



**Humming Healthcare Limited v Asterisk Limited (Civil Appeal (Application)  
E636 of 2023) [2024] KECA 243 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 243 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E636 OF 2023  
SG KAIRU, JA  
MARCH 8, 2024**

**BETWEEN**

**HUMMING HEALTHCARE LIMITED ..... APPELLANT**

**AND**

**ASTERISK LIMITED ..... RESPONDENT**

*(An application for extension of time to deem the already filed record of appeal as having been properly filed and served within time from 28th August 2022 when High Court Commercial and Tax Division at Nairobi (Mabeya, J.) granted leave in HCCC No. 107 of 2014)*

**RULING**

1. In its application dated 18<sup>th</sup> August 2023, the applicant Humming Healthcare Limited seeks an order against the respondent Asterisk Limited for extension of time within which to file the record of appeal and that the record of appeal filed herein be deemed as having been filed and served.
2. The grounds in support of the application are that the applicant was on 28<sup>th</sup> July 2022 granted leave by the High Court to file a notice of appeal to challenge the decision of the High Court given on 1<sup>st</sup> July 2021 lifting the veil of incorporation of the applicant and ordering the directors of the applicant to satisfy a judgment entered in favour of the respondent on 12<sup>th</sup> September 2015; that following the leave granted on 28<sup>th</sup> July 2022 aforesaid, the notice of appeal of appeal was filed on 11<sup>th</sup> August 2022.
3. It is stated that the advocates for the applicants then on record failed to apply for typed proceedings within 30 days as required under Rule 84 of the *Court of Appeal Rules*; and that the request for proceedings was only made on 11<sup>th</sup> January 2023. In her affidavit in support of the application Nawaz Popat, a director of the applicant deposes that the applicant instructed the advocates presently on record, Githumbi Gachaga & Achoki Advocate to take over the conduct of the matter; the said advocates applied for leave to take over conduct of the matter by application dated 12<sup>th</sup> April 2023 and



- were granted leave to come on record on 9<sup>th</sup> August 2023; they then collected the proceedings from the High Court and filed a memