



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. E612 OF 2021

AWALI TUMAINI INVESTMENT LIMITED.....1ST APPELLANT/APPLICANT

SIMON KIRIMA MURAGURI.....2ND APPELLANT/APPLICANT

-VERSUS-

PRIME BANK LIMITED.....RESPONDENT

RULING

1. This ruling is predicated on the Notice of Motion dated 14th December, 2021 taken out by the 1st and 2nd appellants/ applicants and supported by the grounds set out on its body and the facts stated in the affidavit of the 2nd applicant. The applicants sought for an order for leave to appeal out of time against the judgment and decree delivered on 5th November, 2021 in Milimani CMCC No. 7365 of 2019, with an alternative order for extension of time within which to file the notice of appeal.
2. Going by the record, it is apparent that at the time of writing this ruling, the respondent had not filed any documentation to resist the instant Motion despite evidence of service as seen in the affidavit of service sworn by Boniface Sibwoga on 1st February, 2022.
3. I have considered the grounds laid out on the body of the Motion and the facts deponed in the supporting affidavit.
4. The substantive order being sought in the Motion is for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.
5. It is noteworthy that the alternative order for extension of time to file a notice of appeal does not apply here since the filing of notices of appeal is a preserve of appeals lying with the Court of Appeal. It is also noteworthy that while the applicants touched on the issue of a stay of execution in the grounds to the Motion and supporting affidavit, no such order was substantively sought in the prayers and hence this court had no basis on which to consider the subject of a stay of execution pending appeal in this ruling.
6. **Section 79G** of the **Civil Procedure Act** stipulates that an appeal against the decision of a subordinate court shall be lodged within 30 days from the date of the decree or the order being appealed against. The provision further stipulates that an appeal can be admitted out of time where sufficient cause has been shown.
7. Furthermore, under the provisions of **Section 95** of the **Civil Procedure Act** and **Order 50, Rule 5** of the **Civil Procedure Rules**, the court has power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
8. In the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** the Court of Appeal illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.
9. Under the first condition touching on length of delay, while it is apparent from the record that no copy of the impugned judgment was availed to this court, the applicants state that the impugned judgment was delivered on 5th November, 2021 which is slightly over one (1) month prior to the filing of the Motion. In my mind, while there has clearly been a delay in filing the Motion, I do not find the delay to be inordinate.
10. Concerning the reasons for the delay, the 2nd applicant explains in his affidavit that upon delivery of the impugned judgment, the

applicants gave instructions to their advocate to challenge the same on appeal but that there was a delay in obtaining copies of the typed proceedings and judgment/decrees.

11. The 2nd applicant further explains that there was a slight breakdown of communication between the applicants and their advocate, which also contributed to the delay in lodging an appeal.

12. Upon considering the explanation given by the applicants, I find the same to be reasonable in the circumstances.

13. Concerning the condition on whether or not an arguable appeal exists, it is the applicants' assertion that they have an arguable appeal which raises valid points of law and fact.

14. Upon my perusal of the record, it is apparent that the applicants did not attach a draft memorandum of appeal for this court's consideration. Nevertheless, the 2nd applicant through his supporting affidavit lists the grounds of appeal, which indicate that the appeal is challenging the finding of the trial court inter alia, on the interest rate applied by the respondent and further argues that the trial court did not consider their submissions in respect to whether the respondent had proved its case against them. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their appeal.

15. In addressing the final condition on prejudice, the applicants assert that the respondent does not stand to be prejudiced in a manner that cannot be adequately compensated by way of costs.

16. In view of the foregoing circumstances and in the absence of any contrary averments by the respondent, I find it reasonable for the applicants to be given the opportunity to challenge the subordinate court's finding on appeal.

17. In the end therefore, the Motion dated 14th December, 2021 is found to be meritorious and hence it is allowed thus giving to issuance of the following orders:

i. The applicants shall file and serve their memorandum of appeal within 14 days from the date of this ruling.

ii. Costs of the Motion shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2022

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Appellants/Applicants

..... for the Respondent