



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, & Ouko SCJJ)*

**APPLICATION NO. E033 OF 2023**

**-BETWEEN-**

**KENNEDY THINDIU ITHONGO  
(SUING AS LEGAL REPRESENTATIVE OF THE ESTATE  
OF GEOFFREY ITHONGO THINDIU (DECEASED)).....APPLICANT**

**-AND-**

**HARRY KINUTHIA ITHONGO  
(SUING AS LEGAL REPRESENTATIVE OF THE ESTATE  
OF ISHMAEL ITHONGO (DECEASED)).....RESPONDENT**

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*(Being an application for extension of time within which to file and serve an appeal)*

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**Representation:**

Mr. Kennedy Thindiu Ithongo, the Applicant  
*(In person)*

Ms. Mwendwa h/b for Mr. Kithinji for the Respondent  
*(Kithinji Marete & Company Advocates)*

**RULING OF THE COURT**

**[1] UPON** perusing the Notice of Motion dated 8<sup>th</sup> September, 2023 and filed on 30<sup>th</sup> October, 2023 by the applicant, Kennedy Thindiu Ithongo, acting in

person, pursuant to Order 42 rule 6 and 51 of the Civil Procedure Rules, Articles 50(2) and 159 of the Constitution and any other enabling law seeking the following order:

***“THAT this court be pleased to grant the applicant leave to appeal out of time against the judgment of the Honourable Justice Musinga, Hon. Lady Justice Sichale and Hon. Justice Omondi in Court of Appeal at Nairobi in Civil Appeal Case No. 16 of 1981 delivered at Nairobi on 23<sup>rd</sup> September 2022.”***

[2] UPON perusing the affidavit sworn by the applicant, on 8<sup>th</sup> September 2023 in support of the Motion and written submissions dated 23<sup>rd</sup> October 2023 contending that; the origin of the dispute concerned an adverse possession claim instituted by way of Originating Summons in suit ***HCCC No. 1031 of 1977*** by Ishmael Ithongo against his kinsman Geoffrey Ithongo Thindiu (both deceased and substituted by their respective legal representatives) concerning a parcel of land known as ***Kabete/Kibichiko/190***; the High Court (*Scriven J.*) in its judgment delivered on 31<sup>st</sup> July 1979 dismissed the claim by Ishmael Ithongo with costs; Ishmael Ithongo aggrieved, appealed to the Court of Appeal in ***Civil Appeal No. 16 of 1981***; the Court of Appeal (*Law, Miller J.J.A & Simpson Ag. J.A*) in its judgment delivered on 10<sup>th</sup> July, 1981 allowed the appeal ordering that Ishmael Ithongo be registered as the proprietor of the suit land and Geoffrey Ithongo Thindiu vacate it and remove his personal property within three(3) months; the applicant vide his application dated 15<sup>th</sup> March, 2018 sought review of the decision citing among other grounds, that the Court lacked proper jurisdiction having proceeded without substituting Ishmael Ithongo after his demise and further failing to pronounce itself on the existence of the traditional trust known as ‘*muramati*’ where upon the demise of the father, the eldest son in the family becomes trustee of all lands on behalf of all his brothers; the Court of Appeal (*Musinga, Sichale & Omondi J.J.A*) in its ruling delivered on 23<sup>rd</sup> September 2022 dismissed the application finding that substitution was properly done and the traditional trust extensively addressed; and

**[3] UPON** noting that the Applicant in the present application contends that he is aggrieved by the Ruling delivered on 23<sup>rd</sup> September, 2022 for the reason that he was never served with the notice of delivery of the ruling; further, that he is aggrieved by the decision in the initial appeal which denied him and his family their right to be heard as the appeal was determined with impunity since it was heard *ex parte* and the appeal decided in favour of the respondent who was a member of staff of the Judiciary; additionally that had he and his family been given a chance to be heard, as noted by the High Court (*Scriven J.*), the respondent being a family member would not have been granted the orders of adverse possession considering that the applicant's father, by virtue of being the eldest son, was the registered trustee and thus the respondent would have received a share by way of subdivision and not an absolute share of the land leaving the applicant and his family destitute and landless; and he therefore seeks an overhaul of the entire decision made in ***Civil Appeal No. 16 of 1981*** for the sake of natural justice and for this Court to uphold the decision by the High Court (*Scriven J.*) dated 31<sup>st</sup> July 1979; and

**[4] UPON FURTHER NOTING** that the respondent in his replying affidavit sworn on 8<sup>th</sup> December 2023 and written submissions dated 11<sup>th</sup> December 2023 is opposed to the application on grounds that: there has been inordinate delay of about one year in filing the intended appeal and the applicant has failed to proffer a plausible or sufficient explanation for the delay after the ruling delivered on 23<sup>rd</sup> September, 2022; the applicant is guilty of attempting to mislead the Court by stating that he was not notified of the ruling despite being present in court on 30<sup>th</sup> May, 2022 when the Court of Appeal issued the ruling date and delivered the ruling on schedule; the application is an afterthought, the applicant having been jolted to action following the settlement of terms on 9<sup>th</sup> October 2023 before the Deputy Registrar of the Court of Appeal; the intended appeal is not arguable as the applicant has failed to cite any of the grounds of review of a ruling under Order 45 of the Civil Procedure Rules as well as failing to annex a draft memorandum of appeal to allow the Court gauge the arguability of the applicant's intended appeal; the present application is

misconceived as the applicant has already exercised his option to seek review of the judgment of the Court of Appeal and is therefore precluded from seeking an appeal from the ruling on the review application; the respondent and his family would suffer great prejudice if the application were to be allowed as the appeal has already been determined on its merits; and

