



**Rai Cement Limited v Ombati (Civil Appeal E075 of 2023)
[2024] KEHC 15632 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E075 OF 2023
KW KIARIE, J
DECEMBER 3, 2024**

BETWEEN

RAI CEMENT LIMITED APPELLANT

AND

CALEB MAGETO OMBATI RESPONDENT

RULING

1. The appellant/applicant herein moved the court through a Notice of Motion dated the 23rd day of August 2023. It was brought under sections 1,1A, 1B, 3A & 63(e) of the [Civil Procedure Act](#), Order 9 Rule 9, Order 42 Rule 6 & 7 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant is seeking the following orders:
 - a. The application be certified as urgent, and the same be heard on a priority basis.
 - b. The court be pleased to order a stay of execution of the judgment and decree of the subordinate court dated 21st September 2022, and delivered on the same date in Oyugis PMCC No. E033 of 2022, pending this application's hearing and eventual disposal inter partes.
 - c. The court be pleased to extend the time to the applicant. The present appeal against the judgment and decree of the subordinate court dated 21st September 2022 and delivered on the same date in Oyugis PMCC No. E033 of 2020, though lodged out of time and on such time being extended, be deemed as duly filed and valid.
 - d. The court be pleased to order a stay of execution of the judgment and decree of the subordinate court dated and delivered on 21st September 2022 in Oyugis PMCC No. E033 of 2022, pending the appeal's hearing and eventual disposal and determination, on such leave being granted and on such appeal being filed on terms the court shall direct.
 - e. The costs of this application abide by the ended appeal.



2. The application was premised on the following grounds:
 - a. The respondent has a judgment and decree delivered on the 21st of September 2022 in the sum of kshs.790,770/- which he intends to recover from the applicant through execution proceedings and which judgment the applicant herein has challenged by way of an appeal, which appeal has been lodged out of time and cannot be valid without time being extended. The same validated, as the prescribed period of 30 days from 21st September 2022, within which to lodge with this court a memorandum of appeal and to serve, had lapsed.
 - b. Only the Management Committee chaired by the acting managing director has the mandate to consider the implications of a Court decision on any particular litigation involving the company, to decide on and/or instruct an appeal, and/or to settle a decree.
 - c. The amount awarded is colossal and huge, and to say the least, frankly, it was not supported by evidence on record. It amounts to an unjust enrichment and a windfall to the respondents, an issue intended to be raised in the appeal.
 - d. The applicant has an undoubted right of appeal, which she should be allowed to exercise unhindered.
 - e. The applicant stands to suffer a substantial loss in the nature and to the extent of the decretal debt herein if the stay order now sought is not granted, as execution shall proceed and the intended appeal later on succeeding.
 - f. This appeal has been made without delay.
 - g. The applicant is ready and willing to avail and provide security on terms as the court shall order, should this be required as a pre-condition for granting the orders herein sought.
 - h. The appeal is arguable and not frivolous, as can be discerned from the memorandum of the already lodged appeal.
 - i. It will be both just and equitable in the interest of justice to so order.
3. The respondent opposed the application on the following grounds:
 - a. The applicant came to the court too late without any good reasons.
 - b. The application is frivolous and vexatious.
4. Section 79G of the *Civil Procedure Act* provides:

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 good and sufficient cause for not filing the appeal in time. [Emphasis added]
5. An applicant's request to file an appeal out of time may only be accepted if it satisfies the court that they had good and sufficient cause for not filing the appeal in time. The Supreme Court of Kenya in *County Executive of Kisumu vs County Government of Kisumu & 8 others* [2017] eKLR restated the guiding principles as follows:



- (23) It is trite law that in an application for an extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

The under-lying 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 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 the 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.”
6. In this matter, the applicant has contended that the copy of the judgment was not supplied in good time, thus causing a delay in filing the appeal. Curiously, no certificate of delay to provide the proceedings from the trial court was attached. Equally, no copies of letters requesting the supply of proceedings were exhibited. Without such crucial documents, this court cannot exercise its jurisdiction to extend the time to appeal and the other orders sought.
7. The application is therefore dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 3RD DAY OF DECEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

