



Prime Steel Mills Limited v Esquire Investment Limited & another (Civil Application E485 of 2023) [2024] KECA 308 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KECA 308 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E485 OF 2023
PM GACHOKA, JA
MARCH 15, 2024**

BETWEEN

PRIME STEEL MILLS LIMITED APPLICANT

AND

ESQUIRE INVESTMENT LIMITED 1ST RESPONDENT

KAJIADO DISTRICT LAND REGISTRAR 2ND RESPONDENT

(An application for extension of time from the judgment of the Environment and Land Court at Kajiado (M. N. Gicheru, J.) delivered on 17th January 2022 in ELC Case No. 20 of 2019)

RULING

1. The applicant has approached the Court by way of Notice of Motion dated 3rd October, 2023, expressed to be brought under section 3A of the [Civil Procedure Act](#), Rule 4 of the [Court of Appeal Rules](#) and Order 51, rule 1 and 4 of the [Civil Procedure Rules](#), 2010. The applicant prays for extension of time to lodge an appeal out of time against the ruling of the Environment and Land Court (E.L.C), Kajiado (M. N. Gicheru, J.) delivered on 17th January 2022.
2. The application is supported by the affidavit of Jateen Patel Mahendra, a director of the applicant sworn on 3rd October, 2023. He deposes that on 17th January, 2022, the ELC Judge (M. N. Gicheru, J.) delivered a judgment and being dissatisfied, the applicant lodged a notice of appeal on 25th January, 2022. The applicant later withdrew the notice of appeal on 26th February, 2022 and opted to file an application for review of the judgment. As will become later in the ruling, that legal adventure ended miserably as the application for review was dismissed with costs on 23rd September, 2023.
3. Dissatisfied with the impugned ruling, the applicant has now approached this Court seeking leave to file an appeal out of time. The only reasons advanced in support of the application are: that the applicant withdrew the notice of appeal after filing the application for review; that it is in the interest of



justice to extend time; that the respondent will not suffer any prejudice; and that the intended appeal has high chances of success. In support of those arguments, the applicant has filed written submissions dated 14th December, 2023.

4. The application is opposed by the 1st respondent. In opposition thereto, it raised a notice of preliminary objection dated 15th November, 2023 and filed written submissions dated 23rd February, 2024. The 2nd respondent, though served, did not file any response.
5. It is argued by the 1st respondent that this Court has no jurisdiction to hear and determine the application. It opined that it was for this very reason that the applicant withdrew the notice of appeal and opted to file an application for review in the first instance. Citing, *Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi* [2007] eKLR; *Ziporah Moraa vs. David Okiuma & Ant.* [2020] and *HA vs. LB* [2022] eKLR, the 1st respondent submitted that having withdrawn the notice of appeal to pursue a review of the judgment, the instant application is an abuse of the court process.
6. Before addressing the merits of the appeal, I wish to point out to the applicant that the exercise of discretion to extend time is governed by the Court of Appeal Rules and not the Civil Procedure Act. To the 1st respondent, it is important to draw a distinction between the question of jurisdiction and power to strike out a pleading on a preliminary point of law. Having said that, I will now consider the application on its merits.
7. The discretion to extend time is wide and unfettered. It has to be exercised judiciously and upon reason. It should not be exercised arbitrarily, capriciously and on sentimental grounds. (See *Julius Kamau Kithaka vs. Waruguru Kithaka Nyaga & 2 others* [2013] eKLR). It is also settled that the exercise of this Court's discretion under rule 4 of this Court's rules 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. (See *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR).
8. It is instructive to note that the only reason advanced for the delay in filing the appeal is that after filing the notice of appeal on 25th January, 2022, through the firm of Macharia Mwangi Njeru Advocates, it changed advocates and the new advocate, Guandaru Thuita & Co. Advocates, advised it to withdraw the notice of appeal and pursue a review of the judgment. I am alive to the fact that whether an intended appeal has merit or not is not an issue to be determined by a single Judge. That said, it is also not in dispute that a party cannot pursue an appeal and a review at the same time. In doing so, it might suffer the fate of the proverbial hyena, which on reaching a road junction and not sure which road that led to the place where the smell of meat was coming from, it decided to walk astride both roads. As it stretched the legs, it split into two and suffered a painful death.
9. In this application, the applicant filed a notice of appeal timeously but later opted to withdraw it. After lodging the application for review on 26th January, 2022, it now wants to abandon that route and challenge the judgment dated 17th January, 2022 on merits. Without saying much, this in my view, cannot be a good reason for me to extend time.
10. As a further demonstration that it is not clear which legal route that it wishes to follow, I note that after the dismissal of the application for review on 26th September, 2023, it filed a notice of appeal on 3rd October, 2023, not against the ruling, but against the judgment that had been delivered on 22nd January, 2022.



11. I think I have said enough to show that no good reason has been placed before me to exercise any discretion in favour of the applicant. The fact that I have an applicant who is unable to find his way out of a legal maze is not a good reason to extend time.
12. Consequently, it is my finding that the Notice of Motion dated 3rd October, 2023 is without merit and it is hereby dismissed in its entirety with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2024.

M. GACHOKA CIArb., FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

