



**Taib v Said (Civil Appeal (Application) E064 of 2023)
[2025] KECA 43 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KECA 43 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E064 OF 2023
AK MURGOR, P NYAMWEYA & GV ODUNGA, JJA
JANUARY 24, 2025**

BETWEEN

MOHAMED ALI TAIB APPLICANT

AND

SALIM AGIL SAID RESPONDENT

(An application for leave to appeal against the Ruling/ Order of the High Court of Kenya at Mombasa (D. O. Chepkwony J.) dated 23rd August 2008 in Nairobi Civil Suit No. 88 of 1996)

RULING

1. Mohamed Ali Taib, the Applicant herein, filed an application dated 22nd July 2023 seeking three interrelated orders. The first was that he is granted extension of time to apply for leave to file an appeal against the ruling and order of the High Court of Kenya at Mombasa (Chepkwony J.) of 23rd August 2022; second, he be granted leave to file the said appeal; and lastly, that the Notice of Appeal dated 25th August 2022 be deemed as properly filed and on record, and directions for filing of the Record of Appeal and hearing of the appeal be issued thereafter. The application is supported by two affidavits, the first one is sworn by the Applicant on 22nd July 2023, and the second one is sworn on the same date by his advocate, Taib Ali Taib Bajaber SC.
2. The Applicant’s case is that on 17th April 1996 he obtained a decree against Salim Agil Said, the Respondent herein, and has for the last 27 years expended considerable resources in attempts to execute the decree. According to the Applicant, the Respondent fled the country, and has been moving from one jurisdiction to another in a premeditated effort to frustrate the cause of justice and the process of execution of the decree. Further, that when the Respondent returned to the country, the Applicant through his advocates on record, Messrs. Taib A. Taib Advocates, took out a Notice to Show Cause dated 7th December 2020 in the continued pursuit of execution of the judgment/ decree against the



Respondent. However, that on 23rd August 2022, Chepkwony J. dismissed the Notice to Show Cause for being time-barred.

3. The Applicant's advocates thereupon lodged a Notice of Appeal dated 25th August 2022 and issued a letter seeking proceedings to the Deputy Registrar of the High Court of even date. However, it transpired that at the time of delivery of the ruling, the advocate holding brief for the Applicant's advocates failed to seek leave to appeal, nor did he inform the Applicant of this oversight, which was compounded by travel by the advocate for the Applicant out of the country for 3 months. Upon realizing that the leave to appeal the impugned ruling was mandatory pursuant to Order 43 of the Civil Procedure Rules, 2010, the Applicant instructed his advocate to immediately remedy the situation, who thereupon filed a Notice of Motion application dated 30th April 2023 in the High Court, seeking inter alia enlargement of time to seek leave to appeal the impugned ruling and for such leave to be granted.
4. Despite the application being unopposed, the Applicant avers that it was dismissed by the High Court (Magare J.) in a ruling dated 10th July 2023, and the file closed. Aggrieved by the decision of the High Court, the Applicant has now moved this Court and urges this Court to exercise its jurisdiction pursuant to Rule 39 (b) of the Court of Appeal Rules of 2020. Additionally, that he made the application without delay, and it is in the interest of justice and fairness that his application be allowed.
5. In response, the Respondent raised a Preliminary Objection dated 26th July 2023 on this Court's jurisdiction, and filed a replying affidavit sworn on 1st August 2023. He deponed that this Court had no jurisdiction to entertain this application as it offended section 4 (4) of the Limitation of Action Act, since the Notice to Show Cause dated 7th December 2020 purporting to enforce the judgment that was entered on 30th April 1996 was an action that ought to have been filed within the statutory 12 years. In addition, nothing prevented the Applicant from filing the said Notice within the prescribed period as filing the same did not require the Respondent's presence in the country. Lastly, that the application was res judicata on account of the ruling delivered on 10th July 2023 by Magare J. which dismissed a similar application, and the Applicant should have come to this Court by way of appeal.
6. The Respondent further urged that the law provided for substituted service where the whereabouts of a party was not known, an avenue which the Applicant never explored, and the Applicant could not purport to blame his junior for his own mistakes, as he knew the ruling was coming before Chepkwony J. and ought to have inquired from the advocate holding brief on what transpired if he was not present. The Respondent contended that even if the High Court did not give the Applicant the right of appeal, the law provided for 14 days for the aggrieved party to file a Notice of Appeal and the Applicant decided to waive the right of appeal by becoming indolent.
7. The Applicant filed a Supplementary Affidavit sworn on 1st September 2023 by his advocate, Taib Ali Taib Bajaber, in response to the Respondent's Notice of Preliminary Objection and replying affidavit, wherein he denied that the application was res judicata. Reference was made to Rule 39 (b) of the Court of Appeal Rules of 2010 which provided that where an application for leave to appeal had been made to the High Court and refused, then an applicant may file a similar application to the Court of Appeal within 14 days of such refusal, and that the said Rule thereby conferred the Court of Appeal with original jurisdiction to determine the application for leave to appeal provided it was refused in the High Court.
8. The Applicant further deponed that the application presently before the Court was filed on time pursuant Rule 39 (b), and the merits and demerits of the High Court's refusal to grant the application for enlargement of time and grant of leave to appeal were not the subject of this application. Furthermore, that the execution proceedings were commenced on 6th May 1996 and not with the



