



**Crown Paints (K) Limited v Kariuki & 3 others (Civil Appeal 68 & 64 of 2019
(Consolidated)) [2023] KEHC 22625 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 68 & 64 OF 2019 (CONSOLIDATED)
JRA WANANDA, J
SEPTEMBER 22, 2023**

BETWEEN

CROWN PAINTS (K) LIMITED APPLICANT

AND

PETER MBARIA KARIUKI 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 3RD RESPONDENT**

ANTI-COUNTERFEIT AGENCY 4TH RESPONDENT

(Appeal delivered by Hon. Justice W. Musyoka on 19/03/2021)

RULING

1. Judgment in this Appeal was delivered by Hon. Justice W. Musyoka on 19/03/2021. By the said Judgment, the portion of the Appeal challenging liability and general damages was dismissed. However, the portion challenging the quantum of Special damages partially succeeded, to the extent that the amount awarded by the lower Court was reduced.
2. Before the Court is now the Appellant's Application dated 19/04/2021 brought by way of Notice of Motion and filed on the same date. The Application is filed through Messrs Kiingati Ndirangu & Co. Associates Advocates and seeks the following orders;
 1. That the Applicants' Notice of Appeal dated 15th April 2023 and filed in Court on 16th April 2023 and served on the Respondents be deemed as duly filed and served.



2. That there be stay of execution of the Judgement of the Court in the Chief Magistrates' Court at Kakamega Civil Case No. 264 of 2016 pending the hearing and the determination of the Application herein.
3. That costs of this Application be provided for.
3. The Application is expressed to be brought under Sections 1A, 3B, 3A and 95 of the Civil Procedure Act, Section 7 of the Appellate Jurisdiction Act, Order 50 Rule 6, Order 42 Rule 6(1) and (2) and Order 50 Rule (1) of the Civil Procedure Rules 2010. It is premised on the grounds set out therein and the Affidavit sworn by one Nicholas Wanambisi, who has described himself as the Appellant's Human Resource Manager.
4. In the Affidavit, Mr. Wanambisi deponed that being aggrieved with the Judgement of the Court in Kakamega Chief Magistrate's Civil Case No. 264 of 2019, the Applicant filed this appeal against the Judgement, namely, Kakamega High Court Civil Appeal No. 68 of 2019 which was later consolidated with Kakamega High Court Civil Appeal No. 64 of 2019, the Judgement in this matter was delivered on 19/03/2021 dismissing the Appeal, the Applicant's Advocates notified the Applicant on 25/03/2021 of the Judgment and sought instructions but the email did not reach the Applicant, the Applicant was only apprised of the Judgement on 15/04/2021 when the Advocates reached the Applicant on phone, upon learning of the Judgment the Applicant instructed the Advocates to lodge an Appeal but the Advocates advised that the time for filing the Appeal had already lapsed by 12 days, the delay was not inordinate nor intentional as it was caused by a systems failure leading to non-delivery of the email and that the Applicant has since filed a Notice of Appeal and served it upon the Respondents.
5. The deponent further stated that the Applicant wishes to appeal on the following grounds:
 - a. The Honourable Judge erred in law upholding the Judgment of the trial Court in finding that the Applicant was liable for malicious prosecution.
 - b. The Honourable Judge erred in law when he adjudged that the Applicant prosecuted the case against the 1st Respondent whereas the same is the function of the relevant state agency.
 - c. The Honourable Judge erred in law by upholding the lower Court's Judgment in awarding general damages in the sum of Kshs 3,000,000/- which sum is inordinately high.
6. According to the deponent therefore, the Appeal is arguable and the Respondents will not be prejudiced if the Application is allowed.
7. The 1st Respondent opposed the Application vide the Grounds of Opposition filed on 27/04/2021 through Messrs Abok Odhiambo & Co. Advocates. In the Grounds, the 1st Respondent stated that the Application is misconceived ab initio and an abuse of the Court process, it does not disclose any reasonable grounds upon which it can be sustained and that the Applicant has not demonstrated sufficient cause to warrant grant of the orders sought.
8. The present Application had been dismissed on 4/05/2021 by Hon. Justice W.M. Musyoka for non-attendance but was later reinstated by the same Judge vide the Ruling delivered on 8/07/2022.
9. It was then agreed, and the parties directed, to canvass the Application by way of written Submissions. Pursuant thereto, the Applicant filed its Submissions on 22/11/2022 whereas the 1st Respondent filed its Submissions on 14/12/2022.



