



Ririani & another v Childs & 7 others (Civil Appeal (Application) E499 of 2024) [2025] KECA 579 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KECA 579 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E499 OF 2024
LA ACHODE, JA
MARCH 28, 2025**

BETWEEN

**CAPTAIN MARTIN JOSEPH RIRIANI 1ST APPLICANT
ORLY AIR PARK LIMITED 2ND APPLICANT**

AND

**TERRY CHILDS 1ST RESPONDENT
FRASER SMITH 2ND RESPONDENT
EUCTYCHUS WAITHAKA 3RD RESPONDENT
JOHN BAXENDALE 4TH RESPONDENT
GUY ELMS 5TH RESPONDENT
DAVID MUTAVA 6TH RESPONDENT
CHRISTIAN STREBEL 7TH RESPONDENT
ASLAM KHAN 8TH RESPONDENT**

(Being an application for extension of time to file an appeal against the ruling and orders of the High Court of Kenya (F Mugambi, J) dated 8th March, 2024 in HCCOMM NO E350 OF 2023)

RULING

1. The applicants filed a Notice of Motion dated 15th November 2024 under Sections 3, 3A & 3B of the [Appellate Jurisdiction Act](#), Rules 4 of the Court of Appeal Rules, 2022 and Article 159 (a) (b) (d) of [the Constitution](#) for orders that:



- i. This Court be pleased to extend the time for filing of the Notice of Appeal and that the Notice of Appeal filed on 26th day of March, 2024 be deemed to be properly filed and served.
- ii. This Court be pleased to grant leave for the Record of Appeal dated 25th June 2024 to be deemed to be properly filed and served upon the respondents.
- iii. The costs be in the cause.
 1. The application is based on the grounds on the face thereof and the supporting affidavit sworn by the applicant's advocate Mr. Charles Opolu on 15th November 2024.
 2. The appeal arose from a ruling that was delivered by the High Court in HCCOMM NO. E350 OF 2023, between the parties listed herein above. The ruling and orders were given by Dr. F Mugambi J on 8th March 2024.
 3. Counsel deposed that the applicants were aggrieved by the decision and sought to exercise their right of appeal. However, in doing so, there was an inadvertent delay in filing the Notice of Appeal. That the mistake was of the applicant's counsel who had taken time to attend to his elderly ill mother. She was hospitalized for three weeks in November 2023 and counsel had to make several trips to Kisumu. In the process the prescribed time lapsed without lodging of the Notice of Appeal.
 4. The Notice of Appeal although late, was eventually filed and consequently, the Record of Appeal was filed.
 5. The appeal seeks to answer issues of great public importance of whether an arbitration agreement can oust express, exclusive and mandatory constitutional and statutory jurisdiction of the High court. The subject matter is a disputed reference to arbitration in accordance with the arbitration agreement.
 6. In response, Christian Strebel, the 7th respondent swore a Replying Affidavit on 23rd January 2025, and deposed that no reasons have been given why the instant application was not made to the superior court which granted leave to appeal. Further, that there is no evidence to show that the patient whose documents are annexed to the application is actually the mother of the applicants' advocate.
8. It was deposed that the medical records relate to the year 2023 and not 2024 and there is no evidence available to show that the applicants' advocate was attending to the alleged patient, or that the patient was admitted. Thus, the applicant failed to give reasonable explanation for failure to lodge a Notice of Appeal on time.
9. It was also deposed that the delay is of over 8 months, since 22nd March, 2024 and the intended appeal is in any event, frivolous, lacking in merit, and not arguable. The 1st applicant and the respondents are all members of the 2nd applicant which is a company and are bound by the company's MemoArts which provide that all the disputes and questions between the members arising from any clause in the MemoArts of the 2nd applicant, shall be subjected to the decision of a single arbitrator to be appointed in accordance with the provisions of the Arbitration Act. The decision of such Arbitrator shall be final and binding on the parties.
10. The respondents added that there is no public interest, or any matter pleaded in the Memorandum of Appeal that raises a new important and substantial question of law, which is not settled by both the Court of Appeal and the Superior Court. It is therefore in the interest of justice that the arbitration agreement in the MemoArts be enforced by dismissing the application.