**[5] FURTHERMORE, NOTING** the response by the applicant through his affidavit sworn on 22<sup>nd</sup> December 2023 wherein he contends that: despite his application for review before the Court of Appeal coming up for hearing on 30<sup>th</sup> May, 2022, he was never served with notice of the ruling date and hence was unaware of the ruling given; the lack of notice is a sufficient and plausible explanation for the delay in filing of an appeal against the Ruling; the application is well founded in law and follows the procedure required under the Civil Procedure Rules as well as the rules which require him to seek the leave of Court to be allowed to appeal out of time; he urges that members of his family have been buried in public cemeteries and due to the continuous dispute between the two families, there is division in the family; finally that litigation can only come to an end upon crystallization of every opportunity in law, hence the instant the application; and

**[6] NOTING** that the applicant is presenting the instant Motion has relied largely on the provision of the Civil Procedure Code: and

**[7] APPRECIATING** that the Court, under Rule 15(2) of the Supreme Court Rules, 2020 has discretionary powers to extend the time limited by the Rules or by any of its decisions and that an applicant seeking extension of time must satisfy the guiding principles set out in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7 others* SC (App) No. 16 of 2014; [2014] eKLR among other authorities on what a Court should consider in exercise of such discretion on extension of time and which we restate hereinunder as follows:

- i. *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;*
- ii. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
- iii. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- iv. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- v. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- vi. *Whether the application has been brought without undue delay; and*
- vii. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

**[8] FURTHER APPRECIATING** that under Rule 36 (1) of the Supreme Court Rules, 2020, a person intending to appeal to the Court ought to file a Notice of Appeal within fourteen days from the date of judgment or ruling which is subject of the appeal; and

**[9] ADDITIONALLY** bearing in mind that this Court has settled that the only regime of law that governs proceedings before it is, the Constitution, Supreme Court Act, the Supreme Court Rules and any Practice Directions made by the Court or the Chief Justice. And noting that in ***Daniel Kimani Njihia v Francis Mwangi Kimani & Another***, Civil Appl No. 3 of 2014; [2015] eKLR, it was stated thus:

*“[14] This Court’s jurisdiction is exercisable only on the basis of express provisions of the Constitution and the law. The operational rules for this Court (Supreme Court Rules, 2012) are made pursuant to the Constitution, Article 163(8) of which provides:*

***“The Supreme Court shall make rules for the exercise of its jurisdiction”.***

*[15] Consequently, the only applicable sources of law when moving the Supreme Court are the Constitution, the Supreme Court Act, and the Supreme Court Rules, 2012. The Appellate Jurisdiction Act is not applicable when moving this Court. Neither is the Civil Procedure Code. In the Hermanus case, this Court had indicated how it should be moved, thus [paragraph 23]:*

***“... It is trite law that a Court of law has to be moved under the correct provisions of the law.”***

*Hence, without thus identifying the proper legal framework for the motion, an application is liable to be struck out.”*

**[10]** Further, in the ***County Executive of Kisumu vs County Government of Kisumu & 8 others***, SC Civil Appl. No 3 of 2016; [2017] eKLR, it was held that an applicant seeking extension of time, cannot rely on the provisions of the Civil Procedure Code nor can they import the Court of Appeal Rules for matters before the Supreme Court. Reference has to be made to the Supreme Court Rules, 2020 and not any other rules of procedure.

**[11]** Having therefore considered the application, responses and submissions before us, **WE NOW OPINE** as follows:

- i. Taking into account that the applicant, though a layman acting on his behalf, has conflated issues in appealing against the Ruling by the Court of Appeal issued on 23<sup>rd</sup> September, 2022 as opposed to appealing against the Judgment of the Court of Appeal rendered in 1981. However, from his assertions, it is evident that the applicant’s intention is to overturn the Judgment delivered on 10<sup>th</sup> July, 1981, decades before the establishment of this Court.
- ii. The applicant has erroneously relied upon the provisions of the Civil Procedure Rules which are not applicable in proceedings before this

Court. He has also failed to explicitly state the relevant provisions of the Constitution, the Supreme Court Act and Rules rendering his application liable for striking out.

- iii. Those errors notwithstanding, the applicant failed to file a Notice of Appeal within the requisite period in order to properly invoke the jurisdiction of this Court as against the Ruling delivered on 23<sup>rd</sup> September, 2022.
- iv. Additionally, the applicant has failed to annex his intended Petition of Appeal or grounds of appeal which he would wish the court to consider in his intended Petition of Appeal.
- v. Further, the applicant has failed to give sufficient reasons for the delay of one year from the date of delivery of the Ruling of the Court of Appeal.
- vi. Finally, it would greatly prejudice the respondent to reopen the matter settled almost forty-three (43) years ago in the Judgment of the Court of Appeal delivered on 10<sup>th</sup> July, 1981.

**[12] AS REGARDS COSTS**, in the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 others*, SC. Petition No. 4 of 2012; [2013] eKLR it was settled that costs follow the event and that the Court may in appropriate cases exercise discretion and decide otherwise. In the circumstances, it is our considered opinion that it would not serve justice to condemn the applicant to pay costs as he was endeavoring to exhaust every remedy available to him to ventilate his case.

**[13] CONSEQUENTLY**, and for the reasons aforestated we are **NOT** inclined to exercise our discretion in favour of the applicant and we make the following orders:

- i. ***The Notice of Motion dated 8<sup>th</sup> September, 2023 and filed on 30<sup>th</sup> October, 2023 be and is hereby dismissed.***

**ii. There shall be no order as to costs.**

It is so ordered.

**DATED and DELIVERED at NAIROBI this 10<sup>TH</sup> day of MAY 2024.**

.....  
**M.K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF**  
**THE SUPREME COURT**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE &**  
**VICE PRESIDENT OF THE**  
**SUPREME COURT**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**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**