



Summit Travel Services Ltd v Mercantile Insurance Co Ltd & another (Civil Application E514 of 2023) [2024] KECA 346 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KECA 346 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E514 OF 2023
PM GACHOKA, JA
MARCH 15, 2024**

BETWEEN

SUMMIT TRAVEL SERVICES LTD APPLICANT

AND

MERCANTILE INSURANCE CO LTD 1ST RESPONDENT

ABSA BANK KENYA PLC 2ND RESPONDENT

(An application for extension of time against the ruling and orders of the High Court of Kenya at Nairobi (Njoki Mwangi, J.) delivered on 22nd September, 2023 in HCCC No. 511 OF 2008)

RULING

1. Before me is a Notice of Motion, hinged on article 50 of *the Constitution*, sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and rules 4, 31, 39(b), 41, 42, 43 and 47 of the Court of Appeal Rules 2010 (now 2022). The applicant prays for extension of time to file an appeal against the ruling of the High Court (Njoki Mwangi, J.) dated 22nd September, 2023 in HCCC No. 511 of 2008, Nairobi.
2. The application is supported by two affidavits; the first by Jackton Ranguma sworn on 1st November, 2023 and the second by Anthony Odhiambo Wasuna sworn on 1st November, 2023.
3. In his affidavit Mr. Ranguma gives a history of the dispute and contends that the decretal amount of Kshs. 8,961,504.00 had been settled as they had already paid a sum of Kshs. 10,817,000.00. It is his averment that in the circumstances, the learned Judge erred in granting a garnishee order for interest and costs for a sum of Kshs. 9,333,004.58 and USD 48,881.20.
4. On his part, Mr. Wasuna, counsel for the applicant, has given the reasons for the delay which can be summarized as follows: that on 31st July, 2023, the learned Judge directed that the ruling was to be delivered on 22nd September, 2023; that he transmitted the information to his office clerk and the counsel who was to hold his brief on that day; that regrettably, the day was recorded as 22nd October,



2023; that he noticed the error on 23rd September, 2023 and managed to get the ruling on 9th October, 2023; that though the decree was executed, there is gross injustice as the applicant has lost a sum of Kshs.7,896,639.20 and is therefore desirous to challenge the impugned ruling; and that the applicant should not suffer due to an oversight on the part of the advocate.

5. The only issue that arises for determination is whether I should exercise my discretion in favour of the applicant to extend time. Put it differently, has the applicant given good or plausible reasons for the delay in lodging the notice of appeal or filing the appeal within time? The principles that guide the exercise of discretion in extension of time is old hat but due to the very nature of litigation, it is one issue that a court has to contend with all the time. The principles can be discerned in a long chain of authorities. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2EA 231, *Fakir Mohamed v Joseph Mugambi & 2 Others*; [2005] eKLR; *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees* [2020] eKLR; *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and *Athuman Nusura Juma v Afwa Mohamed Ramathan* CA No. 227 of 2015.
6. The principles distilled from the above case law may be enumerated inter alia as follows:
 - i. The mandate under Rule 4 is discretionary, unfettered and does not require establishment of “sufficient reasons”. Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to: the period for the delay, the reason for the delay (possibly), the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.
 - ii. Orders under rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond para-adventure, that the intended appeal is not an arguable one.
 - iii. The discretion under Rule 4 of the Court of Appeal Rules must be exercised judiciously considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see *Githere v Ndiriri*.
 - iv. As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court.
 - v. The degree of prejudice to the respondent entails, balancing the competing interests of the parties, that is, the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.
 - vi. More considerations include, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity;
 - vii. Whether the intended appeal has merit or not is not an issue determined with finality by a single judge, hence the use of the word “possibly”;
 - viii. 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 power, with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.

- (xi) The right to a hearing is not only constitutionally entrenched, but also the cornerstone of the rule of law.
7. The facts relating to this matter are not contested as both the applicant and the 1st respondent agree that the dispute is on the amount payable. The applicant contended that it had settled the decretal amount. This is disputed by the respondent in the replying affidavit of Sarah Weru, the company secretary, sworn on 5th December, 2022. In spite of proper service, the 2nd respondent did not participate in this application.
8. At this stage, the question before me is whether I should grant leave for extension of time. The applicant and the respondent have devoted a lot of content on what I would consider as the merit of the appeal. It is not my role to pronounce the merits of the appeal at this stage. As this Court held in *Athuman Nusura Juma v Afwa Mohamed Ramadhan CA No. 227 of 2015*:
- “This Court has been careful to ensure that whether the intended appeal has merits or not it is not an issue determined with finality by a single Judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”
9. I have looked at the memorandum of appeal and I can only say that it raises arguable grounds that may succeed and I say no more.
10. As to whether the applicant has given plausible reasons for the delay, I note that Mr. Wasuna, counsel for the applicant has candidly disclosed that the date for the ruling was inadvertently recorded in the diary as 22nd October, 2023 instead of 22nd September, 2023. In my view, a mistake by an advocate is not an automatic ground for extension of time. The Court is under a duty to exercise due care taking into account all the circumstances and balance the competing rights of all the parties. In this case, counsel for the applicant discovered the mistake on 23rd October, 2023 and embarked on getting a copy of the ruling. It is stated that he got a copy of the ruling on 9th October, 2023 and filed the instant application on 1st November, 2023. Therefore, the delay is about 21 days. It is instructive that the rules do not set out the number of days that would be considered as inordinate and therefore each case should be determined on its own facts (See *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018]* eKLR.)
11. I have carefully read the application, the rival affidavits and the written submissions (applicant's dated 25th January, 2024 and 29th February, 2024 as well as the 1st respondent's dated 29th January, 2024.) I note that the 1st respondent has devoted a lot of time arguing on the merits of the intended appeal, the long chequered suit at the High Court that was litigated upon for over 15 years and that litigation must come to an end.
12. It is not seriously contested that filing of the application was done with delay. Having considered all the facts in this matter, I am persuaded that I should exercise my discretion in favour of the applicant. The 1st respondent will not suffer any prejudice as it has already executed the decree. The worst that can happen to the 1st respondent, if the intended appeal is successful, is an order for refund of any excess money and it should not fear such an eventuality, if the applicant has no meritorious appeal.
13. In view of the foregoing, I am satisfied that the applicant has met the parameters for exercise of my discretion. Accordingly, I allow the Notice of Motion dated 1st November, 2023. I direct that the notice



of appeal be filed within the next 7 days and thereafter, the appeal be filed within a period of 45 days.
The costs of the application shall abide the appeal.

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

M. GACHOKA CIArb., FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

