



**Associated Warehousing Co. Limited t/a Bamburi Beach Resort & 2 others v  
Trust Bank Limited (in Liquidation) & 4 others (Environment & Land Case  
362 of 2017) [2023] KEELC 21921 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21921 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 362 OF 2017  
NA MATHEKA, J  
NOVEMBER 28, 2023**

**BETWEEN**

**ASSOCIATED WAREHOUSING CO. LIMITED T/A BAMBURI BEACH  
RESORT ..... 1<sup>ST</sup> PLAINTIFF  
NITICHANDRA KRISHNALAN PANDYA ..... 2<sup>ND</sup> PLAINTIFF  
BHAVNA PANDYA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**TRUST BANK LIMITED (IN LIQUIDATION) ..... 1<sup>ST</sup> DEFENDANT  
CLARKSON & SOUTHERN LTD ..... 2<sup>ND</sup> DEFENDANT  
FIDELITY SHIELD INSURANCE CO. LTD ..... 3<sup>RD</sup> DEFENDANT  
NETCALL HOLDINGS LTD ..... 4<sup>TH</sup> DEFENDANT  
THE LAND REGISTRAR, MOMBASA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The application is dated 5<sup>th</sup> June 2023 and is brought under Order 9 Rule 9 of the *Civil Procedure Rules*, Section 7 of the *Appellate Jurisdiction Act* Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Article 159 of the *Constitution* of Kenya, 2010 seeking the following orders;
  1. That this matter be certified as urgent and be heard exparte in the first instance.
  2. That the firm of Cootow & Associates Advocates, be granted leave to come on record for the 1<sup>st</sup> Defendant/Applicant, following delivery of the judgment



3. dated 7<sup>th</sup> February 2023. That pending the hearing of this application inter parties, this Honorable Court be pleased to issue an order for stay of execution of the judgment delivered on 7<sup>th</sup> February 2023.
  4. That this Honourable Court be pleased to enlarge time for the 1<sup>st</sup> Defendant/Applicant to lodge a Notice of Appeal, pursuant to the provisions of Section 7 of the [Appellate Jurisdiction Act](#), against the Judgment delivered on 7<sup>th</sup> February 2023.
  5. That upon grant of prayer 4 above, this Honorable Court be pleased to issue an order for stay of execution of the judgment delivered on 7<sup>th</sup> February 2023, pending the hearing and determination of the appeal against the Judgment delivered on 7<sup>th</sup> February 2023.
  6. Costs of this application be costs in the cause.
2. It is based on the grounds that the Court delivered its judgment on 7<sup>th</sup> February 2023, in favour of the Plaintiffs and against the Defendants. This court found inter alia that the Plaintiffs had established their case on a balance of probabilities, and directed that the sale and/or transfers of the suit parcel of land known as Plot No. 1532 (Original No. 871/1) Section 1 MN Mombasa Title No. CR 13476, from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant, and from the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant, and from the 3<sup>rd</sup> Defendant to the 4<sup>th</sup> Defendant are a nullity and are set aside. Further, the court ordered that the 5<sup>th</sup> Defendant, the Land Registrar, to cancel the said transfers and restore the status quo prior to 19<sup>th</sup> October 1999. The Honourable Court also directed the Defendant/Applicant to recalculate and render a true and full account to the Plaintiffs, as at 19<sup>th</sup> October 1999. A permanent injunction was issued against the Defendants from dealing with or otherwise interfering with the Plaintiff's interest in the Suit Property. The Plaintiffs were awarded costs of the suit.
  3. The 1<sup>st</sup> Defendant/Applicant, being dissatisfied and aggrieved with the said judgment, immediately duly instructed its previous Advocate on record, M/S Makhanu, Odhiambo & Company Advocates to lodge and serve a Notice of Appeal against the judgment, within the mandatory fourteen (14) days. However, the 1<sup>st</sup> Defendant/Applicant, upon following up with its erstwhile Advocate on the status of the filing of the Notice of Appeal, found out that its previous Advocates had never complied with the instructions to lodge a Notice of Appeal, and the fourteen-day period within which to lodge the Notice of Appeal, had already lapsed by then.
  4. The failure in filing and serving the Notice of Appeal arose from the mistake of the previous Advocate for the 1<sup>st</sup> Defendant/Applicant, M/S Makhanu, Odhiambo & Company Advocates. The Defendant/Applicant only discovered that its previous Advocate had failed to lodge an appeal through a Notice of Appeal sometime in April 2023. The 1<sup>st</sup> Defendant/Applicant, Trust Bank Limited - In Liquidation, undertook the rigorous and thorough process of recruitment and procurement of an alternative advocate to undertake the intended appeal, in accordance with the mandatory process of such recruitment and procurement. The Defendant/Applicant and the instant Advocates, M/S Cootow & Associates Advocates then managed to agree on the terms of engagement on the issue of representation in this matter on 15<sup>th</sup> May 2023. The 1<sup>st</sup> Defendant/Applicant has an arguable appeal with high prospects of success against the decision of 7<sup>th</sup> February 2023 as it raises serious and arguable, factual and legal issues. The orders for leave to appeal out of time sought herein ought to be granted to prevent the intended appeal being rendered nugatory.
  5. M/S. Titus Makhanu Associates Advocates stated that the 1<sup>st</sup> Defendant/Applicant formally instructed their firm to represent its interests in Mombasa HCCC No. 218 of 2007 consolidated with Nairobi HCCC NO. 1540 of 1999 Associated Warehousing Co. Ltd v Bamburi Beach Resort



