Wangui & 4 others v NCBA Bank Kenya Plc (Civil Application E792 of 2024) [2026] KECA 843 (KLR) (30 April 2026) (Ruling)

Neutral citation: [2026] KECA 843 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E792 OF 2024

P NYAMWEYA, JA

APRIL 30, 2026

BETWEEN

VIRGINIA SUSAN WANGUI ..... 1ST APPELLANT

CATHERINE WANGARI KIMANI ..... 2ND APPELLANT

PENNIE NJERI CHEGE ..... 3RD APPELLANT

RIKIE NGIGE ..... 4TH APPELLANT

SIMON NGIGI KIMANI ..... 5TH APPELLANT

AND

NCBA BANK KENYA PLC ..... RESPONDENT

(An application for extension of time to file a Notice of Appeal and Memorandum of Appeal against the Judgment delivered by the High Court of Kenya at Nairobi (F. Mugambi J.) on 13th October 2023 in High Court Civil Suit No. 884 of 2021)

RULING

1. The applicants herein seek to be allowed to file their Notice of Appeal and Memorandum of Appeal out of time, so as to appeal a judgment delivered on 13th October 2023 by the High Court at Nairobi (F. Mugambi J.) in High Court Civil Suit No. 884 of 2021. The grounds for this request are stated in their application dated 25th September 2024 and the supporting affidavit thereof sworn on even date by the 5th applicant. In summary, the applicants state that the failure to file a Notice of Appeal within the required time was an oversight, as their advocates gave instructions to their clerk to file it expeditiously, and had been assured that this had been done, only later to learn that the Notice of Appeal was not filed. Further, that failure to grant the extension sought will result in grave injustice, as the applicants will be denied an opportunity to have their appeal adjudicated on its merits, despite the existence of strong and arguable grounds of appeal, and would result in them suffering significant loss, as the respondent

has already commenced the process of execution. In this respect the applicants averred that they are at risk of losing financial losses of over Kenya Shillings Two Hundred Million (Kshs. 200,000,000/=).

2. The applicants' advocates additionally filed written submissions dated 29th November 2024, in which the above averments were reiterated, and various decisions of this Court cited, including Philip Keipto Chemwolo & Mumias Sugar Company Limited vs Augustine Kubende [1986] KECA 87 (KLR) where the court stated that "blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits"; and the decisions in Babs Security Services Ltd vs Mwarua Yawa Nzao and 19 Others [2019] KECA 782 (KLR) that

> "laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.". Lastly, reliance was also placed on the criteria that guides the exercise of the discretion under Rule 4 of the Court of Appeal Rules.

3. The respondent opposed the application in a replying affidavit sworn on 6th December 2024 by Christine Wahome, its Senior Legal Counsel, and submissions of even date filed by their advocates on record. The respondent's case is that application is res judicata as a similar application to the present one dated 11th December 2023 was declined in a ruling delivered by this Court (Gatembu JA) on 20th September 2024. Furthermore, that the applicants have not demonstrated plausible reasons as to why the Notice of Appeal was not filed within the statute based timelines as expressed by the Rules of this Court; execution has not commenced as there is a pending order hindering execution; and the applicants have no arguable appeal at all as the myriad of applications they have lodged are meant to frustrate the respondent in its attempts to exercise its statutory right of sale.

4. I heard the application in chambers in the absence of the parties on 9th February 2026, and have considered the arguments put forth by the applicants. A preliminary issue that needs to be addressed is whether the application is res judicata, since the outcome will determine whether this Court has jurisdiction to hear the application. The respondent in this respect annexed the ruling delivered on 20th September 2024 in Civil Appeal (Application) No. E858 of 2023 to its replying affidavit. I have perused the said ruling, and of note is that the applicants in the application that was the subject of the ruling are the same applicants herein, as was the respondent. The subject application was dated 11th December 2023, and the applicants invoked Rule 4 of the Court of Appeal Rules among other provisions seeking orders therein that the Court "be pleased to allow the appellants to file their Notice of Appeal out of time" and that "their Notice of Appeal be considered as duly filed".

5. In addition, the grounds urged by the applicants were that "upon delivery of the impugned Ruling by the High Court on 13th October 2023, the applicants filed and served a Memorandum of Appeal dated 26th October 2023; that there was an oversight in filing a Notice of Appeal; that despite the applicants' advocates clerk having been given instructions to expeditiously file the Notice of Appeal , he failed to do so and the advocate for the applicants only became aware of this when the matter was raised in a replying affidavit sworn on 20th November 2023 in opposition to the applicants' application for stay of execution".

