



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**Civil Appli 316 of 2006**

JOSEPH MAINA NJOROGE ..... 1<sup>ST</sup> APPLICANT

MOSES IRUNGU ISAAK ..... 2<sup>ND</sup> APPLICANT

STEPHEN MWANGI NJOROGE ..... 3<sup>RD</sup> APPLICANT

AND

PAUL CHEGE MUHAHI ..... RESPONDENT

*(Application for extension of time to file and serve Record of Appeal from an order of the High Court of Kenya Nyeri (Khamoni, J.) dated 18<sup>th</sup> November, 2004 in H.C.MISC. APPLN. NO. 15 OF 1996)*

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**R U L I N G**

I have before me an application by way of Notice of Motion dated 13<sup>th</sup> November, 2006 brought under Rule 4 of the Court of Appeal Rules, by three applicants namely, *Joseph Maina Njoroge*, *Moses Irungu Isaak* and *Stephen Mwangi Njoroge*. It is seeking that the applicants be granted leave to file their appeal out of time on the grounds that:-

“1. *The applicants were in dire financial strains for over two years and were thus unable to raise fees for filing their appeal on time.*

2. *The applicants have an arguable appeal.*”

There is an affidavit in support of the application which does not show the date on which it was sworn but it was sworn by **Stephen Mwangi Njoroge**, the third applicant. The only reason given for the failure to file record of appeal within the time required by this Court’s Rules is at *paragraphs 3, 4, 5 and 6* of the same affidavit. Those paragraphs state:-

“3. *That even as at the time the said Summons came up for hearing before the superior court we were yet to raise enough funds to pay M/s J.N. Muthia Advocates and we had to prosecute the application ourselves in person.*

4. *That on 26<sup>th</sup> November 2004 we instructed M/s Muthui Kimani Advocate to file a notice of appeal against the ruling of the superior court as we organized to raise funds for filing the substantive appeal.*

5. *That it is only on November (sic) this year that we managed to raise sufficient funds to meet the costs of filing our appeal.*

**6. That we are not very educated and could not have managed to file an appeal in person and no one was willing to give us advise in person without demanding for money which we could not raise.”**

In short, the main and only reason for seeking delay in filing the intended appeal in time is that the applicants, jointly and severally were financially unable to raise the money required for an advocate to represent them in filing and prosecuting the intended appeal. Incidentally, although on the face of the application, it is stated that the intended appeal is against the Ruling and Orders of Honourable Justice Khamoni dated 18<sup>th</sup> November, 2004, that cannot be so, as on 18<sup>th</sup> November, 2004, the record shows that the superior court delivered a judgment and not a ruling – at least that is what is annexed in the record.

The respondent, **Paul Chege Muhahi**, opposes the application and has filed Replying Affidavit sworn and filed on 10<sup>th</sup> May 2007 in which he states that the application is incompetent in that the affidavit in support is defective in that the date on which it was sworn is not indicated; the Notice of Appeal has not been filed; the decree against which the intended appeal is proposed is not annexed to the record; draft Memorandum of Appeal is not annexed; the grounds before the superior court for revocation of the grant are not the ones outlined under **Section 76** of the Succession Act; the delay which is of about two years is inordinate and no sufficient reasons have been advanced for the same delay; that the reason of financial constraints cannot be available to the applicants as **rule 112** of this Courts rules provides an avenue for such a situation and lastly, that the firm of Muthui Kimani & Co. Advocates, is not properly on record for the applicants.

Both learned Counsel for applicants and respondents, Mr. Muthui Kimani and Miss Mwangi respectively, addressed me at length on the application and I have considered their respective submissions as well as the affidavits, the record and the authorities to which I was referred by Miss Mwangi.

The law as to the principles to be considered in respect of an application such as this brought under **rule 4** of this Court’s rules is now well settled. The powers of the Court are discretionary but like all such discretionary powers, the same must be exercised judicially and not capriciously. It must be exercised upon reasons and not at the whims of the Court. In exercising such powers, the principles guiding the Court and which need to be considered are first the delay, secondly the reason for the delay or the explanation for the delay, thirdly, whether the intended appeal is arguable (*without holding a mini-appeal*), fourthly the prejudice to the respondent should the application be allowed.

