



REPUBLIC OF KENYA



KENYA LAW
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**Safaricom PLC v Kafwa (Civil Application E328 of 2023)
[2024] KECA 334 (KLR) (28 March 2024) (Ruling)**

Neutral citation: [2024] KECA 334 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E328 OF 2023
PO KIAGE, JA
MARCH 28, 2024**

BETWEEN

SAFARICOM PLC APPLICANT

AND

RONALD WILSON KAFWA RESPONDENT

(An application for stay of execution under Rule 5(2)(b) of the Court of Appeal Rules 2020 pending the lodging, hearing and determination of intended appeal from the judgment and decree of the High Court at Nairobi (A.N. Ongeru, J.) dated 21st June 2023 in Civil Appeal No. E191 of 2022)

RULING

1. The motion dated 18th July 2023 seeks a mixed grill of prayers some of which, those seeking a stay of execution of the judgment of the High Court delivered on 21st June 2023 pending an intended appeal, are not for a single judge, and I will, therefore, not address. Applicants ought to know that omnibus applications of this kind risk striking out for incompetence.
2. The twin prayers that are properly before me, brought under Rule 4 of our *Rules*, are that I grant leave to the applicant to file its notice of appeal and “memorandum of appeal” (sic) out of time and that the said documents, both dated 18th July 2023, be deemed to be duly filed and properly on record. On its face the motion bears grounds, the ones relevant to the above prayers being to the effect that, desirous of appealing against the aforesaid judgment, in which it was ordered to pay the respondent some Kshs. 452,868 for breach of duty of care, it filed a notice of appeal and requested for proceedings for preparation of a record of appeal and that;
3. The delay in filing the appeal is not inordinate and was made within reasonable time of the applicant having considered the judgment it received on 27th June 2023.”



3. The applicant's Senior Legal Counsel and Head of Litigation one Daniel Ndaba swore a supporting affidavit on the same 18th July 2023. Some of the salient averments in that affidavit include the following;

Par 6: On 21st June 2023 the High Court affirmed the Small Claims Court judgment and entered for the sum of Kshs. 452,868 plus costs and interest.

Par 6: The applicant secured a 30 day stay on the day judgment was delivered and this lapses on 21st July 2023.

Par 7: A notice of appeal was prepared by the applicant's advocates on 18th July 2023 and typed proceedings requested.

Par 8,10: A memorandum of appeal has been prepared raising "triable issues with high chances of success." (sic)

Par. 13: The delay in filing the notice of appeal (and a stay) was not inadvertent and not deliberate "as it required internal consultation as to the recourse the applicant had."

Par 14: There was "some delay in filing due to public demonstrations maandamano held on 7 and 12 July 2023 causing further delay in filing the notice of appeal."

Par 15: "This application is made without further delay, it is meritorious and should be allowed."

4. The respondent resists the application and swore a 9-page, 34- paragraph affidavit in reply, altogether too long, in my view, in which he stated, relevant to the extension of time plea, as follows;

Par. 3: The supporting affidavit of Daniel Ndamba is defective as he did not swear to any resolution or other document authorizing, him to swear it for the applicant of which he was not a director.

Par. 5 & 6: The applicants' counsel failed to consider the law and brought a vexatious application merely to frustrate the judgment.

Par. 7: As a preliminary point (which is also the gist of a preliminary objection) there is no right of appeal as section 38(2) of *Small Claims Act* declares that a judgement or order of the High Court on appeal shall be final and no leave to appeal has been sought or obtained."

5. The next averments addressing the applicant's explanation for delay are expressed in the following colourful, if vehement, terms;

"17. That the reasons the applicant advances as to why it did not file a notice of appeal within the statutory timelines does not make sense. The delay in filing the notice of appeal due to "maandamano" held on 7th and 12th July 2023 is also not a serious explanation, and perhaps borders on taking this honourable court for a joke! I am aware that this honourable court now has a judiciary e-Filing Platform, which means that filings can be done from any corner of the Country and at any time of the day. I am also aware that Court's including this Court, have been proceeding despite Covid, Omicron. "maandamano" et all.

18. That the applicant, which prides itself on being the most revolutionary technology company in Africa, cannot feign ignorance and seek to invoke this honourable court's discretion on the basis of "maandamano" in a Country



that is this technology savvy and advanced like Kenya. The applicant’s excuse should therefore be treated with the contempt it deserves.”

6. I have given the application due consideration and must come to the inevitable conclusion that it cannot be granted given the express provision of the *Small Claims Act* cited by the respondent. The entire ethos of that statute, in my understanding, is to bring to a speedy and efficient end certain claims, which should not be caught up in an intractable spider’s web of technicalities of procedure and endless litigation in an unending upward spiral from court to higher court. In the case of the “small claims” the end of the road is decreed to be the decision of the High Court on appeal, which is clothed with finality. And this Court must pay homage to that statutory bar to upward mobility. I find that the intended appeal does not lie. It is barred by an unsurmountable jurisdictional bar and I would strike out the motion as incompetent.
7. But assuming (which is unlikely) that I am wrong in so holding, is this a case deserving of my favourable exercise of discretion? I am afraid not. That discretion, though free and unfettered, is exercised on the basis of settled principles as it is a judicial one to be exercised judiciously for the attainment of the ends of justice. A critical consideration is the length of delay: the longer the delay the less likely it is for a single judge to grant extension of time. A notice of appeal, the simplest of documents a sample whereof is contained in the First Schedule to the *Rules* as Form B, does not require much effort or convoluted intellectualization to file: after all, all it does is communicate grievance and intent to appeal. Our *Rules* require that it be filed within 14 days but the one herein was prepared, not even filed, after 4 weeks, being double the time contemplated by the *Rules*. On the face of it the delay was long and inordinate.
8. Delay alone is not necessarily fatal to an application for extension of time, however. The next matter I would have to consider is the reason proffered for the delay, for it is possible for a perfectly plausible explanation to fully explain delay and exonerate the applicant, no matter how long such delay. I have already cited the explanation advanced by the applicant but I am wholly unpersuaded. I do not accept as reasoned or plausible that the applicant’s “*internal consultations*” should have taken a month to determine whether a notice of appeal should be lodged. I note, most significantly, that the applicant was represented by counsel on the day the judgment of the High Court was rendered and, on its own showing, it applied and obtained a 30-day stay of execution. It was only on the eve of the expiry of that stay, that they prepared a notice of appeal and filed this motion. I am led to wonder about the *bona fides* of such a move.
9. As for the “*maandamano*” protests, Mmhh... The dates given for them are after the 14 days for lodging the notice of appeal had already lapsed, though I understand the applicant to say they were the reason for the “further delay.” More to the point, it is a one-page document, a notice of appeal that is in issue. I take judicial notice that the Kenya judiciary has had a robust electronic filing system since the days of the Covid-Pandemic. I also take judicial notice that this applicant is an undisputed leader in the technology space and a provider of speedy wireless internet connectivity to the country.
10. It cannot have been handicapped, let alone prevented by *Maandamano*, from filing a notice of appeal. Moreover, I note that it is averred that the “*Maandamano protests*” fell on only two specified dates. It was safe to file it on all the other days.
11. The upshot is that I find no merit in this application and its fate is one: I hereby dismiss it with costs to the respondent.

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