Notice to Show Cause dated 7th December 2020, and that there had been numerous attempts over the 27 years including the set of cross jurisdictional attempt to execute the decree. Lastly, that the Applicant's intended appeal raised various issues which merited serious consideration, and which were enumerated in the said affidavit.

9. We heard the application on this Court's virtual platform on 15th July 2024. Learned Counsel, Ms. Gathoni Ibrahim, holding brief for learned Senior counsel, Mr. Taib SC appeared for the Applicant, while learned counsel Ms. Matoke, appeared for the Respondent. The two counsel highlighted their respective written submissions dated 7th September 2023 and 20th September 2023, and reiterated the averments made by the parties in their respective pleadings. The Applicant in their submissions dated 7th September 2023, relied on the original jurisdiction of this Court under Rule 39 (b) of this Court's Rules, and the decision in the case of Zeinab Khalifa & 4 others vs Abdulrazak Khalifa & another [2016] eKLR, where this Court considered and allowed an application brought under Rule 39 (b), where the application for leave in the High Court was denied having been filed after 22 months.
10. While citing the decision of this Court in Pamela Akinyi Omondi vs Jane Atieno Nyamuthe [2021] eKLR, counsel submitted that the computation of time commenced when the High Court rejected the application for leave to appeal, and the application was filed on 24th July 2023 which was within 14 days of the Ruling of the High Court refusing the initial application for leave to appeal delivered on 10th July 2023. With regards to whether the intended appeal raises issues which merit consideration, the counsel invited this Court to consider the Applicant's draft Memorandum of Appeal. Lastly, counsel contended that once the execution process has been started, time stops running and the process must be allowed to be completed, even if the completion comes after the statutory 12-year period. Reliance is placed on the decisions in Godfrey Ajuang Okumu vs Nicholas Odera Opinya [2017] eKLR and Orion East Africa Limited vs Tetu Coffee Growers Co-operative Society limited (in liquidation) [2017] eKLR.
11. The Respondent's counsel on her part reiterated that this matter was in respect of an action of enforcing a court judgment entered on 30th April 1996, and the Applicant had failed to explain the delay, since upon service of summons to enter appearance in 1996, of the Notice to Show Cause filed on 21st December 2020 and subsequently the application before the High Court, the Respondent participated in the said proceedings, and did not run away to evade execution as alleged. Counsel argued that the Applicant failed to explore the avenues available to him in an action for recovery of the judgment amount, including filing of a Notice to Show cause within time, getting a hearing date, and service upon the Respondent by way of substituted service, and only approached the Court 24 years later.
12. While referring to section 4 (4) of the Limitation of Action Act, counsel submitted that equity aids the vigilant and not the indolent. In addition, that even if the Applicant's allegation that execution commenced by filing warrants of attachment in the year 1996 were to be true, the life span of warrant for attachment was 6 months from filing the same and the said warrants expired after the said 6 months and the same was not re issued. Therefore, that on 21st December 2020 when the Applicant filed his Notice to Show Cause, there was no valid action for enforcement of the judgment of 20th April 1996 that was in force.
13. With regard to the instant application being res judicata, counsel for the Respondent submitted that after the ruling of Magare J. in HCC No. 88 of 1996 which dismissed a similar application, the Applicant never filed any application for review nor an appeal against the said ruling. Accordingly, that the instant application contravenes the mandatory provisions of section 7 of the *Civil Procedure Act*, and that for the Applicant to take refuge in Rule 39 (b) of the Court of Appeal Rules of 2010, he ought



