



**Munyororo v Munyororo & 2 others (Civil Application
61 of 2019) [2021] KECA 211 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 211 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 61 OF 2019
W KARANJA, JA
NOVEMBER 5, 2021**

BETWEEN

JOHN MURAGE MUNYORORO APPLICANT

AND

GLADYS WANGARI MUNYORORO 1ST RESPONDENT

LYDIA NYARUAI MUNYORORO 2ND RESPONDENT

MARGARET WANGECHI MUNYORORO 3RD RESPONDENT

(An application for extension of time to file and serve the Record of Appeal arising from the judgment of the High Court of Kenya at Nyeri (T. Matheka, J.) delivered on 23rd October, 2017 in HC Succession Cause No. 65 of 1996)

RULING

1. Before me is an application dated 2nd May, 2019 brought under Rule 4 of the *Court of Appeal Rules* (the Rules), seeking extension of time within which to file and serve a Notice of Appeal and Record of Appeal. The application is supported by the affidavit sworn by the applicant on even date. He deposes that he was one of the protestors in Nyeri High Court Succession Cause number 65 of 1996 in which judgement was delivered on 23rd October, 2017; that being dissatisfied with the judgement he caused a Notice of appeal to be filed on 31st October, 2017 and the same was served upon the respondents on 7th November, 2017; that he also applied for certified copies of proceedings and judgement on 31st October, 2017; that these documents were not ready until 11th January, 2019 and by then, time to file appeal had elapsed.
2. He deposed further that he applied for a certificate of delay which was availed to him on 11th February, 2019; that he was unable to get funds within time so he could not file appeal on time; that it took time to get an extracted decree which was issued on 10th April, 2019; that he has taken a very short time to file this application because there was Easter recess there between; that the delay is not inordinate



and is explainable; that the intended appeal is arguable and that it is in the interest of justice that the application be allowed.

3. The respondents have filed a replying affidavit in opposition to the application. They aver that the judgment which was delivered by the court on 23rd October, 2017 was just and clear on the mode of the distribution of the deceased's parcels of land to his beneficiaries; that as per the said judgement and confirmation of grant all the parties in the Succession cause including the applicant herein got their rightful shares; that the applicant/protestor is a man of means and the reasons given in his supporting affidavit for his failure to file Memorandum of Appeal within time is not true; that the applicant had all the time from the date of judgment which was on 23rd October, 2017 to extract a decree and therefore the reasons given as not doing so because of Easter vacation does not hold any water; they pray that the application be dismissed with costs and parties herein be allowed to enjoy the fruits of their judgment.
4. The applicant has filed submissions in which he expounds the contents of his supporting affidavit. He reiterates that the delay is not inordinate and that the explanation he has given is plausible.
5. He deposes further, that the learned Judge erred in using the wrong principle in distributing the estate of an intestate polygamous man and so he has a good appeal with high chances of success and urges the Court to allow the application.
6. I have considered the application, the rival affidavits, the submissions filed by the applicant and the relevant law. The principles guiding the Court in considering an application for extension of time are well settled. The case of *Leo Sila Mutiso vs Hellen Wangari Mwangi [1999] 2 EA 231* which is the locus classicus in this area, laid down the parameters as follows:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

This position was reiterated in the more recent decision of this Court in Civil Application No. 190 of 2019 where it was *Muringa Company Ltd vs Archdiocese of Nairobi* Registered Trustees explained that:-

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

7. In my view, when it comes to succession matters, may be the courts should have an additional parameter of taking into account the period the Succession Cause has been pending in court. In this matter, the deceased died in 1990 and the parties are still in court with no end in sight. Even as I say so however, I acknowledge a party's right to be heard which is a constitutional imperative.
8. I have considered the application along with the rival affidavits, submissions by the applicant and the relevant law. I will now apply the principles that guide the courts in dealing with applications such as the one before me, to see if this application meets the threshold. There is no doubt that the Notice of



Appeal was filed on time. It is also averred that the letter requesting for the proceedings was sent to the registrar of the court on 31st October, 2017 which is also with the stipulated time.

9. What I do not see in this application is a deposition or evidence to demonstrate that the said letter, which was not even part of this application, was served on the respondents or their counsel on record to bring the applicant within the ambit of the proviso to Rule 82 of the Rules which provides as follows:-

“Rule 82.

Institution of appeals

- (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—
- (a) a memorandum of appeal, in quadruplicate;
 - (b) the record of appeal, in quadruplicate;
 - (c) the prescribed fee; and
 - (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent. (Emphasis ours).
- (3) ...”

10. As can be seen from the above provision, for an intending appellant to seek refuge in the above provision to file a record appeal out of time, it is not sufficient for him/her to flash a certificate of delay to the court. An appellant is enjoined by the proviso to Rule 82 to demonstrate that the letter bespeaking the proceedings was served on the respondent within 30 days of such request. In absence of compliance with the above provision, time is still running against the applicant and the delay he will need to explain is the delay running from October 2017 to date, which is inordinate by any standards and which delay has not been explained. I cannot, therefore, extend time to file the record of appeal because that would be an exercise in futility as the intended appeal would be for striking out *ex debito justitiae*.

11. This application therefore fails and the same is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