v Clarkson & Southern Ltd & 3 Others. Accordingly, they represented the 1<sup>st</sup> Defendant/Applicant zealously as is expected of any competent firm and the trial Court delivered its judgment on 7<sup>th</sup> February 2023 in favour of the Plaintiffs as against the Defendants including the 1<sup>st</sup> Defendant/Applicant herein. That soon thereafter, the firm informed the 1<sup>st</sup> Defendant/Applicant about the judgment, the timeline of fourteen (14) days within which to appeal and the outstanding legal fees payable to their firm. It is noteworthy that the 1<sup>st</sup> Defendant/Applicant had at the time, refused and/or ignored their request to settle their outstanding legal fees incurred during representation before the trial Court, thereby causing them great apprehension that it would not pay their firm's fees in the intended appeal as well.

6. That the 1<sup>st</sup> Defendant/Applicant should not be allowed to use their firm as a scapegoat when it is clear it lacks justifiable reasons for failing to appeal within the stipulated timelines. Therefore, it is in the interest of justice and fairness that the 1<sup>st</sup> Defendant/Applicant settles their outstanding legal fees for the work done thus far before the firm of Cootow and Associates Advocates is allowed to come on record on its behalf.
7. I have carefully considered the rival affidavit evidence, submissions and the various facts that alluded to by the parties in this application. The principles that guide courts in allowing or declining a motion seeking leave to file an appeal out of time was settled by the Supreme Court of Kenya in the case *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR where the court set out the principles as follows;

we derive the following as the under-lying principles that a Court should consider in exercise of 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 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 there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the 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. Parties cannot, either unilaterally or by agreement between them, metaphorically, waive away the rules of the court. The rules of the Court are meant to achieve timely and orderly commencement, progress and proper determination of litigation of proceedings. Given the statutory limit, principally, the delay is inexcusable unless the applicant shows sufficient cause to justify the delay and that any such extension shall not prejudice the respondent. In this regard, the Court in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* (2013) eKLR the Court of Appeal stated that;

The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy and caprice. I take note that in exercising my discretion I ought to be guided



by consideration of the factors states in previous decisions of this Court including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted and whether the matter raises issues of public importance. In *Henry Mukora Mwangi v Charles Gichina Mwangi-Civil Application No. Nai 26 of 2004*, this Court held:- “It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize his principle by referring to the decision in *Mwangi v Kenya Airways Ltd. [2003] KLR 486* in which this Court stated: \_ “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing an application for extension of time under rule 4 of the Rules.

9. For instance, in *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 the time are: first, the length of delay; secondly the reason for 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.”

10. The legal authorities demonstrate that it is indeed a balancing exercise between the need for there to be a good reason for the delay and the prejudice that may be caused to the other party if the extension were granted. That’s why in the *Salat case (Supra)* observed that;

Extension of time being a creature of equity, one can only enjoy if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it”.

11. In the present application, I have given due attention to the issue of delay and prejudice which may be occasioned to the respondent. In the present case, judgement was delivered on 7<sup>th</sup> February 2023 and this application is dated 5<sup>th</sup> June 2023. The main ground the appellant has proffered for the delay is that the failure in filing and serving the Notice of Appeal arose from the mistake of the previous Advocate for the 1<sup>st</sup> Defendant/Applicant, M/S Makhanu, Odhiambo & Company Advocates even after they were instructed to do the same. The said M/S Makhanu, Odhiambo & Company Advocates swore an affidavit refuting these allegations and stated that they informed the 1<sup>st</sup> Defendant/Applicant about the judgment, the timeline of fourteen (14) days within which to appeal and the outstanding legal fees payable to their firm. They continued communicating with the 1<sup>st</sup> Defendant applicant even after the expiry of the statutory period had lapsed. They held meetings with the representatives of the 1<sup>st</sup> Defendant to agree on their legal fees and even drafted an application to file the appeal out of time. The firm of M/S Makhanu, Odhiambo & Company Advocates attached numerous correspondence to prove the same. Enlargement of time is an equitable remedy and the 1<sup>st</sup> Defendant has not come with clean hands and is guilty of laches. Looking at the circumstances of the delay, it is the considered view that the 1<sup>st</sup> Defendant was well aware of the proceedings in this matter and the reasons given for the delay are untrue and inexcusable and enlargement of time to file the appeal cannot be granted. The applicant has not shown sufficient cause to justify the delay. Having found so there is no there will be



no to need to stay execution in this matter as there is no appeal. I find that the application dated 5<sup>th</sup> June 2023 is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY OF NOVEMBER 2023.**

**N.A. MATHEKA**

**JUDGE**

