



**National Bank of Kenya v Musau, Muthama & Mulobi (All Trading as Mwaka
Musau Consultants) (Commercial Miscellaneous Application E889 of 2023)
[2024] KEHC 11430 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E889 OF 2023
MN MWANGI, J
SEPTEMBER 20, 2024**

BETWEEN

NATIONAL BANK OF KENYA APPLICANT

AND

**EZEKIEL MWAKA MUSAU, JAMES MUTHAMA, COSMAS MUTINDA,
AND PETER MULOBI (ALL TRADING AS MWAKA MUSAU
CONSULTANTS) RESPONDENT**

RULING

1. The applicant filed a Notice of Motion application dated 16th October, 2023 pursuant to the provisions of Sections 1A, 1B, 3A, 79G & 95 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, Order 50 Rule 5 & Order 51 Rule 1 of the *Civil Procedure (Amendment) Rules*, 2020, and the inherent powers of this Honorable Court, seeking inter alia extension of time to file and serve its appeal against the judgment of the Honorable Magistrate P. K. Rotich delivered in 18th July, 2023 by fourteen (14) days from the date of making the order, and that it be supplied with a certified copy of the proceedings by the Executive Officer upon payment of the requisite Court fees.
2. The application is supported by an affidavit sworn on the same day by Mercy Musau, an Advocate of the High Court of Kenya and learned Counsel for the applicant, who averred that they wrote to the Registry on 24th July, 2023, 7th August, 2023, 14th August, 2023 and 15th September, 2023 requesting for a typed copy of the judgment, certified copy of the decree, and certified copies of proceedings, but the Registry availed to them only a copy of the judgment on 29th October, 2023 and a copy of the decree on 11th October, 2023.



3. She stated that in the Trial Court judgment, the applicant was awarded Kshs. 1,750,000.00 plus interest thereon from 18th July, 2023 until payment in full. Therefore, the applicant wishes to partially appeal against the said judgment since the Trial Court failed to award it interest from the date of filing suit until payment in full. She claimed that the delay in filing the said appeal was not deliberate, as it was occasioned by the Registry's delay in supplying the applicant with copies of the judgment, decree and proceedings for consideration, and that also the inability to trace the Court file occasioned delay. Ms. Musau further stated that the instant application has been brought timeously and no prejudice shall be occasioned on the respondent if the orders sought are granted.
4. The application was opposed vide Grounds of Opposition dated 12th February, 2024 on the following grounds –
 - i. The reasons advanced for the delay in filing the appeal are not valid since the applicant was represented when the lower Court judgment was read out on 18th June, 2023 and therefore the applicant knew of the contents of the judgment on the issue of interest;
 - ii. As further proof that lack of a certified judgment or proceedings before filing an appeal is not necessary, the respondent themselves filed an appeal to the same impugned judgment in time vide High Court Civil Appeal No. E734 of 2023 on the 3rd of August 2023;
 - iii. Moreover, the applicant should have cross appealed in High Court Civil Appeal No. E734 of 2023 instead of seeking leave to file a separate appeal vide the present application thereby avoiding a multiplicity of separate appeal proceedings over the same judgment;
 - iv. Even if the delay is excusable, which it is not, the intended appeal has slim chances of succeeding since the intended appeal challenges the settled rule that an award of interest on general damages is from date of judgment; and
 - v. Further, the award of interest being in the discretion of the Court, overturning such a discretionary decision of the lower Court on appeal is difficult since an appellate Court will not normally interfere with discretionary decisions of lower Courts except in rare instances.
5. The instant application was canvassed by way of oral submissions. Ms. Musau, learned Counsel for the applicant cited the provisions of Sections 79 & 85 of the *Civil Procedure Act* and Order 50 Rule 5 of the *Civil Procedure (Amendment) Rules*, 2020 and submitted that the instant application was necessitated by the delay in obtaining a copy of the Trial Court's judgment which was delivered on 18th July, 2023.
6. On his part, Mr. Kali, learned Counsel for the respondent submitted that the respondent has appealed against the judgment of 18th July, 2023 in HCCOMMA No. E734 of 2023, and that the applicant has even been served with a Memorandum of Appeal. Thus, the applicant should have cross-appealed in the said appeal instead of filing the instant application.

Analysis and Determination.

7. Upon consideration of the application herein, the grounds on the face of it and the affidavit filed in support thereof, the Grounds of Opposition by the respondent and the oral submissions by Counsel for the parties on 22nd April, 2024, the issue that arises for determination is whether the application for leave to file an appeal out of time is merited.



Whether the application for leave to file an appeal out of time is merited.

