



**Wanjama v Kenya Breweries Limited (Civil Suit 53 of 2016)
[2022] KEHC 12964 (KLR) (Commercial and Tax) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 53 OF 2016
A MABEYA, J
AUGUST 31, 2022**

BETWEEN

PETER WANJAMA PLAINTIFF

AND

KENYA BREWERIES LIMITED RESPONDENT

RULING

1. This is a ruling on an application dated May 17, 2021. It was brought by the defendant under section 3A and 75 of the *Civil Procedure Act*.
2. It sought leave to file an appeal against the ruling delivered on April 22, 2021 out of time. The grounds thereof were set out on the face of it and on the supporting affidavit sworn by Victor Njenga on May 17, 2021.
3. It was contended that the ruling was to be delivered on April 22, 2021. However, on April 21, 2021, the court issued a notice on the cause list stating that the court would not be sitting from April 21-30, 2021. However, the ruling was delivered on April 22, 2022 at 8:00am and the applicant's advocate was not in attendance hence he was unable to seek leave to appeal the ruling.
4. That the applicant was aggrieved with the ruling and seeks leave to appeal against the same.
5. The application was opposed by the respondent vide the replying affidavit sworn by Munene Ng'ati Ng'ang'a on June 7, 2021. It was contended that the parties had engaged in litigation for many years and the application was intended to further prolong litigation. That the applicant's advocate ought to have checked the cause list of April 22, 2021 and attend court as he had notice of the ruling date. That the application was time barred.



6. The applicant filed submissions dated November 22, 2021 and those of the respondents are dated September 17, 2021. The court has considered the parties contestations and the submissions.
7. Section 75 of the Act provides for orders that are appealable as of right. On the other hand, order 43 rule 2 of the Civil Procedure Rules provides that any appeal from orders not listed in order 43(1)(1) 'shall' only lie with the leave of the court.
8. It is not in dispute that the applicant did not seek leave at the first instance, however, the explanation given was valid. The court notes that a notice was issued that the court would not be sitting as from April 21, 2021 to April 30, 2021. Nevertheless, the court sat on April 22, 2021 at 8:00am and delivered the ruling.
9. In this regard, the applicant's advocate cannot be faulted for his absence on the material day. Further, the application was filed 12 days after the expiry of the 14 day period allowed. It cannot be said that there was inordinate delay in bringing the application.
10. In *Sango Bay Estates Ltd v Dresdner Bank AG* [1971] EA 17 at 20, Spry V P stated: -

“I turn to the application itself which can, I think, be disposed of very briefly. As I understand it, leave to appeal from an order in civil proceedings will normally be granted where *prima facie* it appears that there are grounds of appeal which merit serious judicial considerations but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out.”
11. In *JPMachira t/a Machira & Co Advocates v Wangethi Mwangi & Another*, Ca No Nai 433 Of 2001, it was held: -

“The considerations for the grant or refusal of an application for leave to appeal (a matter for the discretion of the court) are few but familiar and we consider it desirable and useful to have them briefly stated. The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has no prospects of success...There must, however, almost always be a ground of appeal which merit serious judicial consideration.”
12. This court has seen the draft memorandum attached to the application. It raises six grounds of appeal and challenges, *inter alia*, this court's finding that the issue of compound interest was *res judicata*. It further seeks to challenge the application of section 7 of the Civil Procedure Act. Those are serious issues which require the court's consideration.
13. This Court is alive to the respondent's concern that the matter has taken rather too long in court. However, it is this court's opinion that injury and or damages suffered from an unsuccessful appeal would be compensated by way of costs.
14. In this regard, the application is allowed. Costs shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST, 2022.



A MABEYA, FCIArb

JUDGE