Applicant's Submissions

10. Counsel for the Applicant submitted that this Court is clothed with the discretion to extend the time for filing a Notice of Appeal and cited Section 7 of the [Appellate Jurisdiction Act](#), Section 95 of the [Civil Procedure Act](#) and Order 50 Rule 6 of the [Civil Procedure Rules](#). He added that the Applicant has demonstrated that it is deserving of the exercise of this Court's discretion to extend the time as it had met the threshold for grant of the orders, the delay was not inordinate, there is an excusable reason for the delay, there is a good chance of success of the Appeal and no prejudice will be suffered by the Respondents in the event the Application is allowed. He cited the Supreme Court case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) (2014) eKLR.
11. Counsel argued that the delay in filing the Notice of Appeal was not inordinate as it was only by 12 days, the reason for the delay was excusable and it would be in the interests of justice to extend time, Courts have held that where a sufficient reason has been shown for the delay, it would be in the interest of justice to extend the time. He cited the case of [Maureen Agutu v Paul Mboya](#) [2019] eKLR where, he submitted, the Court held that a delay of 4 ½ months was not inordinate. He urged that the Applicant has explained that due to technical hitches the Advocates' email informing the Applicant of the Judgment was not received, that the Applicant only learnt of the Judgment on 15/04/2021 and that it immediately instructed the Advocates to file the Notice of Appeal and which was promptly done.
12. Counsel further cited the case of [Vishva Stone Company Limited v RSR Stone \[2006\] Limited](#) [2020] eKLR and urged that the circumstances of this case warrant the Court to exercise its jurisdiction under Article 159(2) (d) of the [Constitution](#) as read with Section 3A of the [Civil Procedure Act](#) to cure the defect of the inadvertent delay and allow for the appeal to be heard on merits for the ends of justice to be met.
13. He submitted further that the intended Appeal has high chances of success as it it raises pertinent issues of law such as whether the Appellant ought to be punished for the misgivings of a state agency in doing its work. He urged further that no prejudice will be suffered by the Respondents, especially the 1st Respondent since firstly, he has already been paid the decretal sum and secondly, he has not demonstrated any prejudice that he will suffer in the event that the Application is allowed. He cited the case of [Geoffrey Oguna & another v Mohamed Yusuf Osman & 2 others](#) (2022) eKLR. Without prejudice to the foregoing, Counsel added that any inconvenience to the Respondent can be cured by an award of costs, the Applicant stands to suffer greater prejudice if the Application is dismissed as it will have lost the opportunity to ventilate its Appeal. He cited the case of [Antony Mwau Wambua v Co-operative Bank of Kenya Ltd](#) [2021] eKLR.
14. Further, Counsel urged that the doctrine of a Court having become functus officio does not hinder the Court from determining other consequential matters that may arise from the Judgement thereof. He cited the case of [Mombasa Bricks & Tiles Limited & 5 others v Arvind Shah & 7 others](#) (2018) eKLR and urged that the Application is not meant to reopen the Appeal, rather it seeks an extension of time for filing the Notice of Appeal, the Court is therefore not functus officio. He submitted that Section 95 of the [Civil Procedure Act](#) donates discretion to the Court to extend and enlarge time whereas Order 50 Rule 6 of the [Civil Procedure Rules](#) empowers the Court to enlarge time depending on the circumstances of the case. Finally, Counsel submitted that under Section 27 of the [Civil Procedure Act](#), costs are at the discretion of the Court but generally, should follow the event. He cited the case of [Supermarine Handling Services Ltd vs Kenya Revenue Authority](#) Appeal No. 85 of 2006 and prayed that the Applicant should be awarded costs of the Application.



Respondents' Submissions

15. In opposing the Application, Counsel for the 1st Respondent submitted that the Applicant failed to first seek leave of Court before filing the Notice of Appeal out of time, there are no sufficient reasons that have been given in support of the Application, the Applicant's Advocates were not keen nor diligent to ensure that the Applicant was kept in the loop regarding delivery of the Judgment, the Applicant claims that after Judgement was delivered on 19/03/2021, the Applicants' Counsel sent an email on 25/03/2021 informing the Applicant of the outcome, it beats logic as to why the Advocates had to wait for 6 days to do so, the other question that begs an answer is why, after allegedly sending an email on 25/03/2021, the Applicant's Counsel had to wait for a further 2 weeks, until 15/04/2021, to follow up with the Applicant vide a telephone call. He argued that what emerges from the explanations is the lackadaisical manner the Applicant's Counsel was handling the appeal process, there was no decent attempt at checking their email to confirm whether indeed the alleged email was actually sent. Counsel cited the case of *Odoyo Osodo -vs- Rael Ohara Ojuok & 4 others* [2017] eKLR, in the High Court of Kenya at Kisii Environment and Land Court Case No. 70 of 2012 and *Nicholas Kiptoo Arap Korir Salat* (*supra*).
16. In revisiting the issue of the Applicant's failure to seek leave of the Court prior to filing the Notice of Appeal, Counsel urged that the failure is fatal to the present Application. He cited the case of *Charles Karanja Kiiru -vs- Charles Gitbinji Muigwa* [2017] eKLR, Court of Appeal at Mombasa. He further alluded that the Applicant's lack of diligence is apparent from the fact that for instance, the present Application had itself been dismissed and the Applicant had to apply for its reinstatement.
17. Regarding the issue of stay of execution, Counsel submitted that the substantive law is found in Order 42 Rule 6(2) of the *Civil Procedure Rules* and whose threshold the Applicant has not met, the Applicant has not demonstrated what loss it stands to suffer if stay is not granted, in any event, the Applicant is more than able to recover any amounts it may be condemned to pay the 1st Respondent, it cannot be said that the Application has been made without unreasonable delay, balancing the interests of the parties plus taking into account the long period of time that has lapsed since delivery of Judgment, it is not fair that the 1st Respondent keeps being held in abeyance from enjoying the fruits of the Judgment of the lower court.

