



REPUBLIC OF KENYA



KENYA LAW
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**Mulwa & another v Mulwa & another (Civil Application
E482 of 2021) [2021] KECA 186 (KLR) (19 November 2021) (Ruling)**

Neutral citation: [2021] KECA 186 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E482 OF 2021
MA WARSAME, JA
NOVEMBER 19, 2021**

BETWEEN

MICHAEL WAMBUA MULWA 1ST APPLICANT

ANDERSON MUIINDE MULWA 2ND APPLICANT

AND

JACKSON MUISYO MULWA 1ST RESPONDENT

JOHNSON MBENZA MULWA 2ND RESPONDENT

(An application for extension of time to file and serve a notice of appeal from the judgment of the High Court at Machakos (D.K. Kemei, J.) delivered on 30th June, 2021 in HCCA No. 44 of 2020)

RULING

1. I have before me a Notice of Motion dated 20th August, 2021 brought under Article 48 & 159 of the *Constitution of Kenya, 2010*, Section 3A & 3B of the *Appellate Jurisdiction Act* and Rule 4 of this Court's Rules seeking an order granting leave to the applicant to file a notice of appeal and further that the notice of appeal lodged in Court on 2nd August, 2021 is hereby deemed properly on record.
2. The singular ground in support of the motion for extension of time in the affidavit dated 20th August, 2021 is that he delay in filing the notice of appeal on time was as a result of the applicants' inability to raise legal and court fees to lodge the same within the legal timelines.
3. As the exercise of this Court's discretion under Rule 4 is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reasons for the delay, the degree of prejudice to the respondent, and (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties are all relevant but not exhaustive factors. (See *Fakir Mohammed v. Joseph Mugambi & 2 Others (2005)*)



eKLR). However, a party who seeks leave for extension of time bears the burden of laying a basis to the satisfaction of the court. (See *Vishva Stone Suppliers Company Limited v. RSR Stone (2006) Limited (2020) eKLR*.)

4. If this Court is to exercise its discretion in favour of a party, the party is obligated to place before it some material to justify exercise of discretion. Indeed, the exercise of the court's discretion which is generally unfettered must be grounded on reason and cannot be exercised on a whim, caprice, or sympathy. What commends to this Court for consideration is whether financial incapacity is a valid reason for extending time to lodge an appeal.
5. The period between the present application dated 20th August, 2021 and the judgment delivered on 30th June, 2021 intended for appeal is 51 days outside the prescribed timelines of filing an appeal and the reason given for the delay is that since the applicants have experienced serious financial distress after the prevailing effects of the covid-19 pandemic. As a result, the applicants state that he is unable to pay the legal and court fees necessary to lodge the notice of appeal within the stipulated legal timelines.
6. The Court when found in a similar position in *Joseph Maina Njoroge & 2 Others v. Paul Chege Mubabi [2007] eKLR* held that the lack of money or impecuniosity on the part of the applicant has never been accepted as a valid reason for extending time to lodge an appeal since Rule 115 of the Court's Rules allows the exercise of discretion in instances where an appellant satisfied the court by an application that he lacks the means to pay the required fees on deposit security for costs. In view of the foregoing, I am not convinced that the explanation given for the delay meets the threshold for exercising my discretion under Rule 4 in favour of the applicant. In the result, this application is dismissed with no orders as to 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

Signed

DEPUTY REGISTRAR

