



Third Bureau of China City Construction Group Company Limited v Otieno (Civil Application E073 of 2025) [2025] KECA 2061 (KLR) (1 December 2025) (Ruling)

Neutral citation: [2025] KECA 2061 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E073 OF 2025
LK KIMARU, JA
DECEMBER 1, 2025**

BETWEEN

**THE THIRD BUREAU OF CHINA CITY CONSTRUCTION GROUP
COMPANY LIMITED APPLICANT**

AND

KENNEY OUMA OTIENO RESPONDENT

(Being an application for extension of time to lodge the notice of appeal out of time from the Judgment of the High Court of Kenya at Homa Bay (W. Kiarie, J) Dated 18th June, 2024 in HCCA No. E019 OF 2024)

RULING

1. The applicant was aggrieved by the Judgment rendered by the High Court in an appeal from the trial Magistrate's court's decision. The judgment was rendered on 18th June, 2024. The applicant on 29th May, 2025 moved this Court in a notice of motion made substantially under Rule 4 of the Court of Appeal Rules seeking a grant to be leave to appeal out of time in a second appeal to this Court. The applicant explained the reason for delay to be; they had previously filed a similar application which included prayers which could only be granted by a full bench of the Court. When the applicant appeared before the full bench of this Court on 25th February, 2025, the Court advised them to file the present application as a separate application; because it was a matter that could only be considered by a single Judge of this Court. In compliance with the Court's direction, the applicant filed the present application. The previous application was withdrawn. The applicant contends that it has a good appeal which should be allowed to be ventilated before this Court. The applicant took issue with the fact that the 1st appellate court did not consider all the evidence, including the additional evidence that was placed before it before rendering the said Judgment. The subject matter of this appeal is a substantial sum of money which the trial court decreed that it be paid. The application is supported by further



grounds on the face of the application and the annexed affidavit of Daniel Kigado, an administrator with the applicant.

2. The application is opposed. The respondent swore a replying affidavit in opposition to the application. He was not persuaded that the applicant was deserving of the exercise of discretion by the Court. The respondent deponed that it took the applicant more than twelve (12) months since the decision was rendered by the 1st appellate court for the applicant to file the present application. In his view, the length of delay was inordinate. It had not been sufficiently and satisfactorily explained. The respondent accused the applicant of inexcusable indolence, which in his opinion, disentitles them to the orders craved for in the application. For added measure, the respondent urged the Court to find that the application is otherwise meant to deny him enjoyment of the fruits of the Judgment. The respondent deponed that the applicant was not being honest in the grounds in support of the application that they are urging the Court to grant. He pointed out that the applicant was misleading and deceiving the Court and thus should have its application disallowed with costs.
3. Both counsel for the applicant and the respondent filed written submissions in support of their respective opposing positions. Both counsel appreciated that in determining the application, this Court is exercising judicial discretion as conferred upon it by Rule 4 of the Court of Appeal Rules. This discretion, though unfettered, is circumscribed by principles established by precedent. The Court has to take into consideration some of the following principles in the exercise of its discretion; the reasons for the delay, the length of the delay, the strength of the intended appeal (possibly), and if the respondent will be prejudiced if the application is allowed (See Andrew Kiplagat Chemeringo v. Paul Kipkorir Kibet [2017] KECA 701 (KLR)).
4. In the present application, the applicant gave the reason for delay to be the setback it experienced when its initial application failed to muster the jurisdictional threshold that they were forced to go back to the drawing board by this Court. The respondent was not impressed by the reasons given by the applicant for the delay in filing the present application in time. This Court agrees with the respondent that the delay of twelve (12) months in moving this Court for extension of time is inordinate. However, in the circumstances of this case, this Court will exercise its discretion in favour of the applicant for the reason that part of the delay was caused by mistakes the applicant took when it initially approached this Court. When the applicant retraced its steps, it did the right thing and corrected the procedural mistakes that it had taken. The subsequent application was filed immediately after the previous application was withdrawn. It was evident that the applicant is desirous of exercising its right of second appeal. The Court's mind was to some extent made in consideration of the value of the subject matter of appeal. The applicant should not be locked out of the seat of justice in the circumstances of this application.
5. In the premises therefore, the application has merit and is allowed. The applicant is granted leave to lodge the notice of appeal out of time. The said notice of appeal shall be lodged within fourteen (14) days. The record of appeal shall be filed within forty-five (45) days of today's date. The respondent shall have the costs of the application.

DATED AND DELIVERED AT KISUMU THIS 1ST DAY OF DECEMBER, 2025.

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed



DEPUTY REGISTRAR.

