



**Republic v County Government of Kwale; Charpenel Enterprises Limited (Exparte Applicant)  
(Judicial Review E020 of 2021) [2023] KEHC 18154 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18154 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW E020 OF 2021  
OA SEWE, J  
MAY 31, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF KWALE ..... RESPONDENT**

**AND**

**CHARPENEL ENTERPRISES LIMITED ..... EXPARTE APPLICANT**

**RULING**

1. The Notice of Motion dated March 8, 2022 was filed herein by the *ex parte* Applicant (hereinafter “the applicant”) under a Certificate of Urgency pursuant to Sections 1A, 1B, 3A & 95 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya and Order 9 Rule 9, Order 40 Rule 2, Order 50 Rule 1 and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#). The applicant also cited Section 7 of the [Appellate Jurisdiction Act](#), Chapter 9 of the Laws of Kenya and all enabling provisions of the law. By the said application, the applicant essentially seeks the following orders:
  - (a) Spent
  - (b) Spent
  - (c) That the Court be pleased to stay execution of judgment and subsequent decree/order herein pending the hearing and determination of the application inter partes (spent)
  - (d) That the applicant be granted leave to file a Notice of Appeal out of time.
  - (e) That the draft Notice of Appeal filed herein be deemed as filed upon payment of the requisite court fees/charges.
  - (f) That the Court do make any other order it deems fit in the circumstances.



2. The application was premised on the grounds that judgment in this matter was delivered on November 9, 2021; and that a Notice of Appeal ought to have been filed within 14 days, but due to the mix-up occasioned during the process of transmission of a copy of the judgment from the Court Registry to the applicant, instructions to appeal were not given in good time.
3. In the Supporting Affidavit sworn by one of the directors of the applicant, Mr Peter Karuga Kariuki, it was averred that the delay in filing the Notice of Appeal was inadvertent; and that the applicant's intended appeal has high chances of success. The applicant annexed a copy of the impugned judgment to its Supporting Affidavit along with a draft Notice of Appeal dated March 7, 2022, among other documents to bolster its application for extension of time.
4. The respondent opposed the application vide its Replying Affidavit filed on March 29, 2022. The affidavit was sworn by the respondent's Director of Legal Services, Mr Kevin Dzumo. The respondent thereby confirmed that the applicant sued it before the lower court in Kwale SPM's Civil Case No 566 of 2016; and that a default judgment was obtained therein which the applicant attempted to enforce by way of Judicial Review. The respondent explained that on the March 6, 2020, it moved the lower court to set aside the said judgment; and that on the April 15, 2021, the lower court allowed its application. Thus, according to the respondent, to allow the instant application would be to undermine the ongoing lower court proceedings.
5. The respondent further averred that, by virtue of Rule 4 of the Court of Appeal Rules, the Court lacks the jurisdiction to hear and determine the application. Thus, the respondent urged the Court to dismiss the application with costs.
6. The application was canvassed by way of written submissions, pursuant to the directions of the Court (Hon Mativo, J, as he then was) dated March 30, 2022. Accordingly, the written submissions of the applicant were filed on April 7, 2022 by Ms Kedeki of M/s Kedeki & Company Advocates. Ms Kedeki reiterated the grounds set out in the Supporting Affidavit to the effect that the delay was occasioned by a breakdown of communication between the applicant and its erstwhile advocate. She cited Articles 165(3)(a) and 159(2)(d) of *the Constitution* and Section 95 of the *Civil Procedure Act*, and urged that the application be allowed in the broad interest of justice. Counsel also relied on *Vishva Stone Suppliers Company Ltd v RSR Stone (2006) Limited* [2020] eKLR for the proposition that the right to a hearing is not only constitutionally entrenched but is also the cornerstone of the rule of law.
7. On behalf of the respondent, written submissions were filed herein on May 5, 2022 by M/s John Bwire & Associates. Counsel thereby proposed the following issues for determination:
  - (a) Whether the Court has powers to grant Prayer 4 and 5 of the application;
  - (b) Whether the prayer for stay can be granted; and
  - (c) Whether the application is merited.
8. Counsel for the respondent relied on Section 2 of the *Appellate Jurisdiction Act* as well as Rule 4 of the *Court of Appeal Rules* to buttress his argument that the Court with jurisdiction to extend time for filing of a Notice of Appeal is the Court of Appeal and not the High Court. He also relied on *Martim v Kibaru* [2004] eKLR in support of this posturing. In respect of the prayer for stay, counsel was of the view that since the order sought to be stayed is a negative order, the same is not capable of being stayed. He added that, in any event there is no real or apparent threat of execution as the Bill of Costs is yet to be taxed.



