



Rafiki Microfinance Bank Limited v Oxkat Solutions Limited (Miscellaneous Civil Application E046 of 2024) [2024] KEHC 16952 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KEHC 16952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E046 OF 2024**

F WANGARI, J

JULY 19, 2024

BETWEEN

RAFIKI MICROFINANCE BANK LIMITED APPLICANT

AND

OXKAT SOLUTIONS LIMITED RESPONDENT

RULING

1. This is a Ruling on a Notice of Motion dated 19/3/2024 seeking leave to file the appeal out of time. The Application is supported by the Affidavit of Cynthia Muhonja Kavasias and the Grounds stated the ruling delivered on 22/11/2022, which is subject to this application was delivered in the absence of the Applicant.
2. That on the same date, the Applicant filed an application to set aside the orders issued by the court, but vide a ruling dated 15/2/2023, the court dismissed the application to have the orders set aside. On 19/4/2023, the Applicant filed an application for review of the orders dismissing the application to set aside the ruling dated 22/11/2022.
3. The court set the ruling date for the above application for review on 5/10/2023 but the ruling date was deferred. That on 20/12/2023, the Applicant through the judiciary portal, came to know that the ruling dismissing their application for review was delivered. Without knowing the contents of the ruling, they kept on following up with the registry, and the typed copy of the ruling was received on 19/3/2024, hence filing this application.
4. The Respondent opposed the Application inter alia on the ground that no plausible reason was given for failure to file the Memorandum of Appeal in time. The Applicant failed in following up on the ruling thus displaying lack of seriousness. The Applicant was also accused of inordinate delay between the time the ruling was delivered and filing of this application.



5. It was directed that the application be canvassed by way of written submissions. Both parties complied by filing their rival submissions. I have considered the submissions.

Analysis

6. The issues for this Court's determination is whether the Applicant has met the legal threshold for an Order to extend time within which to Appeal.
7. The jurisdiction to extend time for filing appeal is set out under Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides as follows;

“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”

8. This Court's discretion in enlarging appellate time has also been set out in a number of judicial authorities. In the case of *Mombasa County Government —Vs- Kenya Ferry Services & Anor (2019) eKLR*, at paragraph 25, the Supreme Court held that;

- 25] Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if 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” [emphasis supplied]



9. In the case relied upon by the Applicant, *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR, the court set out the conditions for grant of extension of time to be premises on the following:
- i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
10. I have perused the Application and the evidence attached in support thereof. I note that the impugned Ruling was delivered on 22/11/2022 and this Application was filed on 19/3/2024. The Applicant is indeed out of time for the Appeal.
11. The Memorandum of Appeal should have been filed by 22/12/2022. There is thus a delay of almost 2 years before waking up to file this Application. The reason given is that the advocate did not inadvertently failed to lodge appeal within time.
12. I revert to Article 48 of *the Constitution* which guarantees every person access to justice. Additionally, under Article 50(1) of *the Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in affair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. These Constitutional imperatives anchor the right to a fair hearing in our jurisdiction.
13. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
14. The Applicant has explained the steps taken since the date the ruling was delivered. Further, this court was kept informed of the steps being taken in the lower court matter, during the proceedings in Mombasa HC Misc. Appn. No. E192 of 2023, where the parties herein are also parties in the matter. The matter has already been determined by this court.
15. In *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR, it was 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.”
16. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no



evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.

17. In the case of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR, the court stated as follows;

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“26. There is no evidence that the application is an afterthought or how the same is intended to abuse court process. Further, it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.

Albeit the Respondent maintained that no sufficient reason was given for the one day lateness, in *Belinda Mural & 9 Others Vs Amos Wainaina* [1978] eKLR, the Court of Appeal – Law JA, citing other cases such as *Shah H. Bharmal & Brothers Vs Kumar* [1961] EA 679 where it was held that:

“Mistakes of a legal adviser may however amount to ‘sufficient cause under the East African Rule.’”

And in *Hamam Singh & Others Vs Mistri* [1971] EA 122 where it was held that:

“...in relation to applications to this court for leave to appeal out of time, it has been held that mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his part...”

18. From the above, I find that the delay in filing the appeal was excusable.
19. The Respondent had taken out contempt proceedings against the Applicant in Mombasa H.C Misc Appn. No. E192 of 2023, hence risking being held in contempt of the court orders. In the matter, the Applicant in this case argued that the orders subject to the contempt proceedings and this intended appeal, cannot be enforced. I find that if the leave to file the appeal is not granted, the Applicant is likely to suffer prejudice.
20. As for costs, this court exercises its discretion and orders that each party do bear its own costs.

Determination

21. The upshot of the foregoing, the Notice of Motion dated 19/3/2024 has merits and is allowed as follows:
- i. That leave to file appeal out of time is hereby granted.
 - ii. The Record of Appeal be filed within the next 30 days, in default the appeal shall stand dismissed.
 - iii. Each party to bear its own costs.
 - iv. File is hereby closed.



Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JULY, 2024.

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F. WANGAR1

JUDGE

In the presence of:

M/S Ndinda h/b for M/S Muhonja Advocate for the Applicant

Ateng Advocate h/b for Mokaya Advocate for the Respondent.

M/S Salwa, Court Assistant