In this matter before me, judgment against which the applicants intend to appeal was delivered on 18<sup>th</sup> November, 2004. The applicants filed Notice of Appeal dated 26<sup>th</sup> November, 2004 on 8<sup>th</sup> December, 2004. Apparently, the respondent was not served with that Notice of Appeal hence his allegation that the applicant did not file Notice of Appeal. That allegation is erroneous whatever the reasons were for it. Be that as it may, the applicants had sixty days from 8<sup>th</sup> December, 2004 to file record of appeal. As on 13<sup>th</sup> November, 2006, when this application was filed, Record of appeal had not been filed. Delay period was almost one year, eleven months. That is the period the applicants had to explain. Their explanation is that for all that period they had no money to hire an advocate to file this appeal. I get this from **paragraph 6** of the affidavit in support of the application, which as I have reproduced herein, states that the applicants are not very educated and could not have managed to file their appeal in person and no one was willing to give them advise in person without demanding for money which they could not raise.

In the case of **FRANCIS MWAI KARANI VS. ROBERT MWAI KARANI**, Civil Application No. NAI. 246 of 2006, Omolo, J.A. in his ruling delivered on 11<sup>th</sup> May, 2007 in a similar matter addressed himself at the very beginning of his ruling thus:-

**“I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new principle different from the well known one that lack of financial resources is generally not a basis for extending time.”**

In that case, because of the peculiar nature of it which was that there the applicant took all steps necessary for lodging the intended appeal including filing Notice of Appeal in time, and filing application for extension only one day after the expiry of the date he was required to file the appeal, and swearing an affidavit one day before the expiry date in which he stated that date of filing the appeal was approaching expiry and he was still actively trying to raise money for the appeal, the application was allowed on the peculiar circumstances of the case which clearly showed that the applicant never slept on his urge to proceed with the appeal.

In this case, the applicants hired a firm of advocates. **Paragraph 4** of their affidavit clearly states that on 26<sup>th</sup> November, 2004, they instructed Muthui Kimani, Advocates to file notice of appeal, and that was done. Thereafter, there is no evidence as to what they or their advocate did in furtherance of their urge to proceed with the appeal till one year and eleven months later. There is no evidence that they applied for proceedings and obtained the same. There is no evidence that they made any attempt to seek funds for the appeal or that failing the same, they filed the appeal in person. **Rule 112** of this Courts Rules is very clear. It provides precisely for a situation such as the applicants alleged they found themselves in. It provides for relief from fees and security in civil appeals and allows any person seeking to appeal in a civil matter to this Court from the decision of superior court who lacks means to pay the required fees or to deposit the security for costs to apply to the court to lodge the same appeal without payment of such fees and security. That explains why *Omolo JA* stated categorically in the case of **Francis Mwai Karani vs. Robert Mwai Karani** (supra) that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of **Rule 112** of this Courts Rules. I do not accept the applicants explanation for delay of one year eleven months in filing the appeal on this matter. I reject it.

Is the intended appeal arguable? How can I tell? There is only a copy of the judgment annexed to the record before me. No proceedings were annexed, no draft memorandum of appeal was annexed, and Mr. Kimani has not made any attempt in his submission to persuade me that there are arguable grounds, in support of the intended appeal. Lastly, I was not addressed by both Counsel on the question of prejudice to the respondent if the application is allowed but it appears to me that to allow the applicants to bring up a matter in respect of revocation of Grant three years after the judgment was pronounced without any compelling reasons would be prejudicial to the respondent.

In the result, I have no proper reasons before me for the exercise of my discretionary powers in favour of the applicants. That being the case, this application is for dismissal. It is dismissed with costs to the respondent.

**Orders accordingly.**

**Dated and delivered at NYERI this 15<sup>th</sup> day of May, 2007.**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**