9. On the merits of the application, counsel submitted that no justifiable reason has been given by the applicant as to why it did not file a Notice of Appeal in time, there being no proof of any attempts made at obtaining a copy of the judgment. He therefore urged for the dismissal of the application with costs.
10. I have given careful consideration to the application, the averments set out in the affidavits filed by the parties as well as the written submissions prepared by their counsel. The background facts are not in contest. The applicant filed the substantive judicial review application on April 27, 2021, praying for an order of Mandamus to compel the respondent to pay the decretal sum and costs awarded in Kwale Civil Suit No 566 of 2016 in respect of a judgment of Kshs 3,079,025/= delivered on January 28, 2020.
11. The application was disposed of by way of written submissions and judgment delivered by Hon Mativo, J (as he then was) on November 9, 2021. The Honourable Judge dismissed the applicant's application with costs and held that:
- “...I find that the first requirement is that there must be a public legal duty to act. This duty cannot arise before the legal prerequisites are met. Closely tied to this first test is the requirement for an application to satisfy all conditions precedent. My reading of the law is that compliance with Section 21 of the *Government Proceedings Act* is a condition precedent. It follows that the writ of mandamus cannot issue in the circumstances of this case, so, the applicant's application is fit for dismissal. Accordingly, I dismiss the applicant's application dated April 27, 2021 with costs to the Respondents...”
12. That being the case, a Notice of Appeal ought to have been filed by May 12, 2021 because Rule 75 of the *Court of Appeal Rules*, is explicit that:
- “(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
- (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.
- ”
13. That the applicant did not comply with the above provisions is also not in dispute. Therefore, the single issue arising for determination is whether, in the circumstances, the applicant has made out a good case for extension of time. However, before engaging into that discussion, the Court must give attention to the preliminary objection raised by counsel for the respondent as to the jurisdiction of the Court. Counsel argued that by dint of Rule 4 of the Court of Appeal Rules, the only Court with jurisdiction to extend time to file Notice of Appeal is the Court of Appeal. He made reference to Section 2 of the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya which defines Court for purposes of the Rules to mean the Court of Appeal.
14. I am in agreement that the court, for purposes of the Court of Appeal Rules is the Court of Appeal. Nevertheless, Section 7 of the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya is deliberate in its tenor and effect, in providing that:
- “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...”



15. In addition, Order 42 Rule 6(4) of the Civil Procedure Rules states:

For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

16. Consequently, the Court does have the jurisdiction to entertain the application considering that, by dint of Section 95 of the Civil Procedure Act the Court has the general discretion to extend time. It provides that:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

17. Similarly, in Order 50 Rule 6 of the Civil Procedure Rules, it is provided that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

18. Moreover, in the case of Kenya Airports Authority & Another v Timothy Nduvi Mutungi, Court of Appeal, Civil Application No NAI 165 of 2013 (UR 113/2013) (2014) eKLR in which 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 requiring the applicant to file the application in the Court of Appeal, Hon. Githinji JA, had this to say:-

“The application of December 10, 2012 (the application for extension of time to lodge Notice of Appeal out of time), 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)...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 and since the present application was made within the 30 days stipulated by order of the High Court made by consent on 17<sup>th</sup> June 2013, the delay which is material is from the date following the delivery of the impugned Judgment... the High Court had jurisdiction by virtue of section 7 of the Appellate Jurisdiction Act to entertain and determine the application for extension of time.”

19. I therefore find no merit in the respondent’s jurisdictional argument. I need to likewise point out that the prayer for stay of execution pending appeal is spent and requires no further consideration. This is because prayer 3 was intended to last the inter partes hearing and determination of the application.

20. On the merits of the application, the guiding principles are now well settled. In Leo Sila Mutiso v Rose Hellen Wangari Mwangi, [1999] 2 EA 231, for instance, the Court of Appeal laid down the parameters in extending time and stated 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.”

21. Hence, I have given consideration to the length of delay and note that the period of inaction lasted from November 7, 2021 to March 8, 2022 when the instant application was filed. At paragraph 2 of the Supporting Affidavit of Peter Karuga Kariuki, it was deposed that the applicant’s former advocate, Ms Chala, was appointed to the Office of the Director of Public Prosecutions as a Prosecuting Counsel and; that on account of a mix-up in the process of obtaining a copy of the judgment the instructions to appeal were delayed. There is however no document to back up those assertions; with the result that there is inordinate delay of about 5 months which is entirely unexplained.
22. Additionally, the respondent averred, at paragraphs 6 to10 of the Replying Affidavit that the default judgment was set aside and that the lower court matter has since been re-opened for hearing and determination on the merits. Those factual assertions were not refuted by the appellant; such that it is plain that to grant extension of time to appeal would in the end amount a mere academic exercise.
23. Indeed, in *Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & Another* [2000] eKLR, the Court of Appeal held:

“The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of Peter Njoroge Mairo vs Francis Gicharu Kariri & another, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal.

24. In the result, I find no merit in the defendant’s Notice of Motion dated March 8, 2022. The same is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31<sup>ST</sup> DAY OF MAY 2023**

**OLGA SEWE**

**JUDGE**