8. Section 79G of the *Civil Procedure Act*, Cap 21 Laws of Kenya provides that every appeal from a subordinate Court to the High Court shall be filed within thirty (30) days from the date of the decree or order appealed from. The Trial Court's judgment was delivered on 18th July, 2023, thus the applicant ought to have filed its appeal against the said judgment on or before 16th August, 2023. Section 79G of the *Civil Procedure Act* however gives Courts the discretion to enlarge time within which an appeal can be filed, upon demonstration of sufficient reason by the applicant for not filing the appeal in time.
9. The guiding principles for extension of time were laid down by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as hereunder-

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 underlying principles that a Court should consider in exercise of 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 delay should be explained to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents if the 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.
10. Further, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No Nai 255 of 1997(unreported), cited with authority by the Court of Appeal in the case of *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, the Court held 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 in general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reasons for delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.

11. The judgment which the applicant seeks to appeal against was delivered on 18th July, 2023 in the presence of Counsel for the parties herein, whereas the instant application was filed on 17th October, 2023 approximately three (3) months later. The applicant claims that the delay in filing an appeal against the Trial Court's judgment was occasioned by the Registry's delay in supplying it with copies of the judgment, decree and certified copy of typed proceedings. The applicant states that the instant



application was filed immediately after the applicant was supplied with copies of the said judgment and the resultant decree on 29th October, 2023, and 11th October, 2023 respectively. It contends that there has been no delay in filing the application herein.

12. It is not disputed that before the Trial Court, the applicant was duly represented by Counsel by the name of Ms. Musau, and the Trial Court's judgment was delivered before the said Counsel and the Counsel for the respondent. Order 41 Rule 1 of the [Civil Procedure Rules, 2010](#) provides for the form of appeals to the High Court. It states that –
 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
13. In order to lodge an appeal against a decision of the lower Court to the High Court as is the case herein, the applicant was required to file a Memorandum of Appeal as provided for under Sub-rule 2 reproduced above. Upon perusal of the Trial Court's judgment, it is manifest that the Court did not indicate the period from which interest on the sum of Kshs. 1,750,000.00 would be charged. However, the decree issued on 11th October, 2023 indicates that the said sum would accrue interest from the date of judgment until payment in full.
14. I have perused the affidavit in support of the instant application and the draft Memorandum of Appeal annexed thereto, and I note that the applicant intends to appeal against the Trial Court's award of interest on grounds that the Trial Court awarded it general damages of Kshs. 1,750,000.00 with interest at Court rates from the date of judgment until payment in full, whereas the said amount should accrue interest from the date of filing suit until payment in full. From the foregoing, it is evident that the applicant's decision to appeal against the Trial Court's judgment was informed by the resultant decree issued on 11th October, 2023 and not the judgment of 18th July, 2023.
15. After delivery of the Trial Court's judgment on 18th July, 2023, the applicant wrote to the Court Registry on 24th July, 2023, 7th August, 2023, 14th August, 2023 and 15th September, 2023 seeking for copies of the judgment, certified decree and certified typed proceedings, and also sought help in tracing the Trial Court file for purposes of extracting the said documents. There is no evidence of responses from the said Registry. However, on the face of the decree annexed to the applicant's affidavit in support of the application herein, it is clear that the said decree was issued on 11th October, 2023, approximately one and a half months after the elapse of the thirty (30) days period within which the applicant could lodge an appeal against the Trial Court's decision.
16. The instant application was filed on 17th October, 2023, six (6) days after issuance of the said decree. No explanation has however been offered by the applicant to explain why it did not file the application herein immediately after it received a copy of the said decree is on 11th October, 2023. In the case of [Jaber Mohsen Ali and another v Priscillah Boit and another](#) [2014] eKLR the Court held that;

“The question that arises is whether the application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”
17. The Supreme Court in [Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others](#) [2018] eKLR, held that 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. In the absence of an explanation and/or reasons as to why the application herein was filed six (6) days after receipt of the decree issued by the Court on 11th October, 2023, this Court finds that there has been inordinate delay in filing the instant application. As was correctly stated by the respondent's Counsel, an application seeking leave to file a cross-appeal out of time should have been filed in HCC Appeal No. E 734 of 2023, instead of having another file opened for filing of the instant application.

18. The Court of Appeal in the case of *Abdul Azizi Ngoma v Mungai Mathayo* [1976] KLR 61, 62, as follows-

“We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

19. In the circumstances of this application, I am not persuaded that the applicant has made a case to warrant this Court to exercise its discretion in its favour, and extend time within which to file an appeal against the Trial Court's judgment of 18th July, 2023, and the resultant decree.
20. In the premise, it is my finding that the instant application is not merited. It is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mrs Musau for the applicant

Ms Muluvi h/b for Mr. Mutua SC for the respondent

Ms B. Wokabi - Court Assistant.

