

**Gaciani & 11 others v Kimanga & another (Application
E004 of 2023) [2023] KESC 23 (KLR) (Civ) (21 April 2023) (Ruling)**

Neutral citation: [2023] KESC 23 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

APPLICATION E004 OF 2023

PM MWILU, DCJ & V-P, MK IBRAHIM, NS NDUNGU, I LENAOLA & W OUKO, SCJJ

APRIL 21, 2023

BETWEEN

KARINGA GACIANI & 11 OTHERS APPLICANT

AND

NDEGE KABIBI KIMANGA 1ST RESPONDENT

AGNES WANGECHI 2ND RESPONDENT

*(Being an application for extension of time to lodge and serve the Notice of Appeal
and leave for the matter to be certified as a matter of general public importance.)*

RULING

Ruling of The Court

1. Upon perusing the notice of motion application dated February 17, 2023 and filed on February 23, 2023 pursuant to rule 15(2) of the [Supreme Court Rules, 2020](#), seeking to be granted extension of time to file and serve the notice of appeal and seeking leave and certification as a matter of general public importance;
2. Upon perusing the grounds on the face of the application; the supporting affidavit of Mary Muthoni Karinga sworn on February 17, 2023 and submissions dated February 17, 2023, the applicants contend that: the delay in filing and serving the notice of appeal is inadvertent; there is no inordinate delay; and the intended appeal raises a matter of general public importance;
3. Upon further considering the applicants' grounds in support of the application that: being dissatisfied with the decision of the Court of Appeal, they instructed the firm of CM Kingori & Co Advocates to seek leave to appeal to the Supreme Court; that the advocate filed the requisite application dated July 16, 2021 but failed to update them on the progress; that upon perusal of the file at the Court of Appeal registry on February 14, 2023 they discovered that the application for leave and certification was withdrawn by their advocate without the applicants' instructions and knowledge; and a notice of appeal was never filed, and this was caused by the negligence on the part of the advocate;



4. Noting the applicants' submissions that the intended appeal raises matters of public interest which transcend the present litigation with substantial, broad based consequences stated as: whether in determining a customary trust in land the court has power to formulate its own class of beneficiaries or mode of sharing without regard to intentions of the trust; whether the court has power to apply constitutional and statutory dictates to alter intentions of the creators of a customary trust; whether in determining a customary trust over land the court should apply the terms of the subject trust existing at the time of creation of the trust; and whether as held by the Court of Appeal in *Mwongera Mugambi Rinturi & Ano v Josephine Kaarika & 2 others* [2015] eKLR, in determining customary trust over land,

“a child is a child none being lesser on account of gender or the circumstances of his birth”

and that each has a distinct share of the trust land regardless of what the applicable customary law may dictate, such as children born after a widow remarries, those born after a wife divorces or those of a levirate union such as the respondents herein;

5. Upon perusing the respondents' replying affidavit sworn by the 1st respondent on March 6, 2023 and their submissions of even date, they contend that: the applicants' advocates withdrew the notice of motion application dated July 16, 2021 filed at the Court of Appeal, on November 29, 2022 in order to seek extension of time to file an appeal to the Supreme Court; the Environment and Land Court at Kerugoya in ELC No 220 of 2013 issued orders to facilitate the implementation and/or execution of the judgment dated November 21, 2016; the application is bad in law as certification ought to be determined at the Court of Appeal in the first instance; the grounds introduced to support certification in the submissions should be struck out; the matter concerns private ownership of property and not one of general public importance under article 163(4)(b) of the *Constitution*, and they cite the decisions of *Patel v Lagat* Civil Application No E046 of 2021 [2022] KECA 509 (KLR) and *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* [2013] eKLR to buttress their arguments;
6. Bearing in mind the provision of section 15(2) of the *Supreme Court Rules, 2020* which gives this court discretion to extend time limited by the Rules or by any decision of the court.
7. Taking into account this court's decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where we stated that the notice of appeal is a jurisdictional prerequisite and signifies the intention to appeal for purposes of this court's *Rules* and further set out the guiding principles for extension of time as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.... we derive the following as the underlying principles that a court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court;
3. whether the court should exercise the discretion to extend time, is a consideration to be made on a case- to-case basis;
4. where there is a reasonable cause for the delay, the same should be expressed to the satisfaction of the court;



5. whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay; and
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”
8. Further noting that the instant application has been filed 18 months after the delivery of the Court of Appeal judgment, which delay is explained by the applicants as caused by the negligence on the part of their advocate;
 9. Having considered the application, affidavit in response and submissions filed, we now opine as follows:
 - (i) Rule 36(1) of the Supreme Court Rules is couched in mandatory terms and requires that a person intending to appeal to the Supreme Court shall within 14 days of the decision of the Court of Appeal, file the notice of appeal. Rule 36(4) further states that in lodging an appeal on a matter of general public importance, it shall not be mandatory to obtain such certification before filing the notice of appeal;
 - (ii) Whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence, the applicants have not demonstrated any efforts or due diligence, through evidence or correspondence of the follow up with the advocates or to pursue their rights as we found in George Kang’ethe Warubiu v Esther Nyamweru Munene & another Civil Application No 18 of 2020 [2021] eKLR. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not.
 - (iii) The delay in filing the instant application is inordinate and has not been satisfactorily explained.
 - (iv) Under section 15B of the Supreme Court Act, and rule 33(1) an application for certification shall be filed before, and determined by the Court of Appeal at the first instance. This renders the prayer for leave to appeal and certification herein premature.
 10. Consequently, for reasons aforesaid, we make the following orders:
 - (i) The notice of motion application dated February 17, 2023 be and is hereby dismissed; and
 - (ii) The applicants shall bear costs of this application for the respondents herein.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL, 2023.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM



JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

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

REGISTRAR,

SUPREME COURT OF KENYA

Representation:

Karinga Gaciana & 11 others

(The applicants acting in person)

Mr. Ngigi

(Ngigi Gichoya & Company Advocates for the respondents)

