



**Kilifi Colours & Dreams Limited v Soso Investments Limited & another (Environment & Land Case E129 of 2015) [2023] KEELC 17204 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17204 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E129 OF 2015**

**EK MAKORI, J  
APRIL 27, 2023**

**BETWEEN**

**KILIFI COLOURS & DREAMS LIMITED ..... PLAINTIFF**

**AND**

**SOSO INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EMMANUEL PATRICK BAHA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicant filed a notice of motion dated December 1, 2022 brought under order 9 rule 9, order 51 of the [Civil Procedure Rules](#) and section 3 of the [Civil Procedure Act](#) seeking the following orders:
  - i. Spent
  - ii. Spent
  - iii. This court grants the 1<sup>st</sup> defendant/applicant leave to appeal out of time.
  - iv. That cost of this application be provided for.
2. The application is premised on the grounds set out on the face of the application and the supporting affidavit of Francis S.K Baya the 1<sup>st</sup> defendant/applicant who deponed that being dissatisfied by the judgment of this court dated February 19, 2021 - Olola J. and thus intends to appeal against the entire decision and has since appointed the firm of Paul Kenneth Kinyua & Associates to take over the conduct of the matter from the firm of K.Lughanje & Co Advocates.
3. He stated that he believes that the appeal has a high chance of success thus this court should grant the orders sought. It was further stated that the delay was occasioned by the handover process between the erstwhile advocate and the former on record having been appointed as a County Attorney.



4. The 2<sup>nd</sup> defendant filed a replying affidavit dated January 2, 2023 stating that judgment in this suit was delivered on February 19, 2021 - Olola J. who allowed the plaintiff's claim and dismissed the 1<sup>st</sup> defendant's counterclaim with costs to the plaintiff.
5. Mr Emmanuel Patrick Baya averred that the 1<sup>st</sup> defendant filed a notice of appeal dated February 23, 2021 together with a notice of motion dated February 24, 2021 seeking a stay of execution pending hearing and determination of the appeal commenced on February 23, 2021 through the filing of the notice of appeal dated February 23, 2021. Further, the application dated February 24, 2021, was heard and determined by Olola J. *vide* a ruling dated June 30, 2022 wherein the said application was dismissed. It was also averred that the 1<sup>st</sup> defendant did not file his appeal in the court of appeal as contemplated in the *Court of Appeal Rules*.
6. It was stated that the plaintiff applied for execution, which was completed, the 1<sup>st</sup> defendant was evicted and the plaintiff put in possession of the suit property and thus this court does not have the jurisdiction to grant the orders sought as the jurisdiction lies with the Court of Appeal. Further, the delay of more than two years has not been explained to warrant the court's discretion in favour of the applicant as the appointment of the previous advocate as a County Attorney was on October 26, 2022 therefore does not explain the delay.
7. In response to the instant application, the plaintiff filed a replying affidavit sworn by Pietro Canobbio the director of the plaintiff company, which contents of the replying affidavit reiterate the averments contained in the 2<sup>nd</sup> defendant's replying affidavit and I do not wish to replicate the same.
8. I have considered the application, grounds, affidavits, submissions and authorities cited by counsels. The applicant seeks leave to file an appeal to the Court of Appeal out of time.
9. Section 7 of the *Appellate Jurisdiction Act* (cap 9) of the Laws of Kenya provides as follows:  
Section 7 power of High Court to extend time  

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:  
Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”
10. From the above provision of the law, this court has the power to extend time for filing a notice of appeal out of time. In the case of *Edward Njane Nganga & another v Damaris Wanjiku Kamau & another* [2016] eKLR, the court adopted the judgment of Munyao J. in the case of *Loise Chemutai Ngurule & another v Winfred Leshwari Kimung'en & 2 others* [2015] eKLR in which the court observed as follows:  

“It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a notice of appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of *Simon Towett Martim v Jotham Muiruri Kibaru*, Nakuru High Court, miscellaneous civil application No 172 of 2004 (2004) eKLR. In the matter, it was held that rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an appeal to the Court of Appeal. The court (Kimaru J) held that in the circumstances, the High Court had



no jurisdiction to entertain an application for extension of time to lodge notice of appeal out of time.

With respect I disagree with the above decision. Section 7 of the Appellate Jurisdiction Act, cap 9, is drawn as follows:-

#### Section 7 Power of High Court to extend time

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

It will be seen from the above that section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the notice of appeal. I think section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a notice of appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.

Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a notice of appeal is concerned. That provision is drawn as follows:-

#### Rule 4: Extension of time

“The court may, on such terms as it thinks just, by order extend the time limited by these rules, or by any decision of the court or a superior court, for the doing of any act authorized or required by the rules, whether before or after the doing of the act, and a reference in these rules to any such time shall be construed as a reference to that time as extended.”

In my opinion, the power to extend time for the filing of a notice of appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of rule 41 of the Court of Appeal Rules which provides as follows: -

One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge notice of appeal out of time.

The matter indeed arose in the case of *Kenya Airports Authority & another v Timothy Nduvi Mutungi*, Court of Appeal, and civil application No Nai 165 of 2013 (UR 113/2013) (2014) eKLR. In the case, an application for extension of time to lodge notice of appeal was filed in the High Court and the High Court declined to hear it, instead asking the applicant to file the application in the Court of Appeal. Githinji JA, had this to say on that point: -

“The application of December 10, 2012, was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to rule 7 of the Court of Appeal Rules (sic) (clearly meant section 7 of the Appellate Jurisdiction



Act) which provides:-(section 7 of the Appellate Jurisdiction Act set down)... Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined..”

11. I fully associate myself with the holdings in the above decisions. That settled, what is left for me to determine is whether the applicant has demonstrated that it is entitled to the orders sought. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (civil application No Nai 255 of 1997) (unreported), the court rendered itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

The court further noted that:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the *Court of Appeal Rules* (cap 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.....

12. The applicant’s reason for the delay in filing the appeal within the prescribed time, is that there was a delay in handover from the erstwhile advocate to the present advocate on record on account that the erstwhile advocate was appointed as a County Attorney. The plaintiff and the 2<sup>nd</sup> defendant dispute this position stating that the appointment of the former advocate to the office of County Attorney was on October 26, 2022 while judgment was delivered on February 19, 2021. From a cursory perusal of the pleadings, the applicant herein did institute an appeal vide a notice of appeal dated February 23, 2021 which the applicant cunningly did not make reference to. There is also no evidence of any further steps taken in respect of the said notice of appeal. One of the maxims of equity is that he who seeks equity must come with clean hands. Unfortunately, in this instance, the applicant’s hands are greased with dirt. It is also my view that the applicant has not given sufficient reasons for the delay of one year and 10 months in bringing the instant application. It is for these reasons that I find that the application is devoid of merit, from the record this court has had enough going on in this matter – it needs to progress to another level for consideration. Consequently, the instant application is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI THIS 26<sup>TH</sup> DAY OF APRIL, 2023.**

**E.K. MAKORI**

**JUDGE**