to have sought for orders setting aside the ruling of Magare J. Lastly, that the Applicant was unable to explain the undue delay hence was not deserving of the order for extension of time sought herein.

14. We have considered the arguments put forth by the Applicant and Respondent, and we need at the outset to clarify the issue that is before us for determination. It is notable in this regard that the instant application was previously the subject of a ruling by this Court (Laibuta JA) delivered on 10th November 2023, wherein it was held as follows:

“13. It is noteworthy that the applicant’s notice of appeal dated 29th August 2022 was lodged on time on 31st August 2022. Likewise, his Motion for leave to appeal dated 22nd July 2023 was filed on time in compliance with rule 41(b) (ii) of this Court’s Rules. The only issue deserving of this Court’s attention is whether the applicant merits leave to appeal as sought in his Motion. Such leave is the prerogative of the full Bench of this Court. To my mind, it is only after obtaining such leave that the applicant would be entitled to seek extension of time to file his record of appeal. Otherwise, his application for leave to appeal is properly on record and pending determination, whereupon the Court may make such findings and orders, and give such directions, as it thinks fit. In the circumstances, I find that the applicant’s Notice of Motion dated 22nd July 2023 is superfluous and is hereby struck out with costs to the respondent.

Orders accordingly.”

15. On 30th November 2023 the Court (Laibuta JA) clarified the above order as follows:

“Having found that the applicant’s notice of appeal dated 29th August 2022 was lodged in good time, and that his Motion for leave to appeal dated 22nd July 2023 was also filed in time and in accord with rule 41(b) (ii) of the Court of Appeal Rules, the intended effect of my ruling and orders were that the applicant’s prayer No. 2 for extension of time to apply for leave to appeal be disallowed on grounds of superfluity; and that his application in terms of prayer No. 3 for leave to appeal against the ruling and orders of the High Court of Kenya at Mombasa (D. O. Chepkwony, J.) dated 3rd August 2022 do proceed to hearing before a full Bench.

In view of the foregoing, I hereby order and direct that the applicant’s Motion dated 22nd July 2023 seeking leave to appeal in terms of prayer No. 2 thereof be set down for hearing on a date to be fixed in the Registry. Orders accordingly.”

16. The prayer that is before us for determination therefore, is that of leave to appeal the ruling and orders of the High Court of Kenya at Mombasa (Chepkwony, J.) dated 3rd August 2022, the other prayers having been dispensed with by the ruling of 10th November 2023. It also necessary to clarify that the merits and demerits of the said ruling and orders of the High Court, particularly as to whether the Notice to Show Cause by the Applicant was time barred, cannot be the subject of this ruling, as this can only be addressed in the substantive appeal, if and when leave to appeal the ruling is granted.
17. A preliminary issue that has been raised by the Respondent with regard to the prayer for leave to appeal is that the same is res judicata, in light of the ruling by the High Court (Magare J.) dated 10th July 2023 dismissing a similar prayer by the Applicant. The Applicant has cited Rule 39(b) of the Court of Appeal Rules of 2010 and urged that the said rule grants this Court original jurisdiction to hear and determine a prayer for leave to appeal, once the same is refused by the High Court. The Respondent claims that an applicant must either appeal such a ruling, or apply to set it aside before resorting to



