

**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CORAM: JOEL NGUGI, LILAN, SILA, JJ.A.)**  
**CIVIL APPEAL (APPLICATION) NO. E198 OF 2021**  
**BETWEEN**

**THE COMMISSIONER OF DOMESTIC TAXES.....APPELLANT**

**AND**

**W.E.C LINES KENYA LIMITED.....RESPONDENT**

*(Being a reference from the decision of a single judge  
(Kimaru J.A) delivered on 10th November 2022, and an  
application dated 21<sup>st</sup> May 2021 seeking to strike out the  
appeal for having been filed out of time)*

**in**

**Civil Appeal (Application) No. E198 OF 2021**

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**RULING OF THE COURT**

1. What is before us is a reference from the decision of a single judge, initiated through a letter dated 15<sup>th</sup> November 2022, brought pursuant to Rule 57 (1) (b) of the Court of Appeal Rules, 2022, and an application dated 21<sup>st</sup> May 2021, seeking to strike out the appeal herein, both of which have been filed by the respondent. The respondent wishes to reverse the ruling of Kimaru J.A, sitting as a single judge, delivered on 10<sup>th</sup> November 2022, vide which the appellant was granted leave to file the memorandum and record of

appeal out of time, and prays that her application to strike out the appeal, for having been filed out of time, be allowed.

2. The brief background is that the appellant conducted an audit of the respondent's business for the period January 2009 to December 2012, and assessed withholding tax on demurrage charges at Kshs.90,513,018/- and VAT at Kshs.8,128,122/-. This assessment was communicated to the respondent through a letter dated 5<sup>th</sup> December 2012. Not happy with the assessment, the respondent filed an appeal before the Tax Appeal Tribunal being Case No. TAT 95/2015. The tribunal, vide a judgment delivered on 24<sup>th</sup> May 2017, upheld the appellant's assessment and dismissed the appeal by the respondent. Not satisfied, the respondent filed an appeal before the High Court contesting the decision of the tribunal (*High Court at Nairobi Income tax appeal No. 29 of 2017, W.E.C Lines (Kenya) Limited vs The Commissioner of Domestic Taxes*). The High Court, in its decision delivered on 7<sup>th</sup> February 2020, partly allowed the appeal. Aggrieved, the appellant filed a notice of appeal dated 21<sup>st</sup> February 2020. On 27<sup>th</sup> February 2020, the appellant applied for proceedings and copies of the judgment for purposes of filing the record of appeal. The record of appeal was eventually filed on 15<sup>th</sup> April 2021.
3. It is after the appeal was filed that the respondent filed the application dated 21<sup>st</sup> May 2021, seeking to have the appeal struck

out for having

been filed out of time. The supporting affidavit to that application was sworn by Leila B. Kayoro, the Finance Manager of the respondent. In it, she asserted that the appeal needed to be filed by 2<sup>nd</sup> April 2021, given that the proceedings were ready on 1<sup>st</sup> February 2021. She however acknowledged that 2<sup>nd</sup> April 2021 was a public holiday (Good Friday) and if the public holidays were excluded, the appeal needed to be filed by 6<sup>th</sup> April 2021. She thus contended that the appeal was filed 9 days late.

4. Upon being served with the application to strike out the appeal, the appellant filed an application dated 16<sup>th</sup> June 2021, seeking extension of time to have the appeal deemed as filed within time. The application by the appellant was supported by the affidavit of Pius Nyaga, an advocate working with the appellant. He acknowledged that judgment was delivered on 7<sup>th</sup> February 2020 and presented that the notice of appeal, and the letter bespeaking of the proceedings and judgment, were lodged within time. He confirmed that the proceedings were certified ready on 1<sup>st</sup> February 2021. He deposed that owing to relocation of their registry, the relevant files went missing and they did not have the documents to file the record of appeal. To demonstrate that this dilemma was real, he annexed an email of 16<sup>th</sup> February 2021, being an email asking for various files to be traced,

including that for the dispute herein. He deposed that the files were not traced until the time for filing the appeal had already lapsed.