6. It was urged for the respondent in opposition to the said application that it was based on an incompetent appeal which was lodged un- procedurally without a Notice of Appeal; that the object of the application was to breathe life into an incompetent appeal; and that the applicants should have

withdrawn the incompetent appeal and commence the process afresh. In upholding this objection, the learned Judge eventually ruled as follows in the ruling of 20th September 2024:

> "...that to the extent that the application is based on 'an appeal' which was instituted unprocedurally without a Notice of Appeal, the same is incompetent. The application is hereby struck out with costs to the respondent. Being of this view, I will refrain from addressing the merits or otherwise of the application".

7. I am guided by the elements of a plea of res judicata as set out in section 7 of the *Civil Procedure Act*, and which were summarised by the Supreme Court of Kenya in John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) as follows:

> "We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
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> a. There is a former Judgment or order which was final;
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> b. The Judgment or order was on merit;
>
> c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

8. The Supreme Court further clarified in Dina Management Ltd vs County Government of Mombasa & 5 others [2023] KESC 30 (KLR) that the elements set out above are to be conjunctive rather than disjunctive and it must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and have identical parties, subject and cause of action. In the present situation, despite the fact that the parties and issue in Civil Appeal (Application) No. E858 of 2023 were the same as in those in the instant application, Gatembu JA was in this regard emphatic in the ruling delivered on 20th September 2024 in Civil Appeal (Application) No. E858 of 2023 that he did not address the merits of the application. The application herein is accordingly not res judicata.

9. I shall therefore proceed to address the substantive prayer for extension of time to file a Notice of Appeal and Memorandum of Appeal. The time lines as regards the filing of a Notice of Appeal are set out in the Rule 77(2) of the Court of Appeal Rules of 2022, which requires the Notice of Appeal to be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged. Under Rule 84, an appeal is thereafter instituted by lodging a memorandum of appeal and record of appeal within sixty days after the date when the notice of appeal. The first hurdle that I therefore face is whether extension of time to file a Memorandum of Appeal can be given in the absence of a record of appeal. I am of the view that such extension cannot be given as its effect would be to short circuit and evade the additional requirements of Rule 84 which an applicant who is out of time in filing an appeal may be required to demonstrate. I will therefore limit myself to the prayer for extension of time for a Notice of Appeal for this reason.

10. The principles that apply to an application for extension of time under Rule 4 of the Court of Appeal Rules of 2022, which have been the subject of many decisions of this Court and the Supreme Court of Kenya. In summary, the Court of Appeal confirmed in the case of Leo Sila Mutiso vs Rose Hellen

Wangare Mwangi, (supra) that the decision whether or not to extend time for appealing is essentially discretionary, taking into account the length of delay and reason for the delay.

11. In the case of Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, Supreme Court of Kenya Application No. 16 of 2014, the Supreme Court of Kenya set down the underlying principles that a Court should consider in exercising its discretion as being:

> " i. 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;
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> ii. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court;
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> iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
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> iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
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> v. Whether the respondents will suffer any prejudice if the extension is granted;
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> vi. Whether the application has been brought without undue delay; and
>
> vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

12. The Supreme Court of Kenya also pronounced as follows in the case of Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR:

> " the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

13. The ruling sought to be appealed was delivered by the High Court on 13th October 2023, and the applicants filed their first application for extension of time on 11th December 2023 in Civil Appeal (Application) No. E858 of 2023. The merits of the said application were not considered as explained in the foregoing, and the reason for the delay of about two months in filing the Notice of Appeal given in the said application as well as in the instant application is that it was not intentional, and there was an honest oversight on the part of the applicants' advocates who had given instructions as regards filing of the notice but failed to follow-up. It is also notable that the ruling in Civil Appeal (Application) No. E858 of 2023 was delivered on 20th September 2024 and the instant application was filed on 25th September 2024.

14. The explanation for the delay though disputed by the respondent, is plausible and reasonable. I also do not find the delay to be inordinate, given the timeous steps taken by the applicants in the circumstances. Lastly, the applicants have indicated they have strong grounds of appeal and request for the right to be heard, the respondent has averred that the applicants will not suffer any form of prejudice in the event the application is declined since it is a reputable banking institution capable of settling such damages or costs as may ultimately be decreed against it. However, it is notable that such an eventuality can only be realized in an appeal, and the respondent has not demonstrated any prejudice he will suffer if the extension for time is granted.

15. I am therefore persuaded that sufficient cause for the delay in filing the Notice of Appeal has been demonstrated by the applicants, and that the delay was not inordinate. Consequently, the application dated 25th September 2024 is found to be merited to the extent that the applicants are granted leave to file and serve a Notice of Appeal out of time from the judgment delivered on 13th October 2023 by the High Court at Nairobi (F. Mugambi J.) in High Court Civil Suit No. 884 of 2021. There shall be no order as to the costs of the application.

16. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2026.

P. NYAMWEYA.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.