Rule 39(b). It is notable that similar provisions to those in Rule 39(b) of the Court of Appeal Rules of 2010 are now found in Rule 41(b)(ii) of the Court of Appeal Rules of 2022, which provides as follows:

- “(b) where an appeal lies with the leave of the Court, application for such leave shall be made—
- i. in the manner laid down in rules 44 and 45 within fourteen days after the decision against which it is desired to appeal; or
 - ii. where application for leave to appeal has been made to the superior court and refused, within fourteen days after such refusal.”

18. The only condition that needs to be fulfilled before one moves this Court for leave to appeal when such leave has been refused by the High Court, is that the application be made within fourteen days of such refusal. This condition was found to have been fulfilled by Laibuta JA in the findings made in the ruling delivered on 10th November 2023 as reproduced hereinabove. In addition, the nature of this Court’s jurisdiction after leave to appeal has been refused by the High Court is not an appellate nor review jurisdiction as alleged by the Respondent, since in Rule 41(b)(ii) of the Court of Appeal Rules expressly permits a party who had applied to the High Court for leave to appeal and whose application has been refused to make another application in this Court for leave to appeal. This Court therefore has original jurisdiction to hear and determine an application for leave to appeal in such circumstances, as explained in *Zeinab Khalifa & 4 others vs Abdulrazak Khalifa & another* [supra]:

“The jurisdiction of the Court under Rule 39(b) is an original jurisdiction, much like the jurisdiction of the Court under Rule 5(2)(b) which allows the Court to hear applications for stay of execution, stay of proceedings or injunctions, notwithstanding that similar applications have been heard and denied by the High court. The application before the Court is therefore not an appeal, a reference or application for review of the decision of the High Court...”

19. We accordingly find that the Respondent’s objections are not supported by law, nor is this application *res judicata*, since this Court has jurisdiction to hear and determine the Applicant’s application for leave to appeal afresh. As regards the substantive issue before us, which is whether or not the Applicant should be granted leave to appeal, the applicable principles were ably enunciated in *Zeinab Khalifa & 4 others vs Abdulrazak Khalifa & another* [supra] as follows:

“The main consideration in determining whether to grant or refuse an application for leave to appeal is whether the intended appeal raises issues which merit serious consideration. In *Sango Bay Estate Ltd & Others v Dredner Bank A. G.* [1971] EA 17, Spry V-P, speaking for the former East Africa Court of Appeal, stated thus:

“As I understand it, leave to appeal from an order in civil proceedings will normally be granted where *prima facie* it appears that there are grounds of appeal which merit serious judicial consideration...”

And in *Machira t/a Machira & Company advocates v Mwangi & Another* [2002] 2 KLR 391, this Court stated that granting or refusing an application for leave to appeal is a matter within the discretion of the court; that the court will only refuse leave if it is satisfied that the applicant has no realistic prospects of success on appeal; and that the court can grant leave



even when it is not so satisfied where the issue is of public interest or raises a novel point requiring clarification.”

20. The Applicant referred us to his draft Memorandum of Appeal, which has raised various issues around when time started to run with respect to execution proceedings, and particularly with respect to his Notice to Show Cause. The parties have canvassed various positions on these issues. This is an illustration that there is an arguable point that merits consideration by this Court, and the intended appeal is therefore not frivolous, as even a single issue that merits serious judicial consideration will suffice.
21. In the circumstances we allow this application and grant the Applicant leave to appeal to this Court. We accordingly admit the Applicant’s Notice of Appeal dated 25th August 2022 to the record, and direct the Applicant to file and serve the record of appeal within 60 days from the date of this ruling. The costs of this application shall abide the result of the intended appeal.
22. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025

A. K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

