Makindu Motors Limited v Sabati Group Limited (Civil Application E308 of 2024) [2025] KECA 232 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KECA 232 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E308 OF 2024

JM NGUGI, JA

FEBRUARY 7, 2025

BETWEEN

MAKINDU MOTORS LIMITED ..... INTENDED APPELLANT

AND

SABATI GROUP LIMITED ..... INTENDED RESPONDENT

(Being an Application on Intended Appeal from the Ruling of the Environment and Land Court at Makueni (Murigi, J.) dated 8thNovember, 2023 in ELC Case No. E032 of 2022)

RULING

1. The application coming up for determination is dated 10th June, 2024. It seeks for leave to file an appeal out of time; and, consequently, that the notice of appeal filed by the applicant in the matter be deemed to be duly filed upon payment of the requisite fees.

2. The application is supported by the affidavit of Stephen Ngei Musyoka, a director of the applicant, sworn on 10th June, 2024 and on the grounds listed on the face of the application. The applicant also filed a further affidavit by the self-same Stephen Ngei Musyoka sworn on 28th June, 2024.

3. The application is opposed. Through its director, Ravi Rameshkumar Patel, the respondent filed a replying affidavit sworn on 27th September, 2024.

4. Pursuant to directions given by the Honourable Deputy Registrar of this Court, the application was canvassed by way of written submissions. The applicant's submissions are dated 17th September, 2024; while the respondent's submissions are dated 27th September, 2024.

5. The brief background to the controversy is as follows.

6. The applicant took out a plaint dated 12th October, 2022 at the Environment and Land Court (ELC) sitting in Makueni in what became intituled as ELC No. E032 of 2022. In essence, the suit was one

for a declaration that the parcel of land known as Makueni/Kitengei B 159 "B" Squatters Settlement Scheme belongs to the applicant and other associated prayers – including one for vacant possession and eviction. The suit was against the respondent herein.

7. Subsequently, the applicant filed a Notice of Motion dated 22nd March, 2023 seeking orders to enjoin some three third parties to the suit and to amend the plaint. The application was vehemently opposed by the respondent. Ultimately, the trial court (Murigi, J.) delivered a ruling dated 8th November, 2023 in which it dismissed the applicant's application dated 22nd March, 2023 in its entirety. The applicant is aggrieved by that decision and is desirous of appealing against it. However, the applicant failed to timeously lodge its Notice of Appeal against the ruling. The present application is an attempt to remedy the situation by seeking an extension of time to lodge a Notice of Appeal out of time.

8. This Court is empowered to grant extension of time under Rule 4 of the Court of Appeal Rules which provides that:

> "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."

9. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in Leo Sila Mutiso v Hellen Wangari Mwangi 2 EA 231 in which it was held as follows:

> "It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."

10. In the present case, the applicant argues that the ruling dated 8th November, 2023 was given without notice; and that neither the client nor the advocates knew about its delivery until 8th April, 2024 when the advocate appeared in court for a mention in the matter. On that day, the applicant says, its advocate learnt that a ruling had been delivered on 8th November, 2023 unbeknownst to them. Thereafter, the applicant's advocate attempted to get a copy of the ruling because none had been posted on the court's e-portal. The applicant says that they were only able to get a copy of the physical ruling on 10th June, 2024 at the ELC registry; and immediately informed their clients. They were, then, given instructions to appeal; and they responded by filing the present application as well as a Notice of Appeal dated the same day, which they hope to regularize through this application.

11. The respondent, through the replying affidavit of Ravi Rameshkumar Patel (Ravi) contests this account by the applicant. The respondent's narrative is that the parties appeared before the learned Judge on 27th April, 2023 for directions. On that day, Ravi depones, the applicant was directed to serve the application dated 22nd March, 2023 within fourteen days; and the respondent was granted fourteen days to respond to it. Thereafter, the applicant was granted a further fourteen days to fill any further affidavit with the parties having a further fourteen days to exchange submissions. Ravi depones that the learned Judge fixed 21st September, 2023 as the mention date to confirm compliance.

12. Ravi further depones that on 21st September, 2023, the parties' advocates appeared before the learned Judge; and that the learned Judge confirmed that the parties had complied with her directions and gave them a ruling date of 8th November, 2023.

    On that ruling date, Ravi depones, only the respondent's advocate was present and the ruling was read.

