



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO. 35 OF 2013**

**BETWEEN**

**JOHN NGARI..... 1<sup>ST</sup> APPELLANT**

**JOSEPH NJERU IRERI.....2<sup>ND</sup> APPELLANT**

**CHRISTIANO NJIRU.....3<sup>RD</sup> APPELLANT**

**NJIRU MBECA.....4<sup>TH</sup> APPELLANT**

**AND**

**NDATHI MBITI.....RESPONDENT**

*An application to appeal out of time from the Ruling of the High Court of Kenya*

*at Embu (Muchelule, J.) dated 1<sup>st</sup> February, 2012*

*in*

***H. C. C. No. 79 of 2005)***

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**RULING**

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time to file the record of appeal, from the ruling and order of the High Court of Kenya (Muchelule, J.) dated 28<sup>th</sup> February, 2012. The application is supported by the affidavit of John Ngari sworn 3<sup>rd</sup> December, 2013.

The ruling in the case before the High Court was delivered on 28<sup>th</sup> February 2012, although the application erroneously states the same to have been delivered on 1<sup>st</sup> February, 2012. The notice of appeal was filed on time on 5<sup>th</sup> March, 2012. However, thereafter, both the applicant and his counsel went to slumber. The record of appeal should have been filed within sixty (60) days of the filing of the Notice of Appeal. The applicant says that the copies of the proceedings were delivered to his counsel on 10<sup>th</sup> September, 2013. However, there is no proof of this.

The applicant has not exhibited a certificate of delay, and there is no way of knowing whether the delay upto 10<sup>th</sup> September 2013, was indeed attributable to the court registry. In any event, this application was filed on 4<sup>th</sup> December 2013, almost three months thereafter, and the reason for delay is explained as follows in the supporting affidavit:

***“Paragraph 7: That due to pressure of work, my counsel lost track of the file and it was inadvertently filed away by the court clerk who was not aware of the fact that the record of appeal was yet to be prepared.***

***Paragraph 8: That it only came to his attention that we had not prepared the record of appeal when he was preparing his yearly schedule and thus prompting the instant application before this court”.***

Having considered the application and the deposition in support of the same, and having heard counsel, I am of the view that the delay in bringing this application is inordinate given that there is no certificate of delay, and that the delay is otherwise not explained satisfactorily, and where it is explained as in paragraphs 7 and 8 of the supporting affidavit, the explanation is lame, unreasonable, and unacceptable.

**Rule 4** of the Rules of this Court gives me unfettered discretion whether to extend time or not. However, that discretion has to be exercised judiciously, and in accordance with the principles set out in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi – Civil Application No. NAI. 251 of 1997** where this Court stated:

***“It is now 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.”***

I have taken into account all the factors indicated above, and am of the view that this application has no merit, and I disallow the same. I make no orders as to costs as the respondent's counsel, though served, did not appear before me.

**Dated and delivered at Nyeri this 31<sup>st</sup> day of March, 2014.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**