



Tymster Motors Limited v Adsite Limited & another (Miscellaneous Application E040 of 2025) [2025] KEELC 4512 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEELC 4512 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E040 OF 2025**

JG KEMEI, J

APRIL 8, 2025

BETWEEN

TYMSTER MOTORS LIMITED APPLICANT

AND

ADSITE LIMITED 1ST RESPONDENT

JOHN KYEE MUTTA 2ND RESPONDENT

RULING

In respect to the Applicant's application dated the 28/2/25 seeking interalia leave to file an appeal out of time

1. Before the Court is the applicant's application dated the 28/2/25 seeking leave to file an appeal out of time against the decision of the Business Premises Rent Tribunal (BPRT) delivered on 17/1/25 in BPRT E1119.
2. The application is premised on the grounds annexed thereto and the supporting affidavit of W Kevin Michuki, the advocate acting on behalf of the Applicant. He avers that the Applicant is the registered owner of the property known as LR NO 209/8536/16 where the 1st Respondent has erected a billboard on the subject premises. That the Applicant approached the BPRT for purposes of gaining access to the premises and later lodged a reference against the tenancy notice issued on 2/7/24 which decision the Applicant is aggrieved with.
3. The deponent states that after the delivery of the ruling, there was delay in obtaining the said ruling which upon request was only received on 27/2/25. That by then the time to file an appeal had expired on the 20/2/25 and hence the need to file the application. The Court was urged to grant the application which was filed within reasonable time having only received the order on 27/2/25, 7 days late. The Court was informed that no prejudice will be occasioned on the Respondents if the application is allowed.



4. The application is opposed by the Respondents vide the Replying affidavit of Samir Shah sworn on 20/3/25 where he impugned this Court's jurisdiction on the basis that the supporting affidavit sworn by the applicant's counsel is incurably defective and ought to be struck out on the grounds that the application is supported by an affidavit sworn by an advocate who is neither a party to the application nor the proceedings before the BPRT contrary to the provisions of Rule 8 of the Advocates Practice Rules. That the advocate has deponed to contentious matters and that the said affidavit offends the legal requirement that a deponent must have personal knowledge of the facts deposed to. That the absence of a proper affidavit renders the application fatally defective, as an affidavit is a mandatory requirement in support of an application of this nature. Further that the application has been brought 14 days after the delivery of the Ruling hence with inordinate delay. In addition, that no explanation has been given for the delay. That the intended appeal has no chances of success given that the orders issued will expire on the 1/5/25 subject to the payment of Kshs 75000/- in costs effectively resolving the matter and eliminating the need for further litigation.
5. On the 4/3/25 Kevin Michuki filed a supplementary affidavit reiterating the contents of his supporting affidavit sworn on 28/2/25.
6. The parties have filed written submissions which I have read and considered.
7. From the application, the pleadings and the rival submissions I discern two issues for determination which are;
 - a. Whether the affidavit sworn by the applicant's counsel is improper, and if so what is the fate of the application
 - b. Whether the Applicant is deserving of the orders of leave to file an appeal out of time
8. As a general rule, a lawyer who appears as counsel for a party in suit or court proceedings should not testify or submit their own affidavit evidence before the tribunal unless they are specifically permitted by law or the Court to do so or unless the matter is purely formal or uncontroverted.
9. The rationale is found in the case of *Oriental Commercial Bank Ltd v Shreeji Contractors Ltd & 2 others* [2021] eKLR where the Court stated as follows;

This principle is grounded in the rules governing conflict of interest and the need for counsel as an officer of the Court to retain an appropriate level of professional objectivity. To protect the integrity of the legal process, the Court cannot countenance counsel for a party placing his or her own credibility in issue on an important point of evidence. However, countless cases have stated that there are certain procedural motions which turn on evidence that counsel can provide, such as the chronology of the action or facts regarding how litigation has progressed. Indeed, in those types of cases, the factual evidence of the Counsel is preferable to that of the client and is largely considered non-contentious – merely a convenient way to organize and identify evidence already on Court record. Indeed, the affidavit itself might be unnecessary
10. The provisions of rule 8 of the *Advocates (Practice) Rules* states as follows: No advocate may appear as such before any Court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:



Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

11. In the case of *Magnolia PVT Limited vs Synermed Pharmaceuticals (K) Ltd* (2018) eKLR, the Court dealing with a similar issue stated as follows:

Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the Court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects, himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.

