



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

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

**Civil Application Nai 163 of 2005**

**BETWEEN**

**1. BEATRICE WAMBUI KIGONDU**

**2. JANE WAIRIMU MUGURO**

**3. EDITH NYAKIEGA**

**4. JOHN KAMAU**

**5. ISAACK WAMBUGU ..... APPLICANTS**

**AND**

**BEATRICE MUTHONI THUMBI ..... RESPONDENT**

**(An application for extension of time to file and serve Notice of Appeal and Record of Appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Githinji J) dated 3rd July, 2002**

**in**

**H.C.SUCC.CAUSE NO. 780 OF 1992)**

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**RULING**

This is an application to file an extension of time to file a Notice of Appeal and a Record of Appeal out of time. The applicants are Beatrice Wambui Kigondu, Jane Wairimu Muguro, Edith Nyakiega, John Kamau and Isaac Wambugu. The Respondent is Beatrice Muthoni Thumbi. It arises from a succession case in which the judgement intended to be appealed against was given by Githinji J. as he then was on 3rd July 2002. The Notice of Appeal was timeously filed on 5th July 2002 and served on 9th July 2002. The letter bespeaking the delivery of the copy of the proceedings addressed to the Deputy Registrar of the High Court was dated 4th July 2002 and a copy of that letter was served on the respondent's Advocates on the same day.

Copies of the Ruling and copies of the proceedings were supplied on the 11th October 2002 and on 15th October 2002 the Certificate of Delay was issued certifying 99 days from 5th July to 11th October

2002. The Memorandum and Record of Appeal were lodged on 13th November 2002. Up to this point the applicant appears on the face of it to have complied with all the time limits for lodging an appeal in commendably diligent fashion.

The applicants' problems began some 2 years later when their Appeal was struck out on 8th February 2005 being the day the Appeal came on for hearing. According to the affidavit in support of the Motion sworn by the applicants' advocate **Mr. Mwihi**, this happened due to there being clerical errors in the Orders and Confirmation of Grant appealed against which errors were claimed by Mr. Mwihi to be not the fault of the applicants but were the fault of the Court registry when typing the documents.

On 18th February 2005, ten days after the strike out of the Appeal, the applicants filed an application (hereinafter "the first application") for extension of time but this application was withdrawn at the request of **Mr. Mwihi** on 17th May 2005 being the day when it came up for hearing before myself. The reason for the withdrawal was the objection by **Mr. Machira**, the learned advocate for the respondent to the application, on the ground that the application only sought an extension of time to file the record of appeal and did not seek any extension of time to file a fresh Notice of Appeal which, consequent upon the striking out of the Appeal, no longer led "an independent life of its own" after the strike out of the Appeal as held by this Court (Omolo J.A.) in *Civil Application No. Nai 397 of 1996 Kinuthia v. Mwangi*. Mr. Machira had also relied upon Rule 82 (a) of the Rules of this Court to the effect that in the circumstances the Notice of Appeal had been deemed to have been withdrawn.

**Mr. Machira** argued that the first application for extension should be dismissed but, in my ruling dated 19th May 2005, I allowed it to be withdrawn as I considered this to be in the interests of justice in the circumstances.

Four weeks later on 15th June 2005 the second application for extension of time for filing both the Notice of Appeal and the Record of Appeal was filed which is now before me. This was just under four weeks after the withdrawal of the first application.

The period of delay sought to be excused was made up of a number of segments.

The first was between 8th February 2005 when the appeal was struck out and the filing of the first application on 18th February 2005 which was ten days. I would not regard that as inordinate in the circumstances.

The second segment was from 19th May 2005, when the first application was withdrawn, to 15th June 2005 when the second application was filed. This is a period of approximately **four weeks**. This is a long time within which to perform a fairly simple task although there may have been need to explain the position to, and get instructions from, the client. The additional reason for this delay was stated to be the necessity to file an application in the superior court to rectify the confirmation of grant and the formal order. This was filed on 26th May 2005 and it appears that the Order was amended on 6th June 2005 and the certificate of Confirmation of Grant was re-rectified on 6th June 2005. It is not clear why this application to the superior court was not filed much sooner after the striking out of the Appeal on 18th February 2005.

**Mr Machira**, in his submissions before me, objected strongly to the manner in which **Mr. Mwihi** presented the applicant's case maintaining that he was misleading the court in claiming that the errors in the Certificate of Confirmation and the formal order were all the fault of the court registry. Mr Machira maintained that, on the contrary, those errors were the consequence of Mr. Mwihi having failed to act in accordance with Order XX rule 7 of the Civil Procedure Code. Mr. Mwihi had not sent drafts of the Certificate of Grant and Orders to **Mr. Machira** for approval which was a mandatory requirement. Had he done so the errors would not have been made. **Mr. Machira** claimed that it was misleading for **Mr. Mwihi** deliberately to conceal this from this court on the hearing of the application. The applicants, relying as they were on the court to exercise a discretionary remedy, had not come before the court with clean hands. **Mr. Machira** submitted that it was his firm which had moved the High Court by summons to rectify the Grant and that **Mr. Mwihi** consented to this application before Mr. Justice Kubo who made

the necessary orders on 27th October 2004.

**Mr. Machira's** contention has considerable force. I need to weigh up these submissions which go to showing considerable errors by the Advocate for the applicants against the consideration as to whether the lay clients should themselves suffer from these mistakes by their advocate.

**Mr. Machira** further submitted that I should take into consideration the prejudice that will be suffered by the respondent if the extension sought were to be granted. He emphasised that the deceased died in 1992 some 13 years ago and the ruling intended to be appealed against was delivered 4 years ago. Despite having succeeded in the High Court and in the Court of Appeal when the appeal was struck out, she is likely to remain in agonizing uncertainty for another 5 or 6 years before the appeal will be heard and determined if an extension is granted. The intended appeal is seeking to disturb the status quo which has prevailed for the last 13 years in which she has been living in the matrimonial home.

**Mr. Machira** further submitted that the intended appeal is hopelessly unarguable to which **Mr. Mwihia** offered counter arguments as a result of which I am not prepared to find that there are no arguable issues. This however is by no means conclusive in applications of this sort.

I am also aware that the fact that the underlying dispute relates to succession to family land which is always a sensitive issue. This however does not mean that in every dispute involving such land extensions of time must always be granted. My final decision is reached after having weighed up all of the above factors in the exercise of my discretion under Rule 4 of the Rules which, I am very aware, although unfettered, must not be exercised capriciously but, on the contrary, must be exercised judicially.

My decision is that the application for extension should be dismissed with costs and I hereby so order.

**Dated and delivered at Nairobi this 9th day of December, 2005.**

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**