Analysis & Determination

18. In respect to the prayer for stay of execution, prayer 2, I note that in his Submissions, Counsel for the Applicant stated

“ no prejudice will be suffered by the Respondents, especially the 1st Respondent since firstly, he has already been paid the decretal sum”.

I believe that it is because of this statement that Counsel did not bother to submit on the issue of stay. Indeed, if, as submitted by its Counsel, the 1st Respondent has already been paid the decretal sum, then it follows that the issue of stay does not arise and the same is overtaken by events. For this reason, I will not belabour prayer 2 of the Application.

19. In the circumstances, upon considering the Application, the Affidavits and Submissions filed, I find that the issue that now remains for determination is the following;

“ Whether the Applicant should be granted leave to file the appeal out of time”

20. I now proceed to analyze and answer the said issue.



21. The Applicant is seeking orders that the Notice of Appeal already filed and served be deemed as duly filed and served. To me, this seems to be a presumptuous prayer insofar as it appears that the Applicant has already determined that leave to file the Notice of Appeal out of time shall be granted by this Court. I say so because there is no preliminary prayer seeking that, first, the Applicant be granted leave to appeal out of time. Be that as it may, I will excuse this apparent erroneous assumption and consider the prayer as also seeking leave to file the appeal out of time.
22. I may also mention that I am aware of the view taken by some Courts that the High Court has no jurisdiction to enlarge time as this, allegedly, is the preserve of the Court of Appeal. I however digress from this view and in doing so, I cite the decision of Hon. Justice Sila Munyao in the case of [Loise Chemutai Ngurule & another v Wilfred Lesbwari Kimung'en & 2 others](#) [2015] eKLR where he stated the following:
- “ 11. It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of [Simon Towett Martin v Jotham Muiruri Kibaru](#), Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004) eKLR. In the matter, it was held that Rule 4 of the [Court of Appeal Rules](#) grants the Court of Appeal exclusive jurisdiction to the Court of Appeal to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.
12. With respect I disagree with the above decision. Section 7 of the [Appellate Jurisdiction Act](#), Cap 9, is drawn as follows:-
- S. 7 Power of High Court to Extend Time
- The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:
- Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.
13. It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the [Constitution](#) of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.
14. Neither am I of the view that there is any conflict between the above provision and the provisions in the [Court of Appeal Rules](#). Rule 4 of the [Court of Appeal Rules](#) also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is drawn as follows:-



Rule 4: Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

15. In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the *Court of Appeal Rules* which provides as follows:-
16. One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.
17. The matter indeed arose in the case of *Kenya Airports Authority & Another vs Timothy Nduvi Mutungi*, Court of Appeal, Civil Application No. Nai 165 of 2013 (UR 113/2013) (2014) eKLR. In the case, an application for extension of time to lodge Notice of Appeal was filed in the High Court and the High Court declined to hear it, instead asking the applicant to file the application in the Court of Appeal. Githinji JA, had this to say on that point :-

“The application of 10th December, 2012 (the application for extension of time to lodge Notice of Appeal out of time), was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the *Court of Appeal Rules* (sic) (clearly meant Section 7 of the *Appellate Jurisdiction Act*) which provides:- (Section 7 of the *Appellate Jurisdiction Act* set down)... Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined...”
18. It will be observed that the Court of Appeal did hold that the application for extension of time to lodge a Notice of Appeal out of time had been filed properly in the High Court and the High Court ought to have determined it.
19. I do not therefore agree with the argument that this court has no jurisdiction to entertain the present application in so far as it seeks extension of time to lodge a Notice of Appeal out of time. I will now go to the merits of the application.
23. As aforesaid, I fully concur with S. Munyao J’s reasoning above. Having found that this Court possesses the jurisdiction to extend the time for filing a Notice of Appeal against its own Judgment, I now proceed to the merits of the Application.
24. Section 95 of the *Civil Procedure Act* provides as follows;

“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.”