5. In his ruling, on the application for extension of time, Kimaru J.A assessed the principles upon which a single judge could extend time as expounded in the case of **Leo Sila Mutiso vs Hellen**

**Wangari**

**Mwangi (1999) 2 EA 231**. He held that the appellant had given excusable reasons for the delay, particularly the reason that the appellant's files had been misplaced owing to relocation of its offices. He also found that the period of two months, separating the time that the appeal ought to have been filed and the date that the application for extension of time was presented, was not inordinate. He held that the appeal raises arguable grounds touching on how taxation should be imposed on services offered by a certain category of players in the shipping industry, and was of opinion that it was in the public interest for the issues intended to be canvassed in the appeal to be heard and determined with finality. He was not persuaded that the respondent would suffer prejudice, reasoning that the exercise of the right of appeal would not adversely affect the respondent until the appeal was heard. Ultimately, he made the following orders:

(i) The applicant is granted extension of time to lodge the

memorandum and record of appeal.

- (ii) The notice of appeal, memorandum of appeal and record of appeal filed in Civil Appeal No. 198 of 2021 is deemed to be properly filed and within time.
- (iii) The respondent shall have the costs of the application in any event.
6. Aggrieved, the respondent has now filed a reference to a full bench pursuant to Rule 57 (1) (b) of the Court of Appeal Rules, and as we earlier mentioned, she also wishes to have her application seeking to strike out the appeal to be allowed.
7. We have taken note of the submissions made, both in writing and orally, by Ms. Almadi, learned counsel for the appellant, and Mr. Ruto, learned counsel holding brief for Mr. Kiragu Kimani for the respondent, and have considered the same, together with the authorities cited, before arriving at our disposition.
8. The principles upon which the court may interfere with the decision of a single judge are more or less settled and have been elaborated in several decisions. Thus, in the case of **John Koyi Waluke v Moses Masika Wetangula & 2 others [2010] KECA 174 (KLR)** , the court expressed itself as follows :

***“Having considered all that has been urged before us in this Reference we would say that we have stated time without number that in exercising the unfettered discretion under Rule 4 of this Court’s Rules, a single judge of the Court is doing so on***

***behalf of the whole Court, and the full bench of the Court would only be***

***entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion, the single Judge has taken into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account or that he misapprehended some aspect of the evidence and the law applicable or short of these, that his decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result.”***

9. Before we go far, we feel that it is also important to set out the principles upon which a single judge considers an application for extension of time under Rule 4. These are also well settled as was expressed by Waki J.A in the case of **Fakir Mohamed v Joseph Mugambi & 2 others [2005] KECA 340 (KLR)**, where he stated as follows:

***“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of***

***delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the***

***application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors: See Mutiso vs Mwangi Civil Appl. NAI. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (ur) and Murai v Wainaina (No 4) [1982] KLR 38.”***

10. We have the above principles in mind while deciding this application.

**11.** In his submissions, Mr. Ruto, learned counsel for the applicant, submitted inter alia that the single judge failed to take into account that the appellant ought to have ensured that its internal processes would allow it to comply with statutory timelines, so that its internal files were available to ensure that the appeal is filed within time. He also submitted that it was erroneous for the single judge to find that the appeal raises important issues relating to taxation within the shipping industry. Relying on the case of **Anthony Burugu & Company Advocates vs Electrowatts Limited (Civil appeal (application) E444 of 2021) (2022) KECA 415 (KLR)**, he pressed that the application to extend time ought not to have

been allowed because it is the respondent's application to strike out the appeal

which prompted the appellant to file the said application for extension of time.

12. The issue of misplacement of files in the registry of the applicant, owing to relocation of its offices, was one of the key reasons for supporting the application for extension of time and it was thus a relevant consideration to take into account while deciding the application. The learned single judge addressed his mind on the issue and was persuaded that this was a good reason for the delay. We cannot reverse the judge's finding because the applicant thinks that the reason was not good enough, and neither can we reverse it because a different judge would have thought that the reason is not sufficient. We can only reverse the finding of the single judge if this was an irrelevant consideration, yet it cannot be argued that it was irrelevant, for it was indeed the very cornerstone upon which the application was founded. We do not see how it can be urged that it was erroneous for the single judge to have determined the application, at least in part, based on this reason. As we have stated, whether or not we would have decided differently is not a consideration; what is important for us is that the issue was relevant, that it was considered, and a reasoned decision on it was made, and we find that the learned single judge did so. Having said that, the issue of relocation of office was in fact one of the considerations that Musinga J.A found relevant

in his ruling in the case of **Anthony Burugu & Company Advocates**

**vs Electrowatts Limited** (*supra*) which the respondent referred as to and we do not see how the respondent now urges that it cannot be taken to be a relevant consideration in the circumstances of this case.

