

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: BOSIRE, J.A. (IN CHAMBERS)
CIVIL APPLICATION NO. NAI. 370 OF 1999**

BETWEEN

LYDIA WANJIRU MÁTHARA.....APPLICANT

AND

SUSAN NCHORO MÁTHARA.....RESPONDENT

**(Application for extension of time to lodge and serve the Notice of Appeal and
Record of Appeal in an Intended Appeal from the judgment of the High Court
of Kenya at Meru (Etyang, J) dated 29th May, 1998**

**in
H.C.C.C. NO. 100 OF 1998)**

RULING

This is an application under rule 4 of our Rules for an extension of time within which to file and serve a notice of appeal and thereafter a record of appeal.

The applicant's Civil Appeal No. 21 of 1998, which had been filed in time, was struck out on 27th October, 1999 on the ground that the decree appealed against did not bear the date of the judgment which gave rise to it. The applicant was desirous of restarting the appellate proceedings and consequently filed this application on 20th December, 1999, about 53 days after her appeal was struck out. Miss Mukuha for the applicant says that the delay in bringing this application was an oversight on her part and prays that I exercise my discretion under the aforesaid rule and grant her client indulgence.

Mr. Mbaya for the respondent has sworn an affidavit in reply dated 26th October, 2000, in which he raises two main issues. Firstly, that the applicant does not have an automatic right of appeal, and should have first obtained leave to appeal before bringing this application. Secondly, that the subject matter of the litigation has already been transferred to a third party with the result that the application and intended appeal has been overtaken by events.

The dispute between the parties concerns land. The applicant contends that she, like the respondent, was the wife of Athara M'Iriara, deceased, who was the registered owner of this land, and was therefore entitled to a share of the land and other estate of the deceased. The superior court ruled that she was not a widow of the deceased, and hence was not entitled to a share of his estate. It is the issue of whether or not the superior court was right that she intends to raise in her intended appeal. Whether or not the land in question has been transferred to a third party is not a relevant fact in this application as of now. That is an issue the court will consider in the intended appeal, if at all it will eventually be filed. I do not therefore wish to say anything more on the issue. There are, however, two fundamental issues which I need to consider. The first of these is whether the applicant has satisfactorily explained the delay in bringing this application, as it is now trite law that an applicant whose appeal has been struck out for incompetence can restart the appellate process. Miss Mukuha accepts responsibility for the delay and requests that I excuse her indolence. Mr. Mbaya for the respondent does not think the delay has been explained at all and prays that I decline to indulge this applicant.

I have considered this issue. Two months in the circumstances of this matter is long but not inordinate and I am inclined to exercise my discretion in favour of the applicant.

As regards the second issue, viz the absence of leave to appeal, I wish to say this. Yes the issue is relevant to the exercise of judicial discretion in matters of this nature. However, in view of the provisions of rule 74(4) of the Court of Appeal Rules, leave to appeal is not a precondition to the exercise of the judicial discretion under rule 4, above.

For the foregoing, reasons, I allow the application and extend the time within which the applicant shall file and serve a fresh notice appeal by 14 days from the date hereof. She shall have a further 30 days thereafter to file and serve a record of appeal. The applicant is reminded that if any leave to appeal is necessary, it should be obtained within the extended period.

The applicant shall bear the costs of this application assessed at Kshs.5,000/-.

Dated and delivered this 27th day of October, 2000.

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR