



REPUBLIC OF KENYA



**Jan Mohamed & another v Maisha Investments Limited (Civil Application
E433 of 2020) [2025] KECA 144 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 144 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E433 OF 2020
LA ACHODE, JA
FEBRUARY 7, 2025
[IN CHAMBERS]**

BETWEEN

MOHAMED HASSANALI ALIMOHAMED JAN MOHAMED 1ST APPLICANT

FARHANA MOHAMED HASSANALI 2ND APPLICANT

AND

MAISHA INVESTMENTS LIMITED RESPONDENT

*(Being an application for extension of time to strike out the Notice of Appeal
against the Judgment and order of the Employment and Labour Court at
Nairobi (Mutungi J) dated 30th October, 2019 in ELC Case No. 218 of 2014)*

RULING

1. Before me is an application by way of Notice of Motion brought by Mohamed Hassanali Alimohamed Janmohamed, 1st applicant and Farhana Mohamed Hassanali, 2nd applicant. It is an application pursuant to rule 42 and 84 *Court of Appeal Rules* 2010. The applicant seek for order that the time provided under rule 84 *Court of Appeal Rules*, 2010, for filing and service of an application to strike out a Notice of Appeal, be extended by a period of 30 days, and cost of application be provided for. The application is dated 31st January, 2022 and the respondent is Maisha Investments Limited.
2. The grounds of the application are to be found on the face thereof that: judgment was entered on 30th October, 2019 by the superior court dismissing the suit filed by the plaintiff against the defendant, seeking for specific performance of what they call ‘non-existent sale agreement’ in respect of all parcel of land known us LR No. 1338/29/ Athi River, that a notice of appeal was subsequently filed in the superior court on or about 22nd October, 2019 (I suspect they meant 22nd October, 2020). It was served upon the advocate of the defendant on 26th October, 2020, that ever since delivery of judgment no



request for High Court proceedings has been served within 30 days in order to derive the benefit of Rule 82 *Court of Appeal Rules*, 2010. Lastly, that the failure to file and request for proceedings within 30 days, renders the intended appeal incompetent and the respondent cannot rely on rule 82(4) of the *COA Rules*, 2022.

3. The respondent did not file any reply to the application nor submission as directed by the Deputy registrar on 14th January, 2025
4. The applicant filed Written Submissions dated 20th January, 2025, through the firm of Kyalo and Associates Advocates. In their submission, it is urged that the delay is not inordinate because the notice of appeal, the subject matter herein, was served on applicant on 12th Nov. 2019 and the application before court is dated 31st January, 2022, which according to counsel, is a delay of about 1 year 2 months, which appears inordinate. Counsel submit that there was an inadvertent error on the part of the applicants' counsel, who erroneously assumed that the letter requesting for proceedings had accompanied the Notice of Appeal filed and served on 12th November, 2019. Counsel submit that, as a general rule of the law, a mistake of counsel ought not to be visited on a litigant. He has cited authorities in the case *Geovanni v Medicino* CA No. 216 of 1997, in which a senior counsel forgot to enter a hearing date on diary with a result that the hearing proceeded without her knowledge and without her client being heard. The court of appeal found the mistake excusable and went ahead to set aside judgment. On that score, they pray that their client should not be punished on account of mistakes of the counsel. It is further sworn that the intended application is merited because although the respondent has filed appeal CA No. E811 of 2022 the same is incompetent because the letter that requested for proceedings was not copied and or served upon the respondent. He states that no wonder the respondent has not opposed the current application. That there is no possible prejudice to be suffered by a party in the respondent's position, if the application is allowed.
5. The application is stated to have been brought under rule 42 and 84 *Court of Appeal Rules*, 2010. Rule 42 provides for the forms of application to court and states that all applications to the court shall be by motion, which shall state the grounds of the application. This rule is therefore not of much use to the application in this application. Rule 84 on the other hand provides for striking out a Notice of Appeal, and is also not useful to the applicant who is seeking extension of time to file an application. The appropriate rule would have been rule 4 of the *Court of Appeal Rules*, 2010 whose provisions are similar to rule 4 of the current rules.
6. I have considered the principles that guide this Court in exercise of that discretion as set out in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court of Kenya Application No. 16 of 2014, which are:
 - “ 1. 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;
 2. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court’
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court’
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;



6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petition, public interest should be a consideration for extending time.”
7. The applicants’ sole reason for delay was that there was inadvertent error on the part of the counsel who erroneously assumed that the letter requesting for proceedings had accompanied the Notice of Appeal filed and served on 12th November, 2019.
8. As is pointed out in the case of *Salat (supra)*, that 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 and that a party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court. A delay of more than 2 years is inordinate by any standard. And will definitely cause prejudice to the respondent who has a right to bring their dispute to conclusion. It is my considered view that the applicant is not deserving of the courts discretion to extend time for filing of their application. Reasons wherefore, the application dated 31st January, 2025 is found to be lacking merit and is dismissed. There will be no orders to costs because the respondent did not respond neither file submissions.

It is so ordered.

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

L. ACHODE

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JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR.