**13.** The second issue raised by the respondent is that the appeal is not arguable. The learned single judge thought that it was arguable, and was also of opinion that it would be in the public interest for the issues intended to be raised in the appeal to be canvassed. We are unable to fault the single judge on this issue, for the arguability of an appeal and public interest are also relevant considerations as expounded in the dictum of Waki J.A in the case of **Fakir Mohamed v Joseph Mugambi & 2 others** (*supra*). We do not think that the intended appeal can be considered to be so frivolous as to fail the test of arguability.

**14.** The final point in the submissions of the respondent is that the application was filed after the application to strike out the appeal had already been filed, with counsel relying on the decision in

**Anthony**

**Burugu & Company Advocates vs Electrowatts Limited**

(*supra*) where a more or less similar scenario unfolded. The facts of that case were that the appellant intended to file an appeal

against a judgment of the Environment and Land Court which was delivered on 16<sup>th</sup> December 2020. A notice of appeal was filed on 11<sup>th</sup> January 2021.

However, the memorandum and record of appeal were not filed until 9<sup>th</sup> August 2021. No application to strike out the appeal was filed within 30 days of service of the memorandum and record of appeal, as required by the rules, leading the respondent to file an application dated 2<sup>nd</sup> November 2021 for extension of time so as to file the application to strike out the appeal. On the other hand, through an application dated 16<sup>th</sup> November 2021, the appellant filed an application for extension of time to admit the filed appeal out of time. The respondent has placed a premium on part of the dictum in that case, where Musinga J.A expressed himself as follows:

***“Additionally, it has not been explained why after filing the record of appeal on 9<sup>th</sup> August 2021 without leave the applicant had to wait up to 16<sup>th</sup> November 2021 to file the instant application for extension of time. I agree with the respondent that the applicant was not intent on pursuing his appeal and was only triggered into action by the respondent’s application dated 2<sup>nd</sup> November 2021. I therefore do not find the reasons espoused by the applicant for the delay in filing the record of appeal plausible.”***

15. We have taken note of the dictum of the good judge, but we are not persuaded that every application for extension of time, which comes after an application to strike out an appeal for being filed out of time, must automatically be dismissed for being filed later.

Every case must be decided on the basis of its unique facts and circumstances. Indeed,

in the case of **Antony Burugu**, the point that the application for extension of time was filed later, was not the sole consideration that was taken into account in deciding the two applications before the court. Prior to the above dictum being expressed, Musinga J.A had already found that there was inordinate delay in filing the memorandum and record of appeal (a delay of close to 6 months from the time the appellant was notified of the proceedings being ready) which delay had not been sufficiently explained.

16. In the circumstances of our case, the delay is of 9 days and it is well explained. We also observe that the appellant had not been furnished with the Certificate of Delay when she filed the appeal, which Certificate was supplied later, and which has been filed in the supplementary record of appeal.

17. In our considered assessment, we do not see any irrelevant consideration that was considered by the learned single judge, and neither do we find any consideration that was relevant and in favour of the respondent, but which the judge failed to consider. We indeed find the reasoning of the single judge to be sound and supported, and by no stretch do we think that it can be alleged that the decision was so wrong that no reasonable judge could reach it.

18. In essence, we do not find merit in the application seeking to reverse the decision of the single judge and the same is hereby

dismissed with

costs. It follows that we cannot allow the application to strike out the appeal and it is also hereby dismissed. The latter application is dismissed with no orders as to costs.

19. The ruling herein to apply *mutatis mutandis* to the cases **Nairobi Civil Appeal (Application) No. E195 of 2021, The Commissioner of Domestic Taxes vs Inchcape Shipping Services (K) Limited; Nairobi Civil Appeal (Application) No. E197 of 2021, The Commissioner of Domestic Taxes vs. W.E.C Lines Kenya Limited;** and **Nairobi Civil Appeal (Application) No. E328 of 2021, The Commissioner of Domestic Taxes vs. Sturrock Shipping (Kenya) Limited,** where similar questions of fact and law were raised.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of April, 2026.**

**JOEL NGUGI**

.....  
**JUDGE OF APPEAL**

**PAUL LILAN, MBS SC**

.....  
**JUDGE OF APPEAL**

**MUNYAO J. SILA**

.....  
**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original  
Signed

**DEPUTY REGISTRAR**