



KCB Bank Kenya Limited v Imbuye & another (Miscellaneous Civil Application E002 of 2023) [2024] KEHC 3048 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS CIVIL APPLICATION E002 OF 2023**

**AC MRIMA, J
MARCH 14, 2024**

BETWEEN

KCB BANK KENYA LIMITED APPLICANT

AND

BENARD KHAYINGA IMBUYE 1ST RESPONDENT

UAP INSURANCE CO LTD 2ND RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 2nd February, 2023
2. The application mainly sought a grant of leave to appeal out of time against the judgment in Kitale Chief Magistrates Civil Suit No. 410 of 2018.
3. The application was supported by the 1st Applicant. The 2nd Applicant neither filed any response nor any submissions.
4. The application was supported by an Affidavit sworn by the Applicant's Head Counsel – Litigation. The 1st Respondent filed a Replying Affidavit in further support to the application.
5. This Court has carefully considered the application, the written submissions and the decisions referred to by the parties. The Court is grateful to Counsel for the on-point submissions and decisions referred to.
6. There is no doubt that the 2nd Respondent herein, UAP Insurance Co. Ltd, filed an appeal against the decision in Kitale Chief Magistrates Civil Suit No. 410 of 2018 which decision was in favour of the Applicant and the 1st Respondent. The appeal is still pending.
7. The power of the High Court to inter alia extend time for filing an appeal from a judgment of a subordinate Court is donated by Section 79G of the Civil Procedure Act, Cap. 21 of the Laws of Kenya.



8. The provision states 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.

9. Courts have over time developed the legal principles guiding the issue of extension of time.

10. The Court of Appeal in *Thuita Mwangi v Kenya Airways* [2003] eKLR stated as follows in respect to the matter: -

Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. 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 generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted [the arguability test]; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

11. And, in *Velji Shahmad v Shamji Bros. and Popatlal Karman & Co.* [1957] EA 438, the High Court expressed itself as follows: -

In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”

12. The guiding law on extension of time was finally settled by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. The Apex Court derived the following underlying principles which a Court should consider: -

- i. 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
13. Having restated the law, this Court will now apply it to the circumstances of this case.
14. One of the cardinal legal factors discussed above is the arguability of the appeal. In *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another* (2018) eKLR, the Court had the following to say about the said factor: -
16. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the appellate Court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal; a demonstration that the Applicant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict....
15. This Court has intently relooked into the Draft Memorandum of Appeal annexed to the application. It raises arguable issues of law. Coupled with the other considerations discussed above, this Court is satisfied that the application is merited.
16. Deriving from the foregoing, the final following orders do hereby issue: -
- a. The Notice of Motion dated 2nd February, 2023 is hereby allowed.
 - b. The Applicant shall within the next 14 days of this ruling file and serve a Memorandum of Appeal.
 - c. Each party shall bear its own costs.
 - d. This file is marked as closed.
- It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 14TH DAY OF MARCH, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 delivered virtually and in the presence of: -

Mr. Naiga, Learned Counsel for the Applicant.

Miss. Mukamo for Mr. Ambutsi, Learned Counsel for the 1st Respondent.

Chemosop/Duke - Court Assistants.

