



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**CIVIL APPLIC 60 OF 2006**

**KAMAU MUGWIMA ..... APPLICANT**

**AND**

**NGÁNGÁ NJOROGE .....1<sup>ST</sup> RESPONDENT**

**NGUGI NJOROGE .....2<sup>ND</sup> RESPONDENT**

**KARIUKI NJOROGE .....3<sup>RD</sup> RESPONDENT**

**NJENGA NJOROGE .....4<sup>TH</sup> RESPONDENT**

***(Application for extension of time to file a Notice of appeal and record of appeal out time in an intended appeal from a ruling of the High Court of Kenya at Nairobi (Martha Koome, J.) dated 21<sup>st</sup> January, 2005 in SUCCESSION CAUSE NO. 263 OF 1992)***

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**RULING**

This is an application by ***Kamau Mugwima*** for extension of time to file a Notice of Appeal and the Record of Appeal in an intended appeal from the ruling of the High Court at Nairobi (Martha Koome J.) dated 21<sup>st</sup> January, 2005. The application was by Notice of Motion dated 2<sup>nd</sup> March, 2006 and lodged on 3<sup>rd</sup> March, 2006.

At the hearing of the application on 20<sup>th</sup> February, 2007 the applicant was represented by Mrs. Kingoo-Wanjai and there was no appearance for the respondents to the application being Ngángá Njoroge, Ngugi Njoroge, Kariuki Njoroge and Njenga Njoroge despite their advocates Wanjau & Wanjau having been duly served with notice of hearing date of the application.

The length of the delay sought to be excused in respect of the Notice of Appeal is from 14 days after 21<sup>st</sup> January, 2005 when the ruling was delivered to the 3<sup>rd</sup> March, 2006 when the current application for extension of time was lodged which I calculate to be approximately 392 days. The applicant is not able to rely on the proviso to ***rule 81*** of the Court of Appeal Rules (thereinafter "***the Rules***") in respect of the extension to lodge the memorandum and record of appeal since ***rule 81 (2)*** was not complied with.

The reasons for the delay were stated on grounds set out in the Notice of Motion at paragraphs 5 and 6 to be:-

**“5. The applicant could not immediately afford the services of an advocate and the applicant took to (sic) account incorrect directions on the period within which to apply for proceedings and judgment.**

**6. The applicant being an old man aged about 88 years loses (sic) count of time and events and that also explains the delay in filing the Notice of Appeal and Record of Appeal in time.”**

The applicant made an affidavit in support of the application in which he, inter alia, deponed that:-

**“3. THAT being aggrieved by the whole of the said ruling I lodged in person a Notice of Appeal in this Honourable Court on 28<sup>th</sup> February, 2005 honestly believing that I had 60 days from the date of the ruling to file a Notice of Appeal.”**

**4. THAT I was also made to believe that I could apply for proceedings in Succession Cause Number 203 of 1992 any time after filing a Notice of Appeal and I therefore applied for proceedings and judgment out of time.**

**5. THAT though I am told that ignorance of the law is not a defence I urge this Honourable Court to consider my age which is well over 88 years and allow me to lodge a fresh Notice of Appeal and file a Record of Appeal out of time.**

**6. THAT I could not immediately after the delivery of the said ruling afford the services of an advocate due to my ill health and that is the reason why I filed the said Notice of Appeal in person and ended up acting on wrong and incorrect information.**

**7. THAT I applied to be supplied with certified copies of the proceedings and ruling of the Hon. Justice Martha Koome vide a letter dated 28<sup>th</sup> February, 2005 for the purposes of filing a record of appeal and to date I have not been supplied with the said proceedings and judgment.**

**8. THAT I am advised by my advocates on record which advice I believe to be true that the intended appeal has high chances of success (see annexure marked “KMS” a draft Memorandum of Appeal.**

**9. THAT what is deponed herein is true to the best of my knowledge, information and belief.”**

The affidavit by the applicant is clearly deficient in several instances in giving the source of much of the information upon which it is based; see particularly paragraphs 3, 4 and 6 of the supporting affidavit.

In other circumstances, I would ignore these paragraphs of the affidavit but given the considerable age of the applicant and the nature of this application I would accept that he was either misinformed as to the rules applicable or simply not aware of them.

In the exercise of my unfettered discretion under **rule 4** of the Rules I will approach my decision on this application on the basis that the applicant was genuinely mistaken as to the time limits involved in appealing against the decision of the Judge.

The next issue that is for possible consideration in application of this nature is whether the intended appeal can be said, prima facie, to be arguable. In this respect I have listened carefully to the submissions made by Mrs. Kingóo Wanjai for the applicant as to the arguability of the submission that the learned Judge was in error in her ruling in respect of the issues outlined in paragraphs 4, 5, and 6 of the draft Memorandum of Appeal.

In my view this is not a case in which there are clearly no issues that can be categorised as arguable.

Having taken all of the above into consideration including the length of the delay, the reasons for the delay, the prima facie arguability of some of the issues intended to be raised on appeal and the lack of substantial prejudice to the respondents in allowing the intended appeal to proceed, I have come to the

conclusion that this is a proper case for granting the application for extension of time.

I hereby order:-

1. *That a fresh Notice of Appeal may be lodged within seven days of the delivery of this ruling.*
2. *That the fresh Notice of Appeal be served on the first, second, third and fourth respondents within seven days of the lodging of the fresh notices of appeal.*
3. *That the time for instituting the appeal in accordance with rule 81 of the Rules be extended to expire within 60 days of the date when the fresh Notice of Appeal is lodged.*
4. *The costs of this application shall be in the appeal.*

***Dated and delivered at Nairobi this 9<sup>th</sup> day of March, 2007.***

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**