



**Githuka v McCRAES Limited (Civil Application 001 of 2021)
[2021] KECA 224 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 224 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 001 OF 2021
KI LAIBUTA, JA
NOVEMBER 5, 2021**

BETWEEN

MBUGUA MUKARA GITHUKA APPLICANT

AND

MCCRAES LIMITED RESPONDENT

(An application for extension of time within which to lodge a notice of appeal and record of appeal out of time, from the Judgment of the High Court of Kenya at Nairobi (H. M. Okwengu, J) delivered on 21st May 2010) in Nairobi High Court Civil Appeal No. 875 of 2003)

RULING

1. In his Notice of Motion dated 11TH February 2021 made under Rules 4 and 82 of the Court of Appeal Rules, the Applicant, Mbugua Mukara Githuka, seeks extension of time pursuant to Rule 4 to file and serve his Notice of Appeal in respect of the intended appeal from the judgment of the Hon. Lady Justice H. M. Okwengu delivered on 21st May 2010 in Nairobi High Court Civil Appeal No. 875 of 2003.
2. The Applicant's Notice of Motion is made on 15 grounds set out on the face of the Motion, and is supported by his unsigned affidavit purportedly sworn on 11th February 2021. I need not recite the grounds on which the application is made, which set out the sequence of events leading to the delay in filing and serving his Notice of Appeal dated 15th October 2010. Apart from the explanations as to the cause of the delay in terms of the grounds disclosed on his Motion and supporting affidavit, there is no evidence on the record before me to suggest that the application has been served. Neither has he supplied any material to persuade the Court that he has an arguable appeal with the possibility of success.



3. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to
- “... extend the time limited by these Rules, or by any decision of the Court or 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 ...,” on such terms as it thinks just.
4. For me to exercise this discretion in his favour, the Applicant must show to the satisfaction of the Court that the application merits the orders sought. He has not. Having examined the record before me, I find that –
- (a) the affidavit filed in support of the applicant’s Motion is not signed and, therefore, the same is fatally defective (see *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli and 2 others [2018] eKLR* para. 6 and 8);
 - (b) the application, which has been made more than 11 years from the date of the impugned judgment, has not been served on the respondent as required under Rule 49(1) of the Court of Appeal Rules;
 - (c) no Memorandum of Appeal has been exhibited to enable me make a finding as to whether the intended appeal is arguable, and the annexed judgment is not certified;
 - (d) there is no evidence before me to suggest that the Notice of Appeal dated 15th October 2010 and filed on 23rd November 2010 has been served on the respondent as required under Rule 77 (1);
 - (e) Despite having been allowed by this Court to appeal as a pauper on 22nd November 2011, it has taken the applicant ten years to approach the Court to express his intention to appeal.
5. Having considered the applicant’s Notice of Motion dated 11th February 2021, the grounds on which it is made, and having taken account of the fatal defect thereof, the foregoing observations, the inordinate delay in approaching this Court, and having found no evidence to suggest that the intended appeal is arguable, I find that the applicant’s Motion is incompetent. The same is hereby dismissed.

DATE AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

