Owino v ABSA Bank Kenya PLC Formerly Barclays Bank of Kenya Limited & another (Civil Appeal (Application) E854 of 2024) [2025] KECA 1125 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1125 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E854 OF 2024

SG KAIRU, JA

JUNE 20, 2025

BETWEEN

JUDY AWUOR OWINO ..... APPLICANT

AND

ABSA BANK KENYA PLC FORMERLY BARCLAYS BANK OF KENYA LIMITED ..... 1ST RESPONDENT

JACQUILINE CHEPCHIRCHIR KURGAT ..... 2ND RESPONDENT

(Being an application for extension of time to file the Record of Appeal out of time against the Judgment of the High Court of Kenya at Nairobi (N. Mwangi, J.) dated 15th May 2024 in HCCC No. 360 of 2018)

RULING

1. The applicant Judy Awuor Owino was financed by the 1st respondent Absa Bank Kenya PLC (formerly Barclays Bank of Kenya Limited) (the Bank) in the purchase of Apartment No. 5-75C on 4th floor of Block 5 erected on the property known as LR No. 209/6491, Kileleshwa Nairobi. The loan facility was secured by a legal charge over that property.

2. According to the Bank, the applicant defaulted in the repayment of the loan whereupon the Bank duly exercised its statutory power of sale and sold the apartment to the 2nd respondent Jackline Chepchirchir Kurgat. The applicant filed suit before the High Court to impeach that sale. The 2nd respondent counterclaimed for possession and damages on the basis that she is a bona fide purchaser for value.

3. In its judgment delivered on 15th May 2024, the High Court (Njoki Mwangi J.) dismissed the applicant's suit and declared the 2nd respondent the rightful owner of the apartment. The applicant and the Bank were ordered to facilitate the transfer of the apartment to the 2nd respondent while the applicant was ordered to compensate the 2nd respondent with an amount of Kshs. 4,964,000.00 as

general damages being the total rent collected from the apartment from September 2018 to April 2024. The applicant was also condemned to bear the costs of the suit and of the counterclaim.

4. Intent on challenging that judgment on appeal, the applicant through its then advocates on record Ms. Prof. Migai Akech & Associates Advocates applied, by a letter dated 21st May 2024 addressed to the Deputy Registrar of the High Court, for certified copy of the judgment and the proceedings. The same firm lodged a Notice of Appeal dated 27th May 2024.

5. However, two blunders were made. First, the letter dated 21st May 2024 applying for a copy of the proceedings was not copied to the respondents. In effect the applicant did not have the benefit under Rule 84 of the *Court of Appeal Rules* of automatic exclusion, in computation of time, of the time taken for the preparation and delivery of the proceedings.

   The second blunder is that although the Notice of Appeal was filed within 14 days as required under Rule 77(2) of the *Court of Appeal Rules*, it was not served on the respondents as required under Rule 79(1) of the *Rules*.

6. In a bid to cure those defects, the applicant has moved the Court by two applications. The first is dated 7th November 2024 (the 1st application) in which she seeks an order for extension of time to file and serve a record of appeal and that the Record of Appeal filed herein be deemed as properly and duly filed. The second application is dated 27th January 2025 (the 2nd application). In that application the applicant seeks an order for extension of time to serve the Notice of Appeal dated 27th May 2024 and for the same to be deemed as duly and properly instituted.

7. With respect to the 1st application, the applicant's case as set out in her supporting affidavit and buttressed in submissions by learned counsel Mr. Yonah Ougo is that the applicant resides in the State of Virginia, USA; that following delivery of the judgment by the High Court, the advocates who had acted for her ceased acting and some time was lost in her search for a replacement counsel and in the hand over of files; that her previous advocates had, in a timely manner, filed a notice of appeal and applied for certified copies of the judgment and typed proceedings from the High Court.

8. The applicant states that after engaging her present advocates in September 2024, she decided to settle the decretal amount awarded by the High Court as there was no order for stay of execution of the judgment but remained intent on challenging the judgement on appeal; that her previous advocates received the typed proceedings from the High Court on 13th August 2024 but her present advocates discovered that there was a procedural omission in that the letter bespeaking proceedings had not been copied to the respondents as the rules require in order to obtain a certificate of delay.

9. She says that the present application is made in good faith and without inordinate delay and without prejudicing the respondent's rights; that the intended appeal has reasonable prospects of success and faults the judge for, among other complaints, granting reliefs that had not been sought and finding, contrary to evidence, that the Bank's right to exercise its statutory power of sale had accrued and was exercisable.

10. With respect to the 2nd application, the applicant states that through her advocates she only became aware on 24th January 2025 upon being served with a response by the respondents in answer to the 1st application, that the Notice of Appeal, though filed within time, had never been served on them; that on becoming aware that the previous advocates had not served the notice of appeal, she promptly filed the 2nd application dated 27th January 2025.

11. Opposing the applications, learned counsel Miss. Muthee for the Bank referred to the replying affidavit of Samuel Njuguna, the Bank's Legal Counsel, Recoveries in urging that the applications are devoid

of merit; that an essential step in serving the notice of appeal had not been taken and neither was there satisfactory explanation for the delay beyond the claim of inadvertence by her previous advocates; that the appeal should have been filed on or before 26th July 2024 and the 1st application was not made until November 2024, a delay of approximately four months; that despite the present advocates having been appointed in September 2024, it took two months to file the application; that allowing the application will prejudice the Bank as it will continue to incur additional legal costs.

