



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: SICHALE, JA IN CHAMBERS]**

**CIVIL APPLICATION NO. 114 OF 2018**

**BETWEEN**

**JOSEPH KINYUA.....1<sup>ST</sup> APPLICANT**

**PASCUALE GITONGA.....2<sup>ND</sup> APPLICANT**

**JOSHUA KALUNGE.....3<sup>RD</sup> APPLICANT**

**AND**

**ROBERT KIMATHI MATI.....RESPONDENT**

*(An application for extension of time to file and serve the record of appeal out of time  
(during the Court’s August Vacation) from the ruling of the High Court of Kenya*

*at Meru (Gikonyo, J) dated 11<sup>th</sup> October, 2017*

**in**

**Meru H.c. Succession Cause No. 417 Of 2013)**

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**RULING**

The applicants, **Joseph Kinyua, Pascuale Gitonga and Joshua Kalunge** filed a motion dated 6<sup>th</sup> **September, 2018** and sought principally for extension of time to file and serve the record of appeal against the ruling of the High Court delivered on **11<sup>th</sup> October, 2017**.

The motion was supported by the affidavit of **Joseph Kinyua** sworn on **6<sup>th</sup> September, 2018** on behalf of himself and on behalf of the other two applicants.

He deponed that whereas his advocate applied for proceedings on **23<sup>rd</sup> October, 2017**, the same became ready on **25<sup>th</sup> April, 2018**; that from mid of **June, 2018**, his counsel could not reach him as during the months of **June and July, 2018**, he was **often** on business trips that took him to Garbatulla, Modogasha and Komorbulla where the safaricom network is poor; that he visited his advocate office on **17<sup>th</sup> August, 2018** after the respondent encroached on their portions of land. Counsel for the applicant indicated that the application was served upon the respondent’s counsel namely, **Ayub Anampiu & Co. Advocates** on **27<sup>th</sup> October, 2018**. However, there is no replying affidavit on record sworn by the respondent.

Be that as it may, I have considered the motion, the supporting affidavit and the law in absence of counsel, as agreed due to the circumstances caused by the Covid 19 pandemic. The applicant’s motion, is *inter alia*, predicated on Rule 4 of this Court’s Rules which provides:

*“The Court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.*

Rule 4 of this Courts Rules, do not however, provide for factors for consideration in an application for enlargement of time. However, this Court in a plethora of decisions has devised appropriate principles to be applied in achieving a “just” decision befitting each particular case. In *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2EA 331 – it was stated:

*“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.”*

The above matters for consideration by a single Judge are both discretionary and non-exhaustive as was explained in the case of *Fakir Mohammed vs. Joseph Mugambi & 2 others* (2005) eKLR where it was held that:

*“the exercise of this Court’s discretion under Rule 4 has followed a well beaten path .... As it 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 reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors”*

The applicant’s counsel applied for proceedings of the High Court which proceedings were supplied 177 days later on 25th **April, 2018** and a certificate of delay issued on **11<sup>th</sup> June, 2018**. However, no action followed thereafter until the filing of the instant application. The 1<sup>st</sup> applicant explains that between the period of **June and July, 2018**, he was in far flung areas where Safaricom network is poor and hence he could not be reached on phone. There is however no supporting evidence that the applicant was away on business trips in those far flung areas. When did he travel to Gabatulla, Modogasha and /or Komarulla? Suffice to state that these were merely allegations that were not substantiated. The applicants seem to have been woken up from their deep slumber when the respondent attempted to take possession of the suit lands.

As we have often stated, the grant of an order (or otherwise) of enlargement is discretionary. However, this discretion is to be exercised judiciously and not whimsically.

I am not satisfied that a reasonable explanation has been given for the delay.

The motion is dismissed with costs.

**Dated and Delivered at Nairobi on this 7<sup>th</sup> Day of August, 2020.**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**