12. The 1st Respondent's issue with the affidavit sworn by the applicant's counsel is that the advocate who is neither a party to the application and the proceedings has deposed to contentious matters yet he is not a witness in the case. It is on this basis that the 1st Respondents urged the Court to deem the affidavit defective and proceed to strike it out as fatally defective.

13. I have perused the said affidavit and would like to reproduce it here for emphasis as follows;

- “ 1. That I am aware that there were proceedings between the Applicant and Adsite Limited at the Business Premises Rent Tribunal in Nairobi being Tribunal Case No E1119 of 2024 *Adsite Limited v. Tymstar Motors Limited* as consolidated with Tribunal Case No. E685 of *Adsite Limited v. John Kyee Muita; Tymstar Motors Limited (interested party)* in which we acted for the Applicant.
3. That I am aware that the matters culminated with a decision delivered on 17th January, 2025 on the online platform. {Annexed and marked WKM001 & WKM002 are screenshots of the case activity in the two matters}
4. That I recall that due to the fact that the Court had only read out the conclusions of its decision we applied for a copy of the ruling and order of the Court on 27th January, 2025 to enable us advise our Client accordingly and take instructions on whether to lodge an appeal.
{Annexed and marked WKM003 is a copy of the request and payment receipt}
5. That I am aware that despite following up with the registry we only received a copy of the order on 27th February, 2025.
{Annexed and marked WKM004 is a copy of the order of the Court signed 27th February, 2025} *Tymstar Motors Limited v. Adsite Limited & Another* 6
6. That we have since advised our Client and been instructed to file an appeal as against the entire decision of the Court;



7. That unfortunately the time granted at law for lodging an appeal lapsed on 20th February, 2025 and we must therefore approach this Court to exercise its discretion to extend time for the Applicant to lodge its appeal”
14. I have considered this issue and carefully perused the subject affidavit and agree with the applicant’s counsel that the issues deponed to are about the delivery of the ruling and the subsequent request for the said ruling, facts which are in the personal knowledge of the counsel as the agent of the applicant. For that reason, I fail to find that the affidavit is defective. This ground fails.
15. Having said that I hold the view that advocates should stay away from swearing affidavits on behalf of their clients moreso in contentious matters as by doing so they invite themselves into the arena of conflict and run the risk of being converted into witnesses, a situation that can leave the advocate in unpalatable position.
16. On the second issue, I rely on the provisions of Section 79G of the Civil Procedure Act (CPA) which provide as follows; -
- 79G. Time for filing appeals from subordinate Courts
- Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.
17. It is trite that extension of time to file an appeal out of time is a discretionary relief which like all discretionary remedies must be granted by the Court on sound legal basis and not on caprice or whims. This is the import of the provisions of Section 95 CPA which empowers the Court to enlarge such time as follows; -
95. Enlargement of time
- “ 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.
18. The Supreme Court laid down the principles to be considered in an application for extension of time in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR as follows;
- “ 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 to be 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.” See also *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* [1999] 2 EA 231.
19. In addition, the Supreme Court in the case of *Nyamboki v Gathuru* (Application 6 of 2019) [2019] KESC 44 (KLR) held as follows in determining an application seeking such extension;
- “....., the Court has to consider whether the explanation given for any delay is reasonable and credible; whether there also exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an Applicant has been slothful, and filed such an application as an after-thought.”
20. In the instant case it is not in dispute that they ruling of the Court was delivered on 17/1/25 and in accordance with the provisions of Section 79G of the *CPA*, the appeal ought to have been filed latest by 17/2/25. However according to the record, the same was filed on 28/2/25, a period in excess of 10 days. The delay in filing the application has been aptly explained by the Applicant being the delay in obtaining the Ruling. It has satisfactorily demonstrated that the Ruling was obtained on 27/2/28 and the Applicant wasted no time in moving the Court on the 28/2/25, a day later. In my view nothing turns on this one.
21. As to whether the appeal has a chance of success, the Court is inclined to give the Applicant a chance to be heard on appeal. The Respondents have not explained any prejudice that they stand to suffer in the event the application is allowed so that appeal is heard on merit.
22. In the end the application is allowed.
23. The costs of this application shall abide the outcome of the appeal.
24. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF APRIL 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI JUDGE

Delivered online in the presence of

Ms.Muthoni HB Michuki for the Applicant

N/A for the Respondents

CA - Ms. Yvette

