



Case Number:	Civil Application 5 of 1980
Date Delivered:	02 Mar 1981
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Cecil Henry Ethelwood Miller
Citation:	Gichangi v Murage [1981] eKLR
Advocates:	Ms Waruhiu & Muite for Appellant Ms Njoroge & Musyoki for Respondent
Case Summary:	<p><b>Gichangi v Murage</b></p> <p>Court of Appeal, at Nairobi March 2, 1981</p> <p>Miller JA</p> <p>Civil Application No 5 of 1980</p> <p><i><b>Appeal - leave - application for leave to appeal out of time - conditions for granting such an application.</b></i></p> <p>The appeal constitutes an application for leave to file a Notice of Appeal out of time against an ex parte order. The applicant made an application to set aside the ex parte order, was heard inter partes and the learned judge ruled that the applicant pays the thrown away costs within twenty eight days failing which, the respondent would be at liberty to enforce the ex parte judgement. The applicant failed to pay the costs and at the same time failed to lodge a Notice of Appeal against the High Court's order within the mandatory fourteen days.</p> <p>At the Court of Appeal the applicant pleaded that the reason for the delay or inability to file Notice of Appeal in time was due to failure to locate the</p>

	<p>case file both in his advocates chambers and at the High Court's Registry.</p> <p><b>Held :</b></p> <p>1. That the applicant with sufficient time and facilities at hand failed to lodge a Notice of Appeal on time even in the knowledge that the appeal was not dependent on possession of the case file.</p> <p>2. That the applicant had been granted an opportunity by the High Court to show good faith by depositing the costs and having squandered the opportunity, the grant of the appeal would achieve nothing that the High Court option would not have achieved.</p> <p><i>Application dismissed.</i></p> <p><b>Cases</b></p> <p>No case referred to.</p> <p><b>Statutes</b></p> <p>Rule 74(2) Court of Appeal Rules (Cap 9, Sub Leg)</p> <p><b>Advocates</b></p> <p><i>Ms Waruhiu &amp; Muite</i> for Appellant</p> <p><i>Ms Njoroge &amp; Musyoki</i> for Respondent</p>
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application Dismissed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram: Miller JA )**

**CIVIL APPLICATION NO. 5 OF 1980**

**BETWEEN**

**GICHANGI.....APPLICANT**

**AND**

**MURAGE.....RESPONDENT**

**RULING**

This is an application under Rules 4 of 81 for leave to lodge Notice of Appeal out of time. The application was filed on the November 27, 1979 and is captioned as being in respect of a High Court's decision dated the November 20, 1979; hence breach of Rule 74(2) within fourteen days of the decision against which it is desired to appeal, has been admitted. The case file of the High Court is not before me and the reason for the delay or inability to file Notice of Appeal in time, has been given in the affidavit of advocate for the applicant as failure to trace the case file both in his chambers and at the High Court's Registry.

The affidavit in opposition to the application sworn by advocate for the respondent, paints a different picture. It is therein averred, that consequent upon an ex parte order made against the applicant on the September 27, 1979, application was made to set aside the said order and at the hearing thereof with advocates on both side appearing and heard on the October 11, 1979, the learned judge ruled that the applicant pays the sum of Kshs 15,000 in respect of costs in the High Court proceedings within twenty eight days, failure to do so, the respondent would be at liberty to enforce the ex parte judgment, but if he paid the said costs within twenty eight days, he could set the case down for hearing.

The applicant failed to pay the said costs within the twenty eight days; and this Court's record shows that as late as the July 11, 1980 advocate here appearing, stated that the said High Court costs had not been deposited as they had not been taxed; there is no doubt in perpetuation of the claim that the relevant files are missing or lost.

It has been agreed before me that the judgment which the applicant sought to set aside was delivered on the September 27, 1979 and the ruling upon which the setting aside and restoration of the cause to a hearing on the condition that the applicant with spatium pays the accrued costs was delivered on the November 20, 1979.

In simple terms the applicant was given opportunity by the High Court to show good faith with respect to his cause as a whole. There is nothing before me tending to impeach the ex parte judgment per se; and the question therefore is, inspite the admitted delay in filing a Notice of Appeal, would a grant of this application finally achieve anything more than that which the High Court made optional at the applicant's choice" The applicant's advocate now appearing concedes that the Condition for reinstating the cause has not till now been met; and more particularly, that the lodging of the Notice of Appeal was not

dependant upon possession of the case file. In his latter behalf, I cannot help restating that which I have done on hundreds of occasions - ie that I detest the claim to the interest of the litigant being of prior consideration on every occasion; where as in this case, the then advocate for the applicant knew and had to know and with sufficient time and facilities at hand, that even as a matter of precaution, Notice of Appeal ought to have been lodged.

I find no merit in this application it is accordingly dismissed with costs to the respondent.

**Dated and Delivered at Nairobi this 2nd day of March 1981.**

**C.H.E.MILLER**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**



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