



Stitching Medical Credit Fund v SBM Bank Kenya Limited (Commercial Case E142 of 2020) [2024] KEHC 3466 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E142 OF 2020
DO CHEPKWONY, J
MARCH 1, 2024**

BETWEEN

STITCHING MEDICAL CREDIT FUND PLAINTIFF

AND

SBM BANK KENYA LIMITED DEFENDANT

RULING

1. What is before the court for determination is the Notice of Motion application filed under Section 7 of the [Appellate Jurisdiction Act](#), Section 95 of the [Civil Procedure Act](#) and Order 50 Rule 6 of the [Civil Procedure Rules](#) 2010. It seeks the following orders:
 - a. Spent;
 - b. This Honourable Court be pleased to extend the time to lodge and serve a Notice of Appeal from the ruling and Order of the High court at Nairobi (Hon . Lady Justice D.O. Chepkwony) dated 14th November 2022.
 - c. The costs of the application be provided for.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Greg Karungo sworn on 25th January, 2023. It has been opposed through Grounds of Opposition dated 1st February, 2023.
3. According to the Applicant, it was dissatisfied with the court Ruling delivered on 14th November, 2022 and intends to lodge an Appeal against it at the Court of Appeal. It states that it obtained a copy of the said Ruling on 5th December, 2022 which was more than 14 days of the Ruling hence the statutory time limit of filing an appeal. It holds that the delay was occasioned with the delay in obtaining a copy



of the Ruling so that it can peruse it and decide on the next step. The Applicant contends that the Appeal has a high chance of success, that the application has been filed without any delay and that no party shall suffer prejudice if the orders are granted. The Applicant has thus urged the court allows its application and extends time to lodge and serve a Notice of Appeal.

4. In response, the Respondent argues that the application has not offered a plausible reason to justify the extension of time sought. The Respondent holds that the Ruling was read in open court in the presence of both Counsel and therefore denies the argument that a copy of the Ruling was required to enable it file the Appeal. The Respondent further argues that the Applicant has not accounted for the days between the time it obtained a copy of the Ruling which was on 5th December, 2022 and 25th January, 2023 when the application was filed which was 50 days later.
5. The Respondent argues that the Applicant cannot state that the Appeal has merit as that is a preserve of the Appellate court. The Respondent holds that the Application does not have merit and thus does not deserve the court's discretion and should be dismissed.

Analysis and Determination

6. I have read through the grounds upon which the application dated 25th January, 2023 is premised both on its face and Supporting Affidavit sworn by Greg Karungo alongside the Grounds of Opposition filed by the Plaintiff/Respondent and written submissions filed by the parties herein. I find the issues for determination being:-
 - a. Whether this Honourable Court lacks jurisdiction to extend the time for filing and serving the Notice of Appeal.
 - b. Whether the court has discretion to extend time within which to file and serve a Notice of Appeal from a ruling and order of the High Court.
7. On the issue of whether this court has jurisdiction to extend time within which to lodge and serve a Notice of Appeal from the ruling and orders of the High Court of Kenya at Nairobi dated 14th November, 2022, it is the Defendant's/Applicant's submission that this court is clothed with discretionary power to allow for extension of time within which a Notice of Appeal can be filed pursuant to the provisions of Section 7 of the *Appellate Jurisdiction Act*, (Cap 9) of the Laws of Kenya which provides:-

“Section 7 Power of High Court to extend time

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

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.
8. On the other hand, the Plaintiff has submitted that the Defendant had not filed a Notice of Appeal by 28th November, 2022 which was beyond the 14 days period stipulated by the Court of Appeal Rules, 2022 from 14th November, 2022 when the impugned ruling was delivered by this court.



9. In reliance on the provisions of Section 7 of the *Appellate Jurisdiction Act*, the court in the case of *Diamond Trust Bank of Kenya Limited -vs- Invesco Assurance Company Limited and Another* [2021]eKLR, held that:-

“

“ 10. In view of the above provisions, it is explicitly clear that the High Court may extend time for giving Notice of Intention to Appeal from a judgment of the High Court and in my view the said Section 7 does not need any more than a literal interpretation. Therefore, Section 7 of the *Appellate Jurisdiction Act* clearly confers to the High Court jurisdiction to extend time for the filing of a Notice of Appeal and to decide otherwise is akin to completely disregarding a clear provision in the law.”

