



Nextgen Office Suites Limited v Kimani & 6 others (Civil Application E286 of 2023) [2024] KECA 378 (KLR) (28 March 2024) (Ruling)

Neutral citation: [2024] KECA 378 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E286 OF 2023
PO KIAGE, JA
MARCH 28, 2024**

BETWEEN

NEXTGEN OFFICE SUITES LIMITED APPELLANT

AND

GEORGE KANYI 1ST RESPONDENT

STANLEY KIMANI 2ND RESPONDENT

SANJAY SHIVJI 3RD RESPONDENT

ALEXANDAR MUEMA 4TH RESPONDENT

THE CHIEF LAND REGISTRAR 5TH RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF LANDS & PHYSICAL
PLANNING 6TH RESPONDENT**

MINISTRY OF LANDS & PHYSICAL PLANNING 7TH RESPONDENT

(An application for extension of time and leave to appeal out of time from the Ruling of the Environment & Land Court at Nairobi (Angote, J.) dated 16th March, 2023 in ELC Case No. E063 of 2023)

RULING

1. By the notice of motion dated 21st June 2023, the applicant seeks a hotch-potch of prayers, some of which are not grantable by a single judge of this Court. I will, therefore, confine myself to what is properly before me namely; a plea for me to extend or enlarge time, under Rule 4 of the Rules of this Court, for it to file and serve a notice of appeal against the ruling of the Environment and Land Court (Angote, J.) delivered on 16th March 2023.



2. Of the grounds on the face of the motion, the ones relevant to the prayer I am dealing with include that the time seeking leave and lodging a notice of appeal lapsed on 31st March 2023. It prayed for extension of time vide a motion dated 24th April 2023, but the same was rejected vide a ruling dated 9th June 2023 which states, *inter alia* that no notice of appeal had been lodged in compliance with the mandatory provisions of Rules 77 and 79 of the *Court of Appeal Rules* 2022. The applicant has now filed such notice of appeal, albeit out of time, and has requested for proceedings. It has a formidable arguable appeal with a good chance. By way of explanation, grounds 8, 9, 10 and 11 state thus;
 - “8. The default to timeously seek leave to lodge the notice and memorandum of appeal has been occasioned by the applicant inadvertently believing that in challenging the ELC ruling on the basis of a review, as opposed to an appeal would have been more apt.
 9. The said inadvertent believe was occasioned by the change of advocates, handover and advice from the previous counsel and counsel on record and a convoluted corporate process leading to the issuing appropriate appeal instructions.
 10. As such, the delay was occasioned by the applicant’s initial instructions to prefer and seek review of the said court ruling which application was filed and set for mention on 18th April 2023.
 11. However, upon further advice, consideration and an internal corporate process noting the serious effect of the impugned ruling and the limited review parameters, the review option was considered inappropriate thus withdrawn at the earliest opportunity on the same day before consideration and determination with instructions to pursue an appeal instead.”
3. Those grounds and reasons are repeated and elaborated on in the supporting affidavit sworn on 19th June 2023 by a director of the applicant, one are Rameshi kumar Kantilal Amlani.
4. The motion is opposed. George Kanyi, the 1st respondent swore a replying affidavit on 9th October on his own behalf and on behalf of his co-respondents. He swore that 6 days after delivery of the impugned ruling, Diro Advocates LLP came on record upon a change of advocates, notice of which was issued on 22nd March 2023, and they wrote to the Deputy Registrar of that court requesting for certified copies of proceedings and ruling for purposes of appeal, but filed a second application for review dated 2nd April 2022. When that application, and another before it, came for hearing on 18th April 2023, the applicant withdrew both. He swears that the applicant having pursued the path of review cannot properly be seeking to appeal.
5. Moreover, it is sworn that after its “numerous applications,” the applicant filed an application for extension of time before this Court being Civil Application No. 162 of 2023, which was heard and dismissed by a ruling dated 9th June 2023. It is therefore urged that the present application is *res judicata*.
6. I have given this motion due and anxious consideration. Whereas the respondents urge that I should find it to be *res judicata*, I note that in his ruling dated 9th June 2023, my learned brother Laibuta, JA did not determine the applicant’s application on the merits of the sought extension of time, but struck it out on the jurisdictional question of absence of a notice of appeal. That being the case, I would resist the invitation to reject the application on the basis of *res judicata* as I am not persuaded there has been a *judicata*.



7. That said, I turn to the merits of this application. It appeals to my discretion, which is free and unfettered to be employed for the doing of justice on a case by case basis. Extension of time under Rule 4 is not given as of right. A single judge, exercising the judicial discretion considers a number of matters including the length of delay; the reason or explanation for the delay; (possibly) the chances of the intended appeal succeeding, and the likelihood of prejudice to be visited upon the respondents if the application is allowed. See *Leo Sila Mutiso Vs. Hellen Wangari Mwangi* [1999] 2 Ea 231 And The Supreme Court Decision In [*Nicholas Kiptoo Arap Korir Salat Vs. Iebc & 7 Others*](#) [2014]eKLR.
8. I have ruminated over the reasons for delay proffered by the applicant, and which I cited verbatim earlier in this ruling. Try as I might, I do not see how those reasons amount to a plausible explanation. Further, there is a candour deficit in what the applicant says, compared with what the respondents have deposed to. The picture that emerges is that the applicant was involved in multiple applications and processes some of which are mutually exclusive. All that while, the applicant had the benefit of able legal counsel and with each move the respondents were made to have to respond. I am not sure that it is a persuasive argument for the applicant to now say it got this late in filing a notice of appeal because it was engaged in internal corporate consultations and had backed the wrong horse somewhere along the way.
9. I think that the delay was in the circumstances of this case inordinate and is implausibly explained. In the result, I cannot exercise my discretion favourably and must reject the application as unmeritorious.
10. The same is dismissed with costs. Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2024

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