11. Lastly, that Section 10 of the *Arbitration Act* which is binding on this Court proscribes the intervention of this Court in arbitration matters, except as provided in the said Act.
12. The firm of Opolu & Co. Advocates, filed submissions dated 8th February 2025 on behalf of the applicants and reiterated the averments in the supporting affidavit. Counsel submitted further that there was an inadvertent delay of 4 days upon the expiry of 14-day period provided by rule 77 (2) of the Court of Appeal Rules for filing and service of the Notice of Appeal. He urged the Court to apply the principles for extension of time as set out in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR by the Supreme Court.
13. Counsel’s plea to this Court is for us to exercise our discretion in the matter, allow this application and give directions as to the hearing and final disposal of the appeal which is duly filed and ready for hearing. Counsel also invoked Article 159(2)(d) of *the Constitution* to urge that justice shall be administered without undue regard to procedural technicalities. That the filing and service of the Notice of Appeal was only late for 4 days and is a procedural technicality.
14. The firm of M/s Litoro & Omwebu Advocates filed submissions dated 27th January 2025, for the 1st to 8th respondents and reiterated the depositions in the replying affidavit. Counsel cited the case of Edith Gichugu Koine Vs Stephen Njagi Thoithi [2014] KECA 485 (KLR) to urge that for an application to succeed under rule 4, the applicant must demonstrate to the satisfaction of the Court, the period of delay, the reasons for delay, the degree of the prejudice to the respondents if the application is granted and whether the matter raises issues of public importance among others.
15. Counsel also submitted that the Notice of Appeal was filed without leave to appeal and that no reasonable explanation has been given for the failure to file the appeal in time. That the instant application was filed on 16th November, 2024, more than 5 months after the respondents had filed the application dated 9th July, 2024 under Rule 86 to strike out the Appeal.
16. Counsel invited the Court to find persuasion in the decision of Mae Properties Ltd vs Joseph Kibe and Anor [2017] eKLR, where the Court found that nothing had been demonstrated by the applicants to stand in the way of express consequences of the law, noting that the applicants’ Advocate could have filed the requisite documents from wherever he was through the Judiciary CTS.
17. Counsel posited that the application is frivolous, lacking in merit and is not arguable. Stating that the 2nd applicant’s MemoArts provide for a dispute resolution mechanism whenever there is any dispute between its members. Any dispute arising from the members or the 2nd applicant’s MemoArts is to be referred to a single Arbitrator to be appointed in accordance with the provisions of the *Arbitration Act* and the Arbitrator’s decision shall be final. They prayed that the Notice of Motion be dismissed with costs.
18. I have considered the application, the affidavits in support and in reply and the submissions from all the parties. Rule 4 of this Court’s rules which grants the Court the mandate to exercise the discretion to extend time otherwise limited by these rules, or a decision of the Court, or Superior Court is unfettered. It provides 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.”



19. The Supreme Court distilled the principles applicable in the exercise of discretion in an application for extension of time in the case of Nicholas Kiptoo Arap Korir Salat (*supra*) as follows:
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 for 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 petitions, public interest should be a consideration for extending time.
20. In an application for extension of time to file a notice of appeal, the applicant must demonstrate a good cause for the delay. The Court will weigh factors like the length of the delay, reasons for it, potential prejudice to parties, and whether the appeal has merit before granting an extension; essentially, it is a discretionary remedy that requires a satisfactory explanation for the delay.
21. I have considered the length of delay in the instant application. The rules do not set out the number of days that may be considered as inordinate delay. Each case is to be determined on its own facts, as held in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR in which the Court of Appeal stated that:
- “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.”
22. I have considered the period of delay and note that the impugned judgment was delivered on 8th March 2024. The Notice of Appeal was filed without leave to appeal and the instant application was filed on 16th November, 2024, more than 8 months later. It was not disputed that the application was filed only after the respondents had filed the application dated 9th July, 2024 under rule 86, to strike out the Appeal. I come to the conclusion that the delay was inordinate.
23. The reason for the delay is attributed to inadvertence on the part of the applicant’s counsel. That in the process of attending to his elderly sick mother who was hospitalized in Kisumu, the prescribed time lapsed without lodging the Notice of Appeal. Be that as it may, a delay of 8 months is inordinate as I have pointed out above. In this case as in *Mae Properties Ltd* (*supra*), nothing has been demonstrated by the applicants to stand in the way of express consequences of the law, noting that the applicants’ Advocate could have filed the requisite documents from wherever he was through the Judiciary CTS.
24. As to whether the intended appeal has merit, the applicants argued that the Arbitral Tribunal lacks jurisdiction to entertain and grant relief in cases of oppression and mismanagement, breach of trust, negligence, default, breach of duty, incompetence and lack of bona fides touching on the 1st applicant’s



rights under the Bill of Rights. They urged that the appeal seeks to answer questions of public importance being:

- a. Whether an arbitration agreement can oust express, exclusive and mandatory constitutional and statutory jurisdiction of the High Court.
 - b. Whether the jurisdiction under Section 238 and 240 and 278 to 812 of the *Companies Act* exclusively conferred on the High Court can be exercised by an arbitral tribunal.
 - c. Whether jurisdiction over the exercise of the bill of rights is conferred exclusively to the High Court.
25. The respondents on the other hand argued that the instant application is not only frivolous but is also incompetent. That this Court lacks jurisdiction to entertain it since there is no valid notice of appeal, and further that they have an arbitration agreement in their Memorandum and Articles of Association that is expected to kick in when, as in this case, a dispute arises.
26. It is not my duty as a single Judge, while considering an application under rule 4, to delve into the merits and demerits of the intended appeal. Suffice it for me to state that the grounds set out above are not idle and say no more on this issue.
27. In considering the question of prejudice to be suffered, I weighed the right of the applicants to pursue the intended appeal against the right of the respondents to have finality and conclusiveness to litigation so that they can enjoy the fruits of their judgement. It is my considered view that the applicants slept on their rights after the judgment was rendered, only to wake up 8 months later to seek leave to appeal. The respondents who have laboured under the impression that the suit was concluded will suffer prejudice if they are called back to court many months down the road.

Consequently, the Notice of Motion dated 15th November 2024 lacks merit and is therefore dismissed. Costs are awarded to the respondents.

It is so ordered.

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

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

