*)



and *Nicholas Kiptoo arap Korir Salat vs. IEBC & 7 Others [2014] eKLR*) Article 159 is not a panacea in each and every instance of breach of procedure. It avails only in deserving cases. In the result the application is dismissed. Parties shall bear their own costs.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

