



**IN THE COURT OF APPEAL  
AT ELDORET  
(CORAM: ONYANGO OTIENO, J.A. (IN CHAMBERS))  
CIVIL APPLICATION NO. NAI. 275 OF 2010  
BETWEEN**

HENRY GATURA .....1<sup>ST</sup> APPLICANT  
SAMUEL NJOROGE .....2<sup>ND</sup> APPLICANT  
PETER WAICHUNGO .....3<sup>RD</sup> APPLICANT  
ROFASI MUSASULA .....4<sup>TH</sup> APPLICANT

AND

CHARLES OGINA .....1<sup>ST</sup> RESPONDENT  
JOSEPH KIMANI KIARIE .....2<sup>ND</sup> RESPONDENT  
ALFRED W. MOCHO .....3<sup>RD</sup> RESPONDENT  
DANIEL MATHENGE NGUGI .....4<sup>TH</sup> RESPONDENT  
ZIPORA WANJA MATHENGE .....5<sup>TH</sup> RESPONDENT

*(Application for extension of time within which to lodge notice of appeal out of time and to lodge record of appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Eldoret (Mwilu, J.) dated 27<sup>th</sup> October, 2010*

in

H.C.C.C. NO. 291 OF 2000)

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**R U L I N G**

I have before me an application dated 23<sup>rd</sup> November 2010 in which the applicants are seeking orders:-

**“1. That the Honourable Court be pleased to extend time within which the applicants will lodge notice of appeal against the ruling made on 27<sup>th</sup> October 2010, and the Court do give the applicants time frame within which to lodge their notice of appeal.**

**2. Costs of the application be provided for.”**

The grounds in support of the application are as follows:-

**“(a) That the time within which the applicants were to file their notice of appeal lapsed on 10.11.2010.**

**(b) That said ruling was delivered in the absence of the applicants.**

**(c) That the applicants became aware of the ruling dated 27<sup>th</sup> October 2010 on 11.11.2010.**

**(d) That failure to lodge the notice of appeal within the prescribed period was due to the fact that the applicants learnt of the ruling on 11.11.2010.**

**(e) That it is for the interest of justice and fairness that the time within which to file the notice of appeal be extended.”**

There are two affidavits in support of these grounds, one sworn by Henry Gatura and another sworn by RofasiMusasula, the first and the last applicants respectively.

The respondents have not filed any replying affidavit though served with the notice of motion and record also shows that their firm of advocates were served with their hearing notice on 28<sup>th</sup> January 2011. Be that as it may, their learned counsel, Mr. Chepkwony, opposes the application on grounds that it was filed too late in time as according to him the applicants’ counsel was served with the notice of the date of ruling that was delivered on 27<sup>th</sup> October 2010 and were thus aware of the date of that ruling.

The notice of motion is brought pursuant to **rule 4** of the Court of Appeal Rules. The law is now well settled, that though the Court has discretion in such an application but that discretion must be exercised upon reasons and not on the whims of the Court nor capriciously. The guidelines that would help the Court in the exercise of such discretion are that the Court needs to know the period of delay; the applicant needs to offer explanation for such delay; the Court needs to see if the applicants’ intended appeal is arguable (but without delving into the main appeal itself), the Court needs to consider whether granting of the application will result into prejudice to the other party. These guidelines are inexhaustive.

In this case the simple facts before me are that ruling the applicants intend to appeal from was delivered on 27<sup>th</sup> October 2010. It was delivered in the absence of the applicants. Mr. Chepkwony says from the bar that the respondents’ advocates had notice of the date of its delivery but as that is not deponed to in any affidavit, I cannot treat it as evidence for it is not in law of any evidential value. The applicants came to know of the ruling on 11<sup>th</sup> November 2010, one day after the 14 days provided for lodging notice of appeal had expired. They then filed this notice of motion on 23<sup>rd</sup> November 2010, twelve days after they knew of the date of the ruling. That was within the fourteen days they would have filed the notice if the ruling had been made on the date they heard of the date of ruling. In short, explanation is given and I cannot fault it. There is no tangible challenge in law to that explanation. I do not have anything to indicate to me that the appeal is arguable neither do I have anything to indicate that if I grant this application, the respondents would be prejudiced as Mr. Chepkwony has not addressed me on that aspect.

The above, considered, I do hold that this is a good case for the exercise of my discretion in favour of the applicants. I do so, with the result that the application succeeds. The time for filing notice of appeal is extended and the notice of appeal may be filed within fourteen days from the date hereof. Costs in the intended appeal. Orders accordingly.

***Made and dated at Eldoret this 14<sup>th</sup> day of February, 2011.***

**J. W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**