

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CIVIL APPEAL E137 OF 2024**

**BEST MANUFACTURERS LIMITED.....1<sup>ST</sup>**

**APPLICANT**

**STEPHEN THEURI NDERITU.....2<sup>ND</sup>**

**APPLICANT**

**VERSUS**

**FLORENCE**

**RUGURU**

**GERALD.....RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 19<sup>th</sup> December 2024 filed by the two applicants herein. Prayer (a) and (c) of the Motion which sought interim orders pending hearing and determination of the application are now spent. What is pending this court's determination are two prayers which are reproduced hereunder;

**(i) That this Honourable Court be pleased to grant the applicants leave to appeal the ruling by Hon. Tessa Marienga delivered on 8<sup>th</sup> November, 2024 out of time and to deem the Memorandum of Appeal filed on 9<sup>th</sup> December 2024 as having been filed within time;**

**(ii) That this honourable court be pleased to grant the applicants stay of proceedings in Kenol CMCC No. E233 of 2024 pending the hearing and determination of the intended appeal; and**

**(iii) That costs be provided for.**

2. The application is anchored on the grounds stated on its face and the depositions made by the 2<sup>nd</sup> applicant, *Stephen Theuri Nderitu*, a director of the 1<sup>st</sup> applicant in the supporting affidavit sworn on 19<sup>th</sup> December 2024.
3. In a nutshell, the applicants contend that they are aggrieved by the ruling delivered by the lower court on 8<sup>th</sup> November 2024 in *Kenol CMCC NO. E233 of 2024* dismissing their preliminary objection dated 9<sup>th</sup> September 2024 seeking to have the respondents suit struck out for having been filed out of time; that despite having instructed the advocate who was

then handling their case to appeal against the decision immediately, the said advocate *Mr. James Keiro* left the firm of *Kamotho and Jomo Advocates* and erroneously failed to give instructions on the filing of the appeal within the stipulated time.

- 4.** The applicants further averred that upon realizing the error, their advocates on record filed a memorandum of appeal dated 9<sup>th</sup> December 2021; that their intended appeal has high prospects of success and the leave sought ought to be granted and the memorandum of appeal filed herein be deemed as properly filed.
- 5.** In addition, the applicants sought orders of stay of proceedings in the primary suit contending that if the proceedings were not stayed, they would suffer substantial loss and their intended appeal will be rendered nugatory.
- 6.** The application is opposed vide a replying affidavit sworn on 15<sup>th</sup> May 2025 by *Ms. Maureen Nekesa Auma*, the respondents counsel and grounds of opposition dated the same day. The

respondent attacked the competence of the applicants' supporting affidavit and urged the court to find that the application was an afterthought and an abuse of the court process.

- 7.** It was also the respondent's case that the reason offered by the applicants for failure to file their intended appeal on time was false as *Mr. James Keiro* never left the firm of *Kamotho and Jomo Advocates* as on 15<sup>th</sup> April 2025, he appeared for the 2<sup>nd</sup> respondent in *Meru Succ Cause No. E1029 of 2024* under the name of the same firm of advocates.
- 8.** The deponent further contended that the applicants' supporting affidavit did not contain evidence demonstrating that instructions were ever issued to their advocates to file an appeal within the prescribed timelines. Consequently, she argued that the applicants' Notice of Motion falls short of the legal threshold required for grant of the orders sought.
- 9.** To counter the depositions made in the replying affidavit, the 2<sup>nd</sup> applicant filed a supplementary affidavit sworn on 19<sup>th</sup> May 2025 deposing that *Mr. James Keiro* took a brief hiatus from

the firm of *Kamotho Njomo & Co. Advocates* between 20th November 2024 and 6th January 2025, and as such, he did not handle any matters on behalf of the firm during that period.

**10.** On 5<sup>th</sup> March 2025, the court directed that the application be canvassed by way of written submissions. The applicants' submissions, dated 16th May 2025, were filed on 9th June 2025 by their advocates, *Ms. Kamotho Njomo & Company Advocates* while those of the respondent dated 5th June 2025, were filed on her behalf on 9th June 2025 by her advocates on record, *Ms. W & M and Company Advocates*.

**11.** I have carefully considered the application, the affidavits on record and the rival written submissions filed on behalf of both parties. Having done so, I find that the key issue arising for my determination is whether the orders sought by the applicant were merited.

**12.** Starting with the prayer for extension of time to file their intended appeal out of time, *Section 79 G* of the *Civil*

*Procedure Act* is the law that governs the filing of appeals to the High Court against decisions made by the lower court.