13. Ravi also depones that the matter came up again on 21st February, 2024 when a ruling for the applicant's application for injunction was due to be read but that in the presence of both parties' advocates, the ruling was deferred to 13th March, 2024 when it was finally read. The respondent, therefore, argues that the applicant's contention that they did not know about the ruling delivered on 8th November, 2023 until sometime in April, 2024 is disingenuous and lack of candour with the Court. The truth of the matter, the respondent insists, is that the applicant's counsel knew about the ruling date of 8th November, 2023; and in any event, knew that the ruling had been delivered later on 21st February, 2024. As such, the respondent depones, the delay in bringing the present application – until 10th June, 2024 – is inordinate and cannot be excused.

14. The parties also disagree on whether the intended appeal raises any arguable. The respondent says that the applicant attempted to amend its plaint by introducing a radically new claim of fraud which materially changed the nature of the suit. The respondent says that the learned Judge was correct in rejecting that attempt because the proposed amendments had no nexus to the claims in the original claim and could not, therefore, be permitted as an amendment to the plaint. Thus, the respondent argues, the intended appeal is inarguable because the applicant would still be unable to demonstrate how the learned Judge was wrong in this regard.

15. The applicant, on the other hand, urges that its appeal is arguable given the definition of an arguable appeal as "not one that must necessarily succeed, but one which ought to be argued before the Court." (Joseph Wanjohi v Benson Maina Kabua (Civil Application No. NAI 97 of 2012 (UR). The applicant states that its draft memorandum of appeal raises arguable issues including that the learned Judge erred in coming to the conclusion that the applicant's failure to include key reliefs in its original plaint was a deliberate omission done in bad faith by the applicant while in fact, the failure was directly attributable to the applicant's former counsel.

16. I have keenly and conscientiously considered the parties' filings and submissions – including the parts of the trial court record that have been brought to the attention of this Court. This is an unusual case where the parties contest what exactly happened at the trial court: the applicant insists that the impugned ruling of 8th November, 2023 was given without notice; while the respondent insists that the notice was given in court, in the presence of advocates for both parties. The respondent also insists that the parties' respective advocates were both in court on 21st February, 2024.

17. On the other hand, the applicant's advocates disavows any such appearance. Indeed, the applicant's advocates introduce a doubt whether the impugned ruling was delivered on 8th November, 2023 or on 21st February, 2024. To demonstrate the basis of their dubiety, the applicant's attached an extract from the Judiciary e-portal for the case. The notation against 8th November, 2023 is "ruling date given" while that against 21st February, 2024 is that "ruling delivered." In both occasions, the applicant insists that the court records are clear that its advocate was absent. This, the applicant argues, forces the question why the trial court did not direct that the applicant or its advocates be served with a notice.

18. Viewed in perspective, I would agree with the applicant that the record introduces a doubt whether the parties had notice of the ruling – and whether, in fact, the ruling dated 8th November, 2023 was delivered on that day or on 21st February, 2024. On either dates, anyway, it is common among the

parties that the applicant's counsel was absent. The applicant and his advocate have straightforwardly indicated that they were unable to obtain a copy of the ruling until 10th June, 2024 – and that it was never uploaded on the e- portal; and had to obtain a hard copy from the registry. This has not been denied by the respondent – and that there has been no contestation of this fact.

19. Given this state of administrative chaos that seemed to have attended the judicial docket associated with this case at the trial court, I am inclined to believe the applicant when it states that neither it nor its advocates knew about the ruling before April, 2024; and that they did not obtain a copy of the ruling until 10th June, 2024. On that score, I would find the delay for bringing an appeal excusable and, certainly, not inordinate.

20. As for the arguability of the intended appeal, I find it eminently arguable if we take the correct definition of an arguable appeal to be one which ought to be argued fully on its merits before the court. See Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 Others, [2013] eKLR. An arguable intended appeal is one which presses a contention which need not necessarily be guaranteed of success; but rather one has a reasonable potential for success. In the present case, the applicant challenges the application of the test for disallowing amendments to plaints on the ground that the proposed amendment would so radically alter the pleadings as to comprehend a wholly new cause of action which would, consequently, prejudice the defendant. In my view, there is a serious question to be urged on appeal whether the learned Judge applied the test correctly.

21. All in all, therefore, I am satisfied that the applicant is entitled to the deployment of judicial discretion under Rule 4 of the Court of Appeal Rules for the extension of time.

22. Consequently, the application dated 10/06/2024 is allowed. The applicant is permitted to file and serve a Notice of Appeal within seven (7) days of the date hereof.

23. Costs will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

Deputy Registrar.