



Kariuki & another v Paramount Bank Limited; Sichuan Huashi Enterprises Corporation East Africa (E.A) Ltd & another (Interested Parties) (Civil Suit E690 of 2021) [2024] KEHC 5146 (KLR) (Commercial and Tax) (13 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5146 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E690 OF 2021**

JWW MONG'ARE, J

MAY 13, 2024

BETWEEN

ALICE WANJIKU KARIUKI 1ST PLAINTIFF

AFRICA BEL AIR LIMITED 2ND PLAINTIFF

AND

PARAMOUNT BANK LIMITED DEFENDANT

AND

**SICHUAN HUASHI ENTERPRISES CORPORATION EAST AFRICA (E.A)
LTD INTERESTED PARTY**

SAROHINDI INVESTMENT LIMITED INTERESTED PARTY

RULING

1. Before the Court is the 1st and 2nd Plaintiff's notice of motion dated 27th October 2023, brought under Article 159 of *the Constitution*, Section 1A, 1B, 3A and 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules, seeking leave to appeal against the ruling delivered by Hon. Majanja J. on 17th August 2023.
2. The application is premised on the grounds on its face, the supporting affidavit sworn by the Plaintiff on 27th October 2023 and written submissions dated 6th March 2024. In summary, the grounds are that the Applicants filed an application dated 9th November 2022. The Court delivered a ruling on that application on 17th August 2023. At that time, it was difficult for the Appellants' advocates to obtain instructions on the way forward as the Applicants had travelled outside the country due to medical reasons. Out of abundance of caution, the Applicants' advocates filed the Notice of Appeal



dated 28th August 2023 which was filed and served upon the Respondents by email on the same date and physically on 5th September 2023. Once the Applicants returned to Kenya on 26th October 2023, they instructed their Advocates to appeal against the aforementioned ruling.

3. The Applicants submitted that they filed the application without undue delay, on 27th October 2023, one day after they returned from their medical trip abroad; that they have complied with the provisions of Rule 77(1) of the Court of Appeal Rules by filing and serving their Notice of Appeal in time; that therefore, the Respondent will not suffer prejudice if leave is granted and that however, should leave not be granted, the Applicants will suffer great prejudice as they will be denied their right to be heard.

Response

4. In response, the Respondent bank filed a replying affidavit sworn by its legal consultant, Timothy Kimani, on 21st November 2023 and written submissions dated 11th March 2024. The Respondent argued that this Court has no jurisdiction to entertain the Applicants' application as it has been filed out of time and with inordinate delay; that the Applicant ought to have sought for leave to appeal against the ruling of 17th August 2023 either orally at the time of delivery or in writing within 14 days from the date of such order as provided under Order 43 Rule 1 (3) of the Civil Procedure Rules; that the requirement is couched in mandatory terms and that the appeal upon which the instant application is predicated is incompetent for want of leave to appeal.

Analysis and Determination

5. I have considered the application, the grounds, the rival affidavits, submissions and authorities. I note that the only issue for determination is "whether the Applicants have made out a case for grant of leave to appeal."
6. I have read the ruling delivered by Hon. Majanja J. on 17th August 2023 which was made with respect to the Plaintiff's Notice of Motion dated 9th November 2022 made substantively under Order 11 Rules 2, 3(5) (b) of the Civil Procedure Rules. Order 11 is not among the orders listed under Section 75 of the *Civil Procedure Act* and Order 43 Rule 1 from which an appeal would lie as of right. Order 43 Rule (2) and (3) of the Rules provide as follows: -
 - "(2) An appeal shall lie with the leave of the court from any other order made under these Rules.
 - (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order."
7. The Applicants concede that they did not seek leave to appeal the impugned ruling and/or order either when it was made on 17th August 2023 or within fourteen days thereof. The Applicants ought to have filed the application for leave on or before 31st August 2023. However, the Applicants filed the instant application on 27th October 2023, 57 days outside the statutory window. Therefore, I find that the present application has been filed out of time and with inordinate delay.



8. Section 95 of the *Civil Procedure Act* provides that:-

“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.”

9. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others*, [2014] eKLR, cited by the Applicants, discussed the principles for consideration in determining whether to enlarge time, as follows: -

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:-

- 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.”

10. Although the Court has the discretionary power to enlarge time for doing an act under section 95 of the *Civil Procedure Act*, it must exercise discretion judiciously, with reason and not on a whim. The Applicants’ explanation for the delay in filing this application is that the 1st Applicant had travelled outside the country to pursue medical treatment for her daughter. They exhibited copies of the 1st Applicant’s daughter’s medical records, her travel visa, hospital appointment letter for dates running from 5th October 2023 to 5th December 2023 and passport showing her date of return as 13th September 2023.

11. The Applicants claimed that it was not until the 1st Applicant returned to the country that she and her co-director were able to study the ruling and instruct their advocates to appeal. However, from my perusal of the exhibits, there is no evidence that the Applicants were outside the country during the 14-day period after the ruling. In the affidavit sworn by the 1st Applicant in support of the present application, it was deposed that they requested their advocates on record to prepare a Notice of Appeal which was filed and served on 28th August 2023. This raises the question why the Applicants did not instruct their advocates to seek leave at that time which was within the statutory timeline for doing so. The Court cannot aid indolence.



12. As to whether the Notice of Appeal is valid, in Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR, the Court of Appeal observed that:-

“Without leave of the High Court, the Applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules; the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”

13. Accordingly, I find that the Plaintiffs’ motion dated 27th October 2023 is without merit and it is hereby dismissed with costs to the Defendant.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 13th DAY of MAY, 2024.

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

1. Mr. Kamau for the Plaintiff.
2. Mr. Nyanjua holding brief for Mumia Defendant.
3. Amos- Court Assistant

