



**IN THE COURT OF APPEAL  
AT NYERI**

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

**CIVIL APPLICATION NO. NAI 55 OF 2011**

**BETWEEN**

**JOSEPH KAROBIA GICHERU ..... APPLICANT**

**AND**

**MICHAEL GACHOKI GICHERU ..... RESPONDENT**

**(An application for extension to file record of appeal out of time from the judgment of the High Court of Kenya at Nyeri (Kasango, J) dated 29<sup>th</sup> April, 2008**

**in**

**HCCA NO. 96 OF 1999)**

**\*\*\*\*\***

**RULING**

The application dated 18<sup>th</sup> February, 2011 and filed on 23<sup>rd</sup> February, 2011, seeks an order of extension of time for the applicant to file and serve a record of appeal out of time. It is based on the grounds of appeal in the body of application and the applicant's supporting affidavit sworn on 18<sup>th</sup> February, 2011. The applicant was represented by A N Nganga, but the respondent appeared in person.

In opposition, the applicant relies on the affidavit sworn on 16<sup>th</sup> May and filed on 16<sup>th</sup> May, 2011.

Mr Nganga concedes that after the judgment of the court on 29<sup>th</sup> April, 2008, the firm then acting for the applicant did file a the Notice of Appeal within the stipulated period but failed to apply for proceedings within the stipulated time. After his firm was engaged on 26<sup>th</sup> September, 2009, Mr Ng'ang'a submitted that the time for filing the record, namely the 60 days had already expired and his firm then concentrated on seeking an order for stay hence the delay because the application for stay was heard on 25<sup>th</sup> May, 2010 and ruling given on 24<sup>th</sup> June, 2010, when the Court of Appeal gave an order of stay preserving the status quo.

Mr Nganga also submitted that his firm applied for proceedings on 1<sup>st</sup> July, 2010, which were certified ad collected on 25<sup>th</sup> November, 2010, and that his firm subsequently prepared a record of appeal and that the applicant had good chances of success in the intended appeal. Finally, Mr Nganga submitted that no prejudice is likely to be suffered by the respondent because he does not stay in disputed land and although he concedes that there was delay, it was largely occasioned by the previous firm. He further invited the

Court to note the effect of its own ruling on 24<sup>th</sup> June, 2010, is to effect anticipate the filing of an appeal.

On his part, Mr Michael Gachoki Gicheru, opposed the application principally on the ground that the applicant was in the circumstances guilty of inordinate delay in taking the necessary steps to file an appeal and that he was of the view that the delay is due to the fact that the applicant is in possession of the disputed land and also collects and derives income from the coffee grown in the land.

He further contended that although the applicants counsel was appointed on 26<sup>th</sup> September, 2009, he did not apply for proceedings for almost 10 months, and this delay has not been explained.

The factors which govern **rule 4** applications were well set out in the case of **MUTISO VS MWANGI, 1997 KLR 630 (CAK)**, where it was held:

*“It is now settled that the decision whether or not 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 of the delay, thirdly (possible) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if application is granted.”*

In the matter before me, I agree with the respondent that the overall delay has been occasioned by the two firms in that no application for proceedings was made as stipulated within thirty (30) days and following the appointment of the new firm by the applicant, a delay of nearly ten (10) months could still not be satisfactorily explained.

If the above issues were the only ones which merit a determination, my instructions would have been to reject the application to extend time for failure to adhere to the principles enunciated in the Mutiso case. However, due to this Court’s ruling of 24<sup>th</sup> June, 2010, which ruling anticipates an appeal, I consider that the court’s ruling by a three judge bench should be respected and could not have been rendered in vain. The effect of not allowing this application would be to negate a full Court ruling. I note that the ruling was made in a stay application brought before this application for extension of time was heard.

For this reason and pursuant to the letter and spirit of the overriding objection, I would allow the application for extension of time and order that the applicant files and serves a record of appeal within fourteen (14) days.

In the circumstances, I award the costs to the respondent in any event.

It is so ordered.

**Dated and delivered at Nyeri this 8th day of July, 2011.**

**J. G. NYAMU**

-----  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**