



**Mzuri Sweets Limited v Rameshwar Distributors Ltd (Civil Suit  
18 of 2019) [2024] KEHC 8749 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8749 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 18 OF 2019  
DKN MAGARE, J  
JULY 16, 2024**

**BETWEEN**

**MZURI SWEETS LIMITED ..... PLAINTIFF**

**AND**

**RAMESHWAR DISTRIBUTORS LTD ..... DEFENDANT**

**RULING**

1. This is a Ruling over an application dated 15/3/2024. The prayers sought are as follows: -
  - a. That the honourable court be pleased to enlarge and/or extend the period/time allowed for filing the notice of appeal out of time.
  - b. That upon grant of order above, the court be pleased to admit out of time and deem the Notice of Appeal dated 14th March 2024 and filed in court on 14th March 2024 as properly on record.
  - c. That the honourable court be pleased to enlarge and/or extend the time to allow the Applicant serve the Notice of Appeal within such time as the court deems fit and proper.
  - d. That the honourable court be pleased to grant an order staying execution of the ruling and all consequential orders of the court by Hon. Justice Kizito Magare delivered on 22nd February, 2024 pending the hearing and determination of this Application.
  - e. That the honourable court be pleased to grant a stay of 60 days from the date of determination of this Application to allow the Applicants file and serve their Memorandum and Record of Appeal.
2. The Respondent filed a Replying Affidavit dated 23/4/2023. It was deposed that the court was functus officio. Further, that the date for delivery of the ruling was given in court on 6/4/2024 in presence of the parties.



## Submissions

3. The Applicant submitted that the court has jurisdiction to extend appeal time to the court of appeal by dint of Section 7 of the [Appellate Jurisdiction Act](#).
4. It was further submitted for the Applicant that the delay was not inordinate and was explained. Also, that the purpose of stay would serve to prevent substantial loss which the Applicant risked to suffer. They relied on [RWW v EKW](#) (2019) eKLR.
5. The Applicant also urged the court to find the Applicant has met the threshold under Order 42 of the [Civil Procedure Rules](#) on stay pending Appeal.
6. The Respondent did not file submissions.

## Analysis

7. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained. If the reason for delay is not sufficient, then the issue as to whether stay of execution should be granted will not fall for determination because there will be no appeal.
8. Waki, JA in [Seventh Day Adventist Church East Africa Ltd. & Another v M/S Masosa Construction Company](#) Civil Application No. Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

9. I have perused the reasons for the delay in the Application and the Supporting Affidavit. The Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in [Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR where the learned Judges held 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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

10. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J. observed that:-

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman v Cumarasamy* [1964] 3 All ER 933; *Savill v Southend Health Authority* [1995] 1 WLR 1254 at 1259.

11. It follows therefore that the Applicant’s explanation for the delay is key in guiding the Court’s exercise of discretion on the issue of leave to appeal out of time.
12. It is self-evident that the ruling was available for the parties on the day of delivery on 22/2/2024 or soon thereafter. The Notice of Appeal ought to have been lodged by 7/3/2024. Instead it was filed on 14/3/2024 and this application was filed on 15/3/2024, 7 days late. The Applicant was under duty to show the reasons for delay. However short the period of delay, it must be explained. The explanation given was that the Applicant had no notice of the delivery of the ruling and only obtained the electronic copy of the ruling on 13/3/2024.
13. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an application is considered.
14. The factors to consider in dealing with such an application are: -
  - a. The length of delay.
  - b. The reason for delay.
  - c. The animus of the applicant.
  - d. The prejudice to the Respondent.
15. It is my considered opinion that the 4 factors above are sequential. Therefore, one must fulfil each as you move to the next. If the delay is inordinate, in may not be necessary to go to the reason for delay. When the delay is reasonable, there must be a real and genuine reason for delay.
16. Where there is doubt, either way, the court can then exercise discretion one way or another. The court cannot find that the delay is inexcusable, inordinate and no reason is given and then, out of sheer whims and fiat, extend time. That makes litigation unpredictable and unending.
17. In this matter, the reasons for the delay are strange. The delay is for about 7 days. I note that the Court in Asike-Makhandia J in *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR stated that:-

“There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise,



the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated:-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

18. I note from the court record that indeed as submitted by the Respondent, the date for delivery of the ruling was given on 13/2/2024 in the presence of counsel for both parties. Subsequently, on 22/3/2024, the Ruling was delivered in the absence of the parties. The Applicant therefore failed to offer a plausible reason for the 7 days delay. I decline to extend time.
19. Given the circumstances of the case, I have also to consider both parties. The Respondent is entitled to the fruits of the judgment. The injustice to the Respondent if the application were to be allowed exceeds the prejudice to the Applicant if the application is disallowed. In *Harris Horn Senior, Harris Horn Junior v Vijay Morjaria* Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:
  - (32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”
20. I find no reason to venture into the issue of stay of execution. This is a proper application to dismiss with costs.

#### **Determination**

21. In the circumstances I make the following orders: -
  - a. The Application dated 15/3/2024 lacks merit and is accordingly dismissed.
  - b. The Respondent shall have costs assessed at Kshs. 20,000/-.
  - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 16<sup>TH</sup> DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Ms. K'Ojienda for the Applicant

Ms. Azei for the Respondent

Court Assistant – Jedidah

