



**Topcats Safaris Limited v Juma & another (Civil Appeal 16 of 2024)
[2024] KEHC 13172 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 16 OF 2024
FN MUCHEMI, J
OCTOBER 24, 2024**

BETWEEN

TOPCATS SAFARIS LIMITED APPELLANT

AND

MICHAEL LUKHOBA JUMA 1ST RESPONDENT

THE QUIL LIMITED 2ND RESPONDENT

RULING

Brief Facts

1. The application dated April 27, 2023 seeks for orders of leave to file the Notice of Appeal out of time against the judgment in the instant matter formerly Kiambu Civil Appeal No. E118 of 2021 delivered on 6th March 2023.
2. The respondent states that he filed a replying affidavit but there is no replying affidavit in the court record or in the portal.

Applicant's Case

3. The applicant states that judgment in the instant matter formerly Kiambu High Court Civil Appeal No. E118 of 2021 was delivered on 6th March 2023 whereby the court found in favour of the applicant on the issue of liability but dismissed the claim for special damages.
4. Being dissatisfied with the judgment, the applicant applied for a certified copy of the judgment to make an informed choice on whether or not to lodge an appeal but the judgment was supplied after 14 days had lapsed. The applicant further states that the period between 30th March 2023 and 11th April 2023 was Easter recess. Thus the applicant argues that the delay occasioned of about 14 days is not so inordinate as to be inexcusable.



5. The applicant argues that it has an arguable appeal based on points of law as the Honourable Court erred in failing to grant quantum of damages having found the respondents liable and further that the Honourable Court failed to consider the extensive submissions and caselaw availed on the issue of quantum of damages.
6. The applicant states that the respondents will not suffer any prejudice if the application is allowed. The applicant further states that it stands to suffer a substantial miscarriage of justice unless the application is granted.
7. Directions were issued that the application be canvassed by way of written submissions and the record shows that only the applicant complied by filing submissions on 12th July 2024. The respondents on the other hand had not filed their submissions by the time of writing this ruling.

The Applicant's Submissions

8. The applicant relies on the cases of Philip Keipto Chemwolo & Another vs Augustine Kibende [1986] KLR 495; Banco Arabe Espanol vs Bank of Uganda [1999] 2 EA 22 and Factory Guards Limited vs Abel Vundi Kitungi (no citation given) and submits that the right of appeal should not be impeded as it is a constitutional right and the cornerstone of the rule of law. The applicant further submits that the delay occasioned in the instant case is not inordinate and thus it should be afforded an opportunity to prosecute its appeal.
9. Relying on the case of Transouth Conveyors Limited vs Kenya Revenue Authority & Another [2007] eKLR, the applicant argues that it has an arguable appeal.
10. The applicant further relies on the cases of Factory Guards Limited vs Abel Vundi Kitungi; Richard Ngetich & Another vs Francis Vozena Kidiga HCCA 75/2012 and Waljees (Uganda) Ltd vs Ranji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188 and submits that the respondents will not suffer any prejudice in any way if leave to appeal out of time is granted.

The Law

Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

11. This court is empowered to grant extension of time under Section 7 of the [*Appellate Jurisdiction Act*](#) which provides:-

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 expired.

12. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any 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 by case basis;
- d. Whether there is a 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 if the extension is granted;
- f. Whether the application has been brought without undue delay.

13. Similarly in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now 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 the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of 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.”

14. The applicant has faulted the trial court for the delay in filing its appeal on the premise that the registry supplied a copy of the judgment after the fourteen (14) days had lapsed.

15. The issue of delay of typed proceedings and judgment is a well-known issue in our legal system and courts have extended time where it is found deserving. It has been pointed out that where such delay is not on the part of the party concerned and that the issue consist of facts beyond a party’s reach, the court may allow extension of time. This was stipulated by the Supreme Court in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others [2014] eKLR where the court stated:-

Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail.....

Would it be in the interests of justice then to turn away an applicant who has prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow turning wheels of the court’s administrative machinery? We think not.

16. The Supreme Court further expounded in the case of County Executive of Kisumu vs County Government of Kisumu & 8 Others [2017] eKLR and held:-

However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.

17. In the present case, this court delivered its judgment on 6th March 2023 in the presence of counsels for both the applicant and the respondents. The applicant filed the instant application on 28th April



2023 which is approximately twenty five (25) days after the requisite period within which to file the appeal. Furthermore, although the applicant has annexed a letter it alleges to have written to the registry requesting for a certified copy of the judgment, the said letter bears no stamp from the registry to acknowledge its receipt. Neither does the applicant provide a receipt for payment of the certified copy of the judgment. Thus, it is evident that the applicant did not file the said letter on the said date as it claims. That notwithstanding, the applicant has annexed a gazette notice which provides that the courts took a break for Easter recess as from 30th March 2023 to 11th April 2023. The applicant has failed to mention that the statutory period allowed for filing the notice of appeal and for filing an appeal. The 14 days period for filing the notice of appeal lapsed on 20th March 2023. The applicant has not explained why it did not file the Notice of Appeal within the period required. For filing of the notice, the applicant did not need a copy of the judgment.

18. It is important to note that the applicant's counsel Ms. Wachira was present for the applicant during the delivery of the judgment. She was therefore aware of the contents of the said judgment given her legal background. As such, she ought to have taken the necessary action within the stipulated period of 14 days.
19. As for filing the appeal, the appellant was required to do so within 30 days after delivery of the judgment. This delay has not been explained in that the applicant failed to prove that it made a request of the copy of judgment as claimed and that the document was not provided on time. It is noted that what the applicant's counsel was required to do, was filing a memorandum of appeal which again, she would have done as she awaited to be supplied with a copy of judgment. It must be born in mind that a memorandum of appeal could be amended later, if need be to include any grounds of appeal left out in the original document.
20. The applicant has not given any plausible explanation on the reasons for delay considering that a delay of twenty five (25) days is not inordinate and inexcusable. Accordingly, I find that the applicant has not established to the satisfaction of this court that it deserves extension of time to file a notice of appeal and to file the memorandum of appeal.
21. Accordingly, I find that the application dated April 27, 2023 has no merit and it is hereby dismissed with costs.
22. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF OCTOBER 2024.

F. MUCHEMI
JUDGE

