



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 694 OF 2012

AFRICA TELCOM SOLUTIONS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KWAKA GENERAL MERCHANTS LIMITED.....1ST DEFENDANT/RESPONDENT

MUGANDA WASULWA

T/A KEYSIAN AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. Through the application dated 14th May 2020, the applicant/plaintiff seeks, inter alia, orders for the extension of time to file a Notice of Appeal against this court's ruling delivered on 23rd April 2020.
2. The application is supported by the affidavit of the applicant's advocate **Ms Jennifer Shamalla** and is premised on the ground that the time within which the Notice of Appeal ought to have been filed lapsed during the Covid -19 Pandemic that necessitated the gazette of **"Stay at Home and "Work from Home"** directives. It is the applicant's case that its advocate inadvertently failed to file the Notice of Appeal within the stipulated period of 14 days and that the delay in filing the Notice of Appeal was neither deliberate nor inordinate.
3. The respondent opposed the application through the replying affidavit of **Stephen Kimani Kamau**. Parties canvassed the application by way of written submissions which I have considered.
4. The main issue for determination is whether the applicant has made out a case for the granting orders to extend time for the filing of Notice of Appeal.
5. The application is brought under Section 7 of the Appellate Jurisdiction Act which stipulates as follows: -

"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court of for making an application for leave 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."

6. The applicant submitted that by dint of the above cited Section, this court has jurisdiction to grant the prayers sought. Reference was made to the decision in **Kenya Airport Authority & Another v Timothy Nduvi** [2014] eKLR wherein the court held: -

"The application of 10th December, 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 Court of Appeal Rules(sic)... 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..."

7. The principles to be considered in determining applications for extension of time were laid out in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others** [2014] eKLR as follows; -

"...it is clear that the discretion to extend time is unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant."

“...we derive the following as the underlying principles that a court should consider in exercising such discretion.

- 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 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. Where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the court.*
- 5. Whether there will be any prejudice suffered by the respondents, if extension is granted.*
- 6. Whether the application has been brought without undue delay; and*
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

8. Applying the above principles to the present case, I note that the applicant has explained that the ruling that is the subject of the intended appeal was delivered on 23rd April 2020 and that there was therefore a delay of 8 days from the date that it ought to have filed the Notice of Appeal to the date that it filed this application. The applicant further explained that the delay was neither deliberate nor inordinate as it was occasioned by inadvertence of the part of the advocate owing to the restrictions on movement imposed by the Covid-19 Pandemic Regulations.

9. On their part, the respondents argued that the reasons for the delay advanced by the applicant were not plausible as the applicant’s counsel was all along aware of the impugned ruling and opted not to act on it until after the expiry of the period allowed for such filing.

10. I have considered the rival arguments over the issue of delay. I find that in the circumstances of this case, and taking judicial notice of the fact that the impugned ruling was delivered at a critical time of great anxiety and fear caused by the onset of the Covid- 19 Pandemic coupled with the attendant government restrictions on movement, the 8 days’ delay in filing the Notice of Appeal cannot be said to be inordinate or inexcusable. Moreover, courts have taken the position that mistakes of an advocate should not be visited on the client.

11. In the present case, the applicants advocate conceded that the delay was caused by her inadvertence. I further note that the respondents have not demonstrated that they will suffer any prejudice if the time for filing the Notice of Appeal is extended.

12. For the above reasons I find that the application dated 14th May 2020 is merited and I therefore allow it with orders that costs shall abide the outcome of the intended Appeal.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kago for Defendants/Respondents

No appearance for the Applicants

Court Assistant: Sylvia