The provision is in the following terms;

***“ 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.”***

**13.** It is clear from the above provision that appeals to the High Court ought to be filed within 30 days from the date the order or decree appealed against was made but this court had wide and unfettered discretion to enlarge the aforesaid time if the applicant demonstrated good and sufficient cause for failure to file the intended appeal within the prescribed time.

**14.** In ***Thuita Mwangi V Kenya Airways limited [2003] eKLR***, the Court of Appeal discussed the factors that a court ought to

consider in determining such applications. The court expressed itself as follows:

***“... It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly, the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted....”***

**15.** The principles courts consider in deciding how to exercise their discretion in applications such as the one before this court have been discussed in many other authorities decided by the superior courts including the Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat V IEBC and 7 Others (2014) eKLR** in which the court emphasized that extension of time was not a right of any party but was an equitable remedy that was only available to a deserving party at the discretion of the court.

**16.** In this case, it is not disputed that the ruling intended to be appealed against was delivered on 8<sup>th</sup> November 2024. Given the method of computation of time set out in *Section 57* of the *Interpretation and General Provisions Act* and *Order 50 Rule 3* of the *Civil Procedure Rules*, the statutory period for filing the intended appeal expired on or about 10<sup>th</sup> December 2024.

**17.** In this case, the applicants filed their Memorandum of Appeal on 9<sup>th</sup> December, 2024, which was well within the statutory timelines limited for filing of appeals to this court. Prayer (b) of the instant application was therefore unnecessary as the applicants filed their appeal on time. Consequently, it is my finding that the memorandum of appeal filed on 9<sup>th</sup> December 2024 did not require any validation as it was properly before the court.

**18.** Regarding the prayer for stay of proceedings in *Kenol CMCC No. E233 of 2024* pending the hearing and determination of the appeal, the factors that should guide exercise of the courts discretion in applications for stay of proceedings were

enumerated in the Court of Appeal case of **Lalita Devi Lalchand Galot V Mohan Galot [2020] KECA 704 (KLR)**, where the court cited with approval the decision of Ringera J (as he then was) in **Global Tours & Travels Limited, Nairobi HC winding up Cause No. 43 of 2000**, and stated as follows:

***“.....As I understand the law whether or not to grant a stay of proceedings or further proceedings of a decree or order appealed is a matter of judicial discretion to be exercised in the interest of justice ... The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expedition of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”***

**19.** In the instant appeal, the applicants challenge the trial court's ruling dismissing their preliminary objection in which they had challenged the competence of the respondents suit on grounds that it was time barred. The applicants urge this court to find that if the stay sought is not granted, hearing of the suit in the lower court will continue rendering their appeal nugatory.

**20.** I have perused the Applicants Memorandum of Appeal dated 9<sup>th</sup> December 2024 and although I cannot say at this stage that the appeal has high chances of success as argued by the applicants, I can comfortably say that the grounds raised therein are not idle. An allegation that a suit was time-barred goes to the jurisdiction of the court and is one that was capable of disposing of the suit summarily. For this reason, the applicants' contention that the suit was statute-barred needs to be properly ventilated by the parties on appeal and a decision made by this court one way or the other before suit can proceed for hearing.

- 21.** If the stay orders are not granted as prayed, it is obvious that hearing of the suit in the lower court will continue before the appeal is heard and determined and if the appeal is eventually successful, its outcome will be rendered nugatory. Besides, the applicants will suffer great prejudice as they will have been forced to go through a hearing and thereby incur costs which could have been avoided.
- 22.** On the other hand, if the stay is granted as prayed, none of the parties will suffer prejudice as depending on the outcome of the appeal, the suit will be terminated by this court if the appeal is successful or will proceed for hearing after determination of the appeal if the appeal is dismissed.
- 23.** Given the foregoing, it is my finding that the interests of justice tilts more towards staying proceedings in the lower court pending the hearing and determination of the appeal. Prayer (d) of the Notice of motion dated 19<sup>th</sup> December 2024 is thus allowed as prayed.

**24.** Costs follow the event but are at the discretion of the court. In this case, costs of the application shall abide outcome of the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **MURANGA** this 12<sup>th</sup> day of November 2025.

**HON. C.W. GITHUA**

**JUDGE**

**In the presence of:**

*Ms. Sigei* for the Applicants

*Mr. Koech* for the respondents

*Ms. Susan Waiganjo*, Court Assistant.