



REPUBLIC OF KENYA



KENYA LAW
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Mburu & 5 others v Barclays Bank of Kenya Limited (Civil Application E606 of 2024) [2025] KECA 390 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KECA 390 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E606 OF 2024
AO MUCHELULE, JA
FEBRUARY 28, 2025**

BETWEEN

**ALICE NDUTA MBURU 1ST APPLICANT
ALICE NDUTA KIMANI 2ND APPLICANT
FLORENCE WANJIKU KINYANJUI 3RD APPLICANT
ANCALO LIMITED 4TH APPLICANT
JULIET NJERI 5TH APPLICANT
ANDREW KIBE 6TH APPLICANT**

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

(An application for the extension of time seeking certification and leave to apply to the Supreme Court against the judgment and decree of the Court of Appeal of Kenya at Nairobi (Waki, Nambuye & Murgor, JJ.A.) dated 20th September 2019 in Civil Appeal No. 164 of 2018)

RULING

1. On 20th September 2019, this Court (Waki, Nambuye and Murgor, JJ.A.) dismissed the appeal by the applicants, Alice Nduta Mburu, Alice Nduta Kimani, Andrew Kibe, Juliet Njeri, Florence Wanjiku Kinyanjui and Ancalo Limited, together with costs. The applicants had appealed against the dismissal by the High Court of their counterclaim. The dismissal was by the High Court on 4th January 2017. Their claim had arisen from mareva injunction and tracing orders that had been issued by the High Court against the appellants on 9th October 1986. The respondent, Barclays Bank of Kenya Limited, had sued five people and the applicants following the loss of Kshs.10,538,952/40. It was pleaded that on diverse dates between 4th March 1986 and 8th August 1986, the applicants and others had been



involved in the fraudulent encashment of twenty-four (24) cheques for Kshs.20,440,444/= which cheques the Income Tax Department claimed were drawn in its favour and part of the proceeds of the stolen cheques were traced to the applicants' accounts.

2. Following the issuance of the mareva injunction and tracing orders, the applicants' bank accounts in various banks were frozen. It was the applicants' case that they had lost Kshs.175,823/05 which was held in those accounts. The respondent obtained a default judgment against the 1st to 5th applicants who had neither entered appearance nor filed defences. Due to passage of time and the unavailability of witnesses, the respondent withdrew the suit against the applicants, and, with it, the mareva injunction and tracing orders were discharged. Also withdrawn were criminal charges against the 1st applicant.
3. The withdrawal notwithstanding, the applicants sought to pursue the counterclaim that they had filed against the respondent. They had allegedly lost money, share certificates, title deeds, vehicles, logbooks and other documents during the freezing orders. This is the counterclaim that, after hearing the evidence, the High Court had dismissed with costs.
4. This application was filed on 11th November 2024 pursuant to Articles 48, 159 and 163(4)(b) of the *Constitution*, sections 3, 3A and 7 of the *Appellate Jurisdiction Act*, Rule 24(1) of the Supreme Court Rules, 2012 and Rules 4, 5(2)(b), 39, 40, 41 and 43 of the Court of Appeal Rules, 2022, seeking the extension of time for the applicants to seek for certification and leave to apply to the Supreme Court from the decision of this Court delivered on 20th September 2019; that, upon the extension of time, the draft application ("ANM 7") seeking certification and leave to apply to the Supreme Court be deemed as properly filed upon the payment of the requisite fees; that, upon the granting of the above prayers, leave to appeal the decision to the Supreme Court be allowed on the basis that the judgment raises an issue of general public importance which transcends the circumstances of this case and with significant public interest to be determined by the Supreme Court.
5. As a single Judge, the only prayer that comes under my jurisdiction is the one that relates to extension of time. That is prayer 1. In support of the application, the applicants stated that they filed a valid notice of appeal dated 2nd October 2019, and on 2nd October 2019 requested for a certified copy of the order. They state that they had, by motion dated 18th November 2019, sought the certification and leave to apply to the Supreme Court but that the motion had been struck out on 12th April 2024 for being filed out of time by 48 days without leave. They blame the registry for having failed to inform them that that application had been filed out of time and without leave.
6. The applicants claim that the intended appeal will raise substantial questions of public importance transcending the interests of the parties, and that the questions included the following:- whether general damages could be granted when not particularized; whether mareva injunction and tracing orders were appropriately issued and extended; whether a defendant is entitled to general damages in lieu of orders issued against them to their detriment when ultimately the claim is not proved against them; and so on.
7. Rule 4 of this Court's Rules states as follows:-

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”



8. This Court’s discretion to extend time is exercised on the basis of the following considerations: the length of the delay; whether satisfactory reasons have been given by the applicant for the delay; the possible chances of the appeal succeeding, if the application is granted, and the degree of prejudice that may be suffered by the respondent, if the application is allowed. (See *Leo Sila Mutiso -vs- Hellen Wangari Mwangi* [1999]2 EA 231).
9. Under Rule 36(1) of the Supreme Court Rules, 2020 a person who intends to appeal to the Court shall file a notice of appeal within 14 days from the date of the judgment or ruling which is the subject of the appeal. While Rule 33(1) provides that an application for certification shall, in the first instance, be made in the court from which the appeal originates.
10. The instant application for extension of time was brought seven (7) months after the ruling that struck out the application for certification was delivered. Through the ruling, the applicants were informed that their application was not competent because it had been brought 48 days late and without extension of time. There is no explanation for the seven (7) months delay. Any delay, even if it is for one day, has to be explained. In *Andrew Kiplagat Chemaringo -vs- Paul Kipkorir Kibet* [2018]eKLR it was observed as follows:-

“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 of delay is the key that unlocks the court’s flow of discretionary favour. There has to be clear and valid reasons, upon which the discretion can be favorably exercisable.”
11. Once again, the delay has not been explained. Seven (7) months of inaction, in the face of knowledge that the applicants were out of time, was a very long time. There was inordinate delay.
12. The consequence is that I find no merit in the application as there is no material on which I can exercise my discretion in favour of the applicants. The notice of motion dated 11th November 2024 is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