12. It was submitted that the applicant, as an aspiring appellant ought to have exhibited sufficient zeal and initiative to comply with the requirements of the law and there was no explanation by the previous advocates why they failed to comply with the law. In that regard the decisions of the Court in Eldoret *Grains Limited v Kipkoech & 14 others* [2021] KECA 273(KLR); *Motorways Kenya Limited v Kenya Engineering Workers Union* [2018] KECA 327(KLR); *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] KECA 835(KLR), among other decisions were cited in urging that the applicant failed to provide a plausible explanation before her default could be excused.

13. Counsel submitted further that as the judgment of the High Court has already been satisfied and vacant possession of the apartment given to the 2nd respondent, nothing further remains and litigation should not continue to hover over the Bank exposing it to unnecessary legal costs.

14. Learned counsel Mr. Muganda for the 2nd respondent in referring to the replying affidavits sworn by the 2nd respondent also pointed out the the notice of appeal was never served and neither was the letter bespeaking proceedings copied to them; that despite the matter having been mentioned before the High Court on numerous occasions, the lapses were not brought to the attention of the court; that "such persistent indolence reflects a lack of seriousness and good faith in prosecuting the purported appeal"; and that the excuses that her current advocates were unaware of the procedural lapses is an afterthought and the 2nd respondent should not be prejudiced by the applicant's failure to exercise due diligence;

15. It was submitted that in any event the judgment of the High Court has substantially been complied with, the transfer of the apartment has been facilitated and the 2nd respondent has taken possession and assumed rental collection and nothing remains to be performed; that the intended appeal is academic and it would be unjust to extend time in the circumstances. In that regard the decision in *Mae Properties Limited v Joseph Kibe & another* [2017] eKLR was cited.

16. It was submitted further that the 2nd respondent has protection under Section 99 of the *Land Act* as an innocent purchaser; that there is no justifiable reason why the 2nd respondent should continue being dragged into the matter; that the intended appeal has no merit and there is no explanation for delay; that the applicant's attempt to shift blame onto her former advocates is disingenous and litigation should come to an end.

17. Counsel referred to numerous decisions of this Court including the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR for the argument that inaction is not excusable and that it is not enough to accuse the advocates for failure of compliance; the case of *Njuki v Ngunjiri & 3 others* [2024] KECA 1700 (KLR) for the argument that parties who are lethargic in prosecuting their cases are undeserving of favourable exercise of the Court's discretion.

18. It was urged that the applications do not meet the legal threshold for extension of time; that the 2nd application is an afterthought filed only after the respondents had raised the issue of nonservice in reply to the 1st application.

19. I have considered the applications. The legal principles upon which the Court considers applications of this nature are established. Although the court has unfettered discretion under Rule 4 of the *Court*

of Appeal Rules to extend time, that discretion should be exercised judicially. In *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No. 16 of 2014 the Supreme Court of Kenya pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other considerations include whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay. Public interest is also a relevant consideration.

20. Earlier, the Court in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04)) had stated that:

> " The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor."

21. With those principles in mind, the issue for determination is whether the applicant has discharged her burden by laying a basis for the Court to exercise its discretion in her favour. In that regard, the judgment of the High Court the subject of intended appeal was delivered on 15th May 2024. The notice of appeal was filed within 14 days in accordance with Rule 77 of the *Court of Appeal Rules*. It was however not served as required under Rule 79.

22. Similarly, an application for a copy of the proceedings of the High Court was made within 30 days as envisaged under the proviso to Rule 84 of the *Rules*. There was however default in serving a copy of that letter on the respondents.

23. The explanation given by the applicant for those lapses is that the advocates who acted for her before the High Court ceased acting and that she lost time in seeking to replace them. She explains that she is resident in the USA which contributed to the delay in the engagment of new advocates.

24. The present advocates for the applicant were appointed on 5th September 2024. Assuming her previous advocates ceased representing her sometime after filing the notice of appeal and applying for proceedings, it took the applicant almost four months to appoint the advocates. Given that the world is considered a global village and the technological advancement in communication, the applicant should have taken a shorter time in replacing her former advocates.

25. That said, having been appointed on 5th September 2024, the present advocates say that they were engaged in handling garnishee proceedings in the matter before the High Court and presented the 1st application on 7th November 2024, approximately a month after their appointment. They evidently, but mistakenly, assumed that the notice of appeal had been served on the respondents by the previous advocates only to realize that was not the case when served with responses to the 1st application.

26. All in all, it seems to me that the challenges the applicant encountered are attributable to the previous advocates having ceased acting midstream after having set in motion the process of appeal. The absence of the applicant from the country, being resident as she says in the USA did not help matters. I accept that mistakes of counsel are no cure for inaction on the part of the litigant.

27. In this case however, I discern candour on the part of the advocates for the applicant, and to her credit, the applicant it would appear, has fulfilled and satisfied the judgment of the High Court but feels strongly about getting an opportunity to challenge the judgment on appeal. Moreover, looking at the grounds of appeal, I do not think the intended appeal is frivolous and considering that the judgment has been satisfied, in the event the appeal fails, the respondents will no doubt have recourse for the legal costs that will have been incurred against the applicant beyond which there is no demonstrable prejudice.

28. I am in the foregoing circumstances inclined to allow both applications. The applicant shall serve the notice of appeal on the respondents within 5 day of delivery of this ruling and shall file and serve the memorandum and record of appeal within 14 days from the date of delivery of this ruling.

29. The applicant shall pay the respondents costs of both applications.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

Deputy Registrar