



**REPUBLIC OF KIENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CIVIL APPLICATION NO. NAI 168 OF 1997**

**BETWEEN**

**JOYCE MUTHONI NJAGI**

**(SUING AS  
ADMINISTRATRIX OF  
THE  
ESTATE**

**OF NJAGI KABITHA,  
DECEASED) .....**  
**.....**  
**APPLICANT**

**VERSUS**

**1. ELIZABETH M.  
NYAGA)**

**2. SOLOMON K.  
NJAGI .....**  
**.....**  
**RESPONDENTS**

**(Being an application for leave to appeal out of time from the judgment of the**

**High Court at Nairobi (Mr. Justice Tank) dated 25th February, 1991**

**in**

**H.C.C.C NO. 2370 OF 1990**

**CONSOLIDATED WITH HCCC NO.218 OF 1995 (O.S)**

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**RULING**

This is an application by way of Notice of Motion brought under Rules 4 and 81 of the Court of Appeal Rules. The orders sought in this Notice of Motion are as follows:-

"1. THIS Honourable Court do extend the time for filing an intended appeal and the applicants be allowed to file the appeal out of time and/or within such extended time as the Honourable Court will direct.

2. COSTS of this application be in the Appeal Cause".

This is an application with unhappy history. The judgment of the Superior Court was delivered way back in 1991 when a notice of appeal was filed. Mr. Khamati who is now appearing for the applicant came on record on 21st February, 1995, when he immediately applied for stay of execution which was granted on 5th May, 1995. Thereafter Mr. Khamati applied for certified copies of proceedings and the decree. There was the usual delay and indeed a certificate of delay was issued. It was Mr. Khamati's contention that the intended appeal had good chances of succeeding. He went on to explain that the applicant was an illiterate peasant from Kirinyaga and that the delay can only be blamed on her lawyer.

Mr. Ndege for respondents opposed the application on the ground that there has been no explanation for the delay. He pointed out that they applied for copies of proceedings four years after judgment. In Mr. Ndege's view, it would be unjust to allow this application.

In an application of this nature, this Court is being asked to exercise its unfettered discretion. It is upon the applicant to explain to the satisfaction of the court that this discretion should be exercised in her favour. We have indeed a long delay. This Court would expect clear explanation as to why the applicant did not take appropriate steps within the time stipulated by the rules of this Court.

As Lakha JA said in *Peter Maina Munyua v. Damaris Njoroge - Civil Application No. NAI 210 of 1999* (unreported). "When there is no explanation there can be no indulgence".

And in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi - Civil Application No. NAI.255 of 1997* (unreported) this Court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal stated inter alia:-

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also 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 for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and, fourthly the degree of prejudice to the respondent if the application is granted".

In the present application there is indeed a very long delay. The reason for the delay was that the applicant who is an illiterate peasant from Kirinyaga was abandoned by her previous lawyer until Mr. Khamati appeared on the scene and then injected some life into this matter. The dispute herein relates to land which is certainly dear to this illiterate peasant of Kirinyaga. In Mr. Khamati's view the intended appeal has a high chances of succeeding. What prejudice would be caused to the respondents? It would appear that after stay of execution was granted, the respondents have remained on the land without any disturbance. There would be no prejudice only that the respondents would indeed wish to see the end of this litigation.

This Court sympathises with the applicant's predicament. She left everything in the hands of her lawyers. The lawyers let her down. She is not to blame for the long delay and all other acts that have contributed to the present problem. I have considered the fact that the applicant is not to blame for the delay and the fact that this is a sensitive land dispute and hence the applicant should not be shut out from exercising her statutory right to be heard on appeal. Accordingly, I allow this application and I extend the time for filing record of appeal by 30 days from the date of this ruling. I take it that notice of appeal was filed in time but for avoidance of any further difficulties, I direct that the notice of appeal already filed be

deemed as duly filed in time. Costs of this application assessed at Shs.6,000/- to be paid to the respondents by the applicant within 15 days from the date of this ruling and in default execution to issue.

These will be my orders.

Dated and delivered at Nairobi this 7th day of July, 2000.

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**