



REPUBLIC OF KENYA



**Taib v Said (Civil Suit 88 of 1996) [2023] KEHC 20481 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20481 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 88 OF 1996  
DKN MAGARE, J  
JULY 10, 2023**

**BETWEEN**

**MOHAMMED ALI TAIB ..... PLAINTIFF**

**AND**

**SALIM AGIL SAID ..... DEFENDANT**

**RULING**

1. This ruling relates to an application dated April 30, 2023. The application seeks two orders: -
  - a. Enlargement of time within which the applicant can apply for leave to appeal out of the ruling dated August 23, 2022.
  - b. leave for the applicant to appeal from the ruling dated August 23, 2022
2. It is grounded on the fact that the applicant has discovered that the advocate holding brief for Taib SC, failed to seek leave when he attended court on the date the ruling was made
3. The test for extension of time whether to appeal or to do anything out of time. Has to be merited. It must meet the following criteria: -
  - a. Be made without undue delay.
  - b. Must not be frivolous
  - c. Delay must be fully explained
  - d. The court must have power to do that extension
  - e. Lengthy of delay.
  - f. Extent of Prejudice to the Respondent.



4. Order 43 Rule (1) of the *Civil Procedure Rules* sets out the orders and rules in respect of which appeals would lie as of right. Under Order 43(2) it is provided that an appeal shall lie with the leave of the court from any other order made under the Rules.
5. Ipso facto, where there is no right of appeal leave must be obtained prior to filing a Notice of Appeal or at the same time. Consequently, unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1) leave to appeal must be obtained before such an appeal can be preferred. The procedure guiding leave application set out in Order 43(3) which states as doth: -
  - (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.

6. Section 75 provides as follows: -

“75. Orders from which appeal lies

- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
  - a. an order superseding an arbitration where the award has not been completed within the period allowed by the court;
  - b. an order on an award stated in the form of a special case;
  - c. an order modifying or correcting an award;
  - d. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

7. Section 95 also provides for extension of time in the following manner: -

“95. Enlargement of time 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.”

8. The matter of extension of time has been dealt extensively by superior courts of record. In the case of *Vishva Stone Suppliers Company Limited v RSR Stone* [2006] Limited [2020] eKLR the supreme court stated as doth:-

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystallized .... in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:

- i. the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- ii. the right to be heard is a valued right; and



- iii. that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice...”
- 9. Before, thus I make an adverse ruling, I must be satisfied that the applicant is undeserving of the orders sought. In other words, if there just minor infractions, I must err on the side of allowing the application.
- 10. The principles for extension of time were restated by the Supreme Court of Kenya (MK Ibrahim & SC Wanjala SCJJ) were in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (supra) as follows: -
  - a. 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.
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
  - c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
  - d. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
  - e. Whether there will be any prejudice suffered by the respondent of the extension is granted.
  - f. Whether the application has been brought without undue delay; and
  - g. Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
- 11. These principles will be considered one by one for this matter.
- 12. First, it is noted that extension 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. The Applicant was present when the decision was made. A notice of appeal together with a letter bespeaking proceedings. It was signed by the advocate who was said to be out of the country for 3 months.
- 13. Therefore, there is no candid disclosure to the court. The ruling was delivered in the presence of both parties. The Advocate who ‘forgot’ to seek leave did not swear any affidavit. No evidence has been attached to the depositions supporting the Application.
- 14. The burden of proof is on the party who seeks for extension of time. He has to laying a basis to the satisfaction of the court. I am unable to understand why leave was not sought immediately or within 14 days. I am aware that this court has to exercise discretion. But the discretion to be exercised must be judicious, it cannot be exercised on no evidence or capriciously.
- 15. To enable me exercise discretion I need material to act on. It is not a blanket order but on case by case basis. Noting that this is a 1996 matter, the applicant ought to be more vigilant. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis. It is not until April 30, 2023 that this application and filed thereafter. The case was not in court till May 11, 2023.



16. It is my considered view that the delay is neither reasonable reason for the delay nor is the delay should be explained to the satisfaction of the court. The excuse they give does not cut. Whether the advocate was a junior or a senior one, he was an advocate of the high court. In the famous case of *Butt v Rent Restriction Tribunal* [1979] eKLR, Madan, Miller and Potter JJA as then they were, put this succinctly, when dealing with a question of young and old judges, which apply equally to advocates: -

“A judge is a judge whether he is newly appointed or an old fogy. The former has the benefit of his latest learning, the latter the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals and imbued with reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of juristic spills. Both are jealously scrupulous and impartial. Both are 24 carat gold. Both act free from doubt, bias and prejudice. Both carry the conviction of correctness of their decision. Both speak no ill of any litigant. Both are torch bearers for stability of society. Both are strugglers for liberty. Neither should, however, become an advisor instead of an adjudicator. The litigants and their professional advisors are the best judges of their affairs...”

17. I am not persuaded that there was any difference Taib, SC could have done if he did not seek leave. It is over 8 months since this matter which has been in our courts for 27 years was laid to bed. Then the respondent will be woken up that there is another issue. This application ought to have been made then and allowed or refused. It has been brought with undue and unexplained delay.

18. In the case of *George Mwenda Muthuri v Mama Day Nursery and Primary School Limited* [2014] eKLR in which extension of time to appeal was declined on account of the applicant’s failure to explain a delay of twenty (20) months and stated as doth: -

“(7) I have considered the rival submissions by both counsel, it is well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal is essentially discretionally. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; inter alia, the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted. (*Mutiso v Mwangi*), (supra). Rule 4 of the Court of Appeal Rules donates unfettered discretion and as long as the discretion is exercised judiciously a single Judge would be entitled to consider any other relevant material.”

19. Even where delay is for a reasonable period, it must be explained. This has not happened in this matter. Let sleeping matters sleep. It is unnecessary o consider if leave is merited in view of my finding above.

20. In the circumstances this application lacks merit and is dismissed. Given that the respondent did not file a response, each party to bear its costs.

### **Determination**

21. The upshot of the foregoing is that I make the following orders:

- a. The application dated April 30 2023 is bereft of merit and as such is dismissed with no order as to costs.
- b. The file is closed.



**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10<sup>TH</sup> DAY OF JULY, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

Miss Gathoni for Taib SC for the Applicant

No appearance for the Respondent

Court Assistant - Brian

M D KIZITO

