



Case Number:	Civil Application 286 of 2003
Date Delivered:	11 Dec 2003
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Emmanuel Okello O'Kubasu
Citation:	Husamuddin Gulamhussein Pothiwalla v Kidogo Basi Housing Co-operative Society Ltd & 31 others [2003] eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;"><b>Pothiwalla v Kidogo Basi Housing Co-operative</b></p> <p style="text-align: center;"><b>Society Ltd &amp; 31 others</b></p> <p style="text-align: center;">Court of Appeal, at Nairobi December 11, 2003</p> <p style="text-align: center;">O'Kubasu JA</p> <p style="text-align: center;">Civil Application No NAI 286 of 2003 (UR.142/2003)</p> <p><b><i>Civil Practice and Procedure - extension of time – time to file Notice of Appeal and lodge Record of Appeal – court's unfettered discretion – how such discretion should be exercised – what an applicant must do in order to succeed in an application for extension of time – rule 4 of the Court of Appeal Rules.</i></b></p> <p>The applicant herein sought an extension of time to file a Notice of Appeal and to lodge a Record of Appeal. The applicant submitted that the suit land had been in dispute for about 7 years and it was valued at Kshs.30,000,000/=. The applicant was a trustee and an earlier appeal was struck out as the</p>

Record of Appeal did not contain a certified copy of the decree. The applicant explained that the reason why there was a delay in filing this application was because he had fallen sick.

The respondent contended that the court had to look at the totality of the matter when dealing with an application of that nature. It was pointed out that the Notice of Appeal was defective and so was the certificate of delay.

The respondent argued that there would be no point in granting leave yet the appeal was hopelessly out of time.

**Held:**

1. In an application under rule 4 of the Court of Appeal Rules to extend time to file a Notice of Appeal and lodge Record of Appeal, the court is being asked to exercise its unfettered discretion.

2. The discretion of the court under rule 4 of the Court of Appeal Rules must be exercised judicially.

3. For an applicant to succeed in an application under rule 4 of the court of Appeal rules (cap 9 sub leg) he must satisfy the court that:-

- a) The delay was not inordinate;
- b) the delay has been sufficiently explained;
- c) the intended appeal is arguable; and
- d) no prejudice would be caused to the respondent if the application to extend time is allowed.

4. The delay in bringing the application soon after the earlier was struck out had been satisfactorily explained and the applicant was entitled to the benefit of the court's discretion.

Application allowed.

**Cases**

*Kiragu, Muchugi v James Muchugi Kiragu & another* Civil Application No NAI 356 of 1996

	<p><b>Statutes</b></p> <p>Court of Appeal Rules (cap 9 Sub Leg) rule 4</p> <p><b>Advocates</b></p> <p><i>Mr Maanzo</i> for the Applicant.</p> <p><i>Mr Jiwaji</i> for the Respondent.</p>
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	112 of 1995
Case Outcome:	Application Allowed
History County:	Mombasa
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: O'Kubasu JA)**

**CIVIL APPLICATION NO NAI 286 OF 2003 (UR.142/2003)**

**HUSAMUDDIN GULAMHUSSEIN POTHIWALLA, Administrator,**

trustee and executor of the estate of **GULAMHUSSEIN**

**EBRAHIMJI POTHIWALLA .....APPLICANT**

**VERSUS**

**KIDOGO BASI HOUSING CO-OPERATIVE SOCIETY LTD**

**ABDALLA S. BURHANI**

**YUSUF ATHUMANI**

**HUSSEIN MOHAMED YUNIS**

**SAID SALIM**

**FATUMA ABDUL REHMAN**

**BWANATUMU SOMBWANA**

**NASOOR KHALFAN**

**KHAMIS KARAMA**

**ROSEMARY MUTHONI MUCHANGI**

**HAJJI SALEH MOHAMED**

**ATHUMANI SADIQ**

**AWADH BURAN SAID**

**ABDALLAH OMAR**

**YUSUF RAMZAN**

**JAFFARI SALIM**

**OMARI KARAMA**

**OMARI SOMBWANA**

**SWALEH ALI SAID**

**JUMA ATHUMANI**

**MOHAMED IQBAL**

**AHMED HAJI ABDALLA**

**NOOR KHAMIS, ZAINA BUNU**

**MAIMUNA SAAD**

**AMINA BABU**

**MBARAK SEIF**

**SWALEH BURAN SAID**

**MOHAMED SASU**

**ABDALLA NOORANI**

**RAMADHAN HAJI ISMAIL**

**ZANA BINTI BOMU..... RESPONDENTS**

### **RULING**

This is an application under rule 4 of the Court of Appeal Rules (the rules) for extension of time in which to file a Notice of Appeal and lodge Record of Appeal. Mr Maanzo, for the applicant, submitted that the main ground in this application was that this piece of land in Mombasa has been subject of a dispute for about seven years and that the land is valued at about 30 million shillings. He explained that the applicant was a trustee and that an earlier appeal was struck out on the ground that the record of appeal did not contain a certified copy of the decree. That appeal was struck out on 18<sup>th</sup> July, 2003 and this application was filed on 4th September, 2003. The reason for the delay was that after the earlier appeal was struck out the applicant fell sick. It was Mr. Maanzo's submission that the delay between 18th July, 2003 on 4th September, 2003 had been explained. Mr Jiwaji, for the respondent, contended that this Court must look at the totality of the matter when dealing with an application under rule 4 of the rules. He pointed out that the Notice of Appeal was defective and so was the certificate of delay as these documents referred to different dates of the judgment to be appealed from. It was Mr Jiwaji's argument that there would be no point in granting leave and yet the appeal was hopelessly out of time. He asked me to dismiss this application so that the applicant could file a reference before the full court.

I think, it is now settled that an application of this nature (under rule 4 of this Court's Rules) the Court is being asked to exercise its unfettered discretion and that for an applicant to succeed he must satisfy the Court that the delay was not inordinate and that the delay has been sufficiently explained. The other

issue to be considered is whether the intended appeal is arguable. Lastly, the applicant has to show that no prejudice would be caused to the respondent if the application to extend time is allowed. This discretion, like any other judicial discretion must be exercised judicially.

In *Muchugi Kiragu v James Muchugi Kiragu & Another* – Civil App. No. NAI. 356 of 1996 this Court had the following to say as regards this Court’s discretion under rule 4:-

“Lastly we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal, is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

In this application, the Court has been informed that the applicant is a trustee and that the land in dispute is valued at 30 million shillings. The applicant’s earlier appeal was struck out on 18th July, 2003 after which he fell sick. Then on 4th September this application was filed. Hence there was a delay for about six weeks. That delay has been attributed to the fact that the applicant fell sick.

In view of the foregoing, I would say that the delay in bringing the application soon after the earlier appeal was struck out has been explained to my satisfaction and hence the applicant is entitled to the benefit of my discretion under rule 4 of the Rules. I therefore allow the application and direct that the Notice of Appeal be filed within 7 days from today and the Record of Appeal be lodged and served within 21 days from the date the Notice of Appeal is filed. Costs of this Motion to be in the appeal.

Dated and delivered at Nairobi this 11<sup>th</sup> day of December, 2003

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**



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