



National Housing Corporation v Ngatia & Associates Advocates (Miscellaneous Reference Application E101 of 2021) [2023] KEHC 27258 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS REFERENCE APPLICATION E101 OF 2021
MS SHARIFF, J
DECEMBER 21, 2023**

BETWEEN

NATIONAL HOUSING CORPORATION APPLICANT

AND

NGATIA & ASSOCIATES ADVOCATES RESPONDENT

RULING

a) Application

1. The Applicant approached this court vide an application dated 28th July 2023, wherein it seeks the following orders;
 - i) Spent
 - ii) That leave be granted to the applicant to appeal the decision of this court dated March 27, 2023.
 - iii) That costs of this application to abide by the outcome of the appeal.
2. The gist of the Applicant's application is that it is aggrieved by the decision of this court dated 27th March, 2023 and desires to appeal the said decision to the Court of Appeal and given that the impugned decision is on reference on taxation and thus not appealable as of right but only with leave being granted by this court, the Applicant hence seeks such leave.
3. The Applicant contends that the delay in approaching this court is justifiable and that it has already filed a notice of appeal and has also obtained the ruling, proceedings and a certificate of delay and is ready to lodge the appeal.
4. The Applicant wishes to challenge the holding that time started running on 28th May, 2021 when the ruling on taxation was delivered. Further, it intends to raise an issue of law involving the interpretation



of the provisions of rule 11(2) of the [Advocates Remuneration Order](#), for determination by the Court of Appeal. Further the Applicant posts that it will be greatly prejudiced by the obligation to pay the sum of Kshs.103,400,302 prior to a determination on the correctness of that amount.

b) Respondent's Case:

5. This application has been resisted by the Respondent through a replying affidavit dated 8th August, 2023 sworn by Fred Ngatia SC and he deposes that order 43 rule 1 (3) of the [Civil Procedure Rules](#) provides that leave to appeal should be sought orally at the time when the decision to be appealed against is made or within 14 days from the date such order is made. Given that the ruling that the Applicant intends to appeal from was delivered on 28th March 2023, the application for leave to appeal ought to have been filed on or before 11th April 2023. Senior Counsel further deposes that the inordinate delay prior to filing of the application for leave, is sufficient ground for dismissal of the motion.

c) Analysis and Determination:

6. The issue that is for determination is whether leave should be granted to the Applicant to appeal the decision of this court dated 27th March, 2023.
7. The court is being called upon to exercise a discretionary jurisdiction. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No. Nai 255 of 1997) (unreported), the court expressed 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”.

8. The principles that govern the exercise of discretion in applications for extension of time were set out by the Supreme Court in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR thus:

- “ 1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether the application has been brought without undue delay; and
5. Whether there is a reasonable reason for the delay that should be explained to the satisfaction of the court;
6. Whether there will be any prejudice suffered by the Respondents if the extension is granted;



7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
9. In this case, the taxing master delivered the ruling on the advocate/client bill of costs on 28th May, 2021. The Applicant thereafter filed chamber summons on 9th July 2021 dated 17th June 2021, which was struck out by the court via the order dated 27th March, 2023. On 6th April 2023, the Applicant filed a notice dated 5th April, 2023.
10. I have perused a certificate of delay dated 19th July 2023, signed by the Deputy Registrar of the High Court and the same certifies that the Applicant’s advocates applied for typed proceedings on 25th April, 2023 which was within the 30 days of the decision and paid for typing on 26/4/2023. The typed proceedings were received on 19th July, 2023.
11. Whereas the Applicant did not make an oral application for leave to appeal at the time of delivery of the impugned ruling, this court will not keep it away from the seat of justice due to that omission as the Applicant has demonstrated that it has been vigilant in filing the notice of appeal and in requesting for provision of the ruling and proceedings. This court notes that the delay is not inordinate and I am thus satisfied by the reason advanced by the Applicant for its delay in approaching this court. Cognizance has also been taken of the fact that the taxed costs are not negligible wherefore it is in the interest of justice that the Applicant be allowed to file its appeal.
12. Premised upon the foregoing analysis this court finds merit in the application and the same is thus allowed and I proceed to make the following orders:
- i) The Applicant is granted leave to file appeal within 14 days from the date hereof.
 - ii) The Respondent is granted costs of this application.
 - iii) Mention on 28.2.24 to confirm compliance.

DELIVERED, DATED AND SIGNED IN KISUMU THIS 21ST DAY OF DECEMBER 2023.

M. S. SHARIFF

JUDGE