“Section 7 Power of High Court to extend time

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

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

10. The next issue for consideration by the court is whether it has discretion to extend the time within which to lodge and file an appeal. On this, reliance is placed on the principles that were set out by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR which are follows:-

- 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.”

11. It is not in contention that the impugned ruling of this court was delivered on 14th November, 2022. It is also not in dispute that the Defendant/Applicant filed the current application dated 25th January, 2022 on even date, which was about 64 days after delivery of the ruling and contrary to the statutory



timeline set of fourteen (14) days provided for filing a Notice of Appeal pursuant to Rule 77 (2) of the *Court of Appeal Rules*, 2022.

12. According to the Defendant/Applicant, the physical and uncertified copy of ruling delivered on 14th November, 2022 was only availed to the Defendant/Applicant on 5th December, 2022, which was more than 14 days since its delivery and they needed time to peruse the same in order to decide on the next step to be taken. It is the Defendant's/Applicant's contention that contents of the impugned ruling have far-reaching pronouncements as they touch on the interpretation of Section 3, 3(1) of the *Transfer of Business Act* which appear to make a conclusive determination of the issues in dispute that may cause the Applicant great prejudice if it is not allowed to appeal against the ruling.
13. In response, the Plaintiff/Respondent has submitted that there is no provision by the law requiring that a copy of ruling be availed to a party for a Notice of Appeal to be filed especially when here is evidence on record to conform that the ruling was delivered in open court and in the presence of counsel for both parties. The Plaintiff also submits that there is no letter or communication addressed to the Registry to confirm a copy of ruling was sought for which has been shown to this court. Further, the Plaintiff/Respondent has submitted that there is no plausible reason which has been tendered to explain the 50 days period from the date of obtaining the copy of ruling to the date of filing the instant application.
14. Indeed, this court agrees with the Plaintiff/Respondent's submission that it has the unfettered discretion to grant extension of time within which a party may file and serve a Notice of Appeal but the same may only be exercised judicially and on the basis of reasonableness and fairness as was held by the court in the case of *Evans Mungasia Annob –vs- Sierra Flora Limited* [2022]eKLR, that:-

“This court has unfettered discretion in enlarging time for the
various situations that may arise in the course of proceedings. However, that discretion is to be exercised in a fair and just manner and the court should not be whimsical or capricious in making such a decision. The discretion must be exercised based on sound reasons that are logical, legal and reasonable based on the peculiar circumstances of each case. What is clear as daylight is that enlargement of time is not a right to any party or Applicant”.
15. While this court finds herein that there is delay in filing the Notice of Appeal and or application herein, the reason given for the said delay have not been sufficiently demonstrated. However, the court has considered the existence of Nairobi Court of Appeal Civil Appeal NO.E620 of 2022 *SBM Bank (Kenya) Limited –vs- Afraba Bank Limited*, whose facts are alleged to be similar to the ones in the present case and are pending hearing and determination before the Court of Appeal, a claim not by the Plaintiff, and is inclined to exercise its discretion in favour of the Defendant/Applicant to allow for the disputed issues to be canvassed further on appeal.
16. In view of the above findings, an expedited hearing of the appeal would suffice. The application dated 25th January, 2022 be and is hereby allowed on condition that:-
 - a. The Defendant/Applicant files and serves a Notice of Appeal upon the Appellant within 14 days for the date of this ruling.
 - b. Costs of the application to be paid to the Plaintiff/Respondent
 - c. Failure to comply with the condition No.(a) will render the application stand dismissed with costs to the Plaintiff/Applicant.



It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF FEBRUARY, 2024.

D. O. CHEPKWONY

JUDGE

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

ALFRED MABEYA

JUDGE

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