25. On its part, Section 79G of the *Civil Procedure Act* stipulates 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 a good and sufficient cause for not filing the appeal in time.” [Emphasis added].

26. The Applicant contends that the delay was occasioned by the fact that its Advocates sent an email on 25/03/2021 notifying the Applicant of the Judgement that had been delivered on 19/03/2021. According to the Applicant, due to systems failure, the email was not delivered as intended. The Applicant further alleged that the Advocates made a follow-up on 15/04/2021 by making a phone call to the Applicant upon which the Advocates were instructed to appeal. Whereas the delay of 12 days may not be inordinate, I must address my mind to the chronology of events. The Advocates informed the Applicant of the Judgement 6 days after the decision was delivered, then waited for over 2 weeks to follow up on the same. It is my considered view that this was complacency on the part of the counsel.

27. However, despite finding that there was complacency on the part of the Applicant’s Advocates, I am still duty bound to consider other relevant factors. This is because in determining an Application for extension of time, the Court is required to take into account several other factors, not just the conduct of the parties or their Counsel. In regard thereto, in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court set out the relevant factors to be considered 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 a reasonable reason 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.”

28. Further, in *Edith Gichungu Koine vs Stephen Njagi Thoithi* [2014] eKLR, Odek JJA guided the Courts on such relevant factors as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the



delay, the degree of prejudice to Respondent if the Application is granted, and whether the matter raises issues of public importance, amongst others.”

29. In applying the above principles to the facts of this case, I do not find that any prejudice will be suffered by the Respondents if the extension of time is granted since, as submitted by the Applicant, and which has not been denied, the 1st Respondent has already been paid the decretal sum. I also find that the 12 days delay was not inordinate.

30. I am also of the persuasion that mere inaction by Counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude (see holding of Shah, JA in *Mwangi v Kariuki* (199) LLR 2632 (CAK)).

31. As stated by W. Korir, JA in *Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi* (Civil Application E032 of 2022) [2023] KECA 381 (KLR) (31 March 2023) (Ruling),

“the interest of justice demands that a party is accorded every reasonable and available opportunity to ventilate their grievances within the available ranks of our judicial system. That is what the applicant seeks to do”.

32. I am aware of the view that filing of a Notice of Appeal out of time before first seeking leave to do so renders an Application filed subsequently seeking such leave to a nullity. In advancing this view, the 1st Respondent’s Counsel relied on the Supreme Court case of *Nicholas Kiptoo Arap Korir Salat* (*supra*). However, in respect to application of the said authority to Section 79G of the *Civil Procedure Act*, which is the provision invoked herein, the authority was distinguished by the Court of Appeal in *Charles Karanja Kiiru v Charles Gitthinji Muigwa* [2017] eKLR as follows:

“26. In our view however, the *Salat case* was in respect of Rule 53 of the Supreme Court Rules which simply provides as follows;

“The Court may extend the time limited by these Rules, or by any decision of the Court.”

That Rule only applies to applications before the Supreme Court and not before any other court. Conversely Rule 4 *Court of Appeal Rules* provides as follows on extension of time.

“The Court may, on such terms as it thinks just, by order extend the time limited by these *Rules*, or by any decision of the Court, or of a superior court, for the doing of any act authorized or required by these *Rules*, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”. (emphasis supplied)

We find it necessary to cite the above Rule in entirety because even assuming the learned Judge was wrong in deeming the appeal as having been deemed to have been duly filed, this Court would still have jurisdiction to validate the said leave if it deemed it appropriate to do so. Moreover, in our view, under Order 50, Rule 6 of the *Civil Procedure Rules* on which the learned Judge relied, the court has power to enlarge time “upon such terms as the justice of the case may require...”



If therefore the learned Judge finds it in the interest of justice to deem an already filed document as having been duly filed, then his discretion in that respect should not be fettered.”

33. In the circumstances, I find that the Application is merited.

Final Orders

34. In the premises, I order as follows;

- i. The Applicant’s Notice of Motion dated 19/04/2021 is allowed in terms of prayer 1. Accordingly, the Applicants’ Notice of Appeal dated 15/04/2021 and filed in Court on 16/04/2023 is hereby deemed as duly filed and served.
- ii. The Applicant shall however bear the costs of the Application.
- iii. Consequently, save for ancillary steps such as extraction of orders and typing of proceedings for purposes of filing the Appeal, if pursued, this file is marked as closed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2023

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WANANDA J. R. ANURO

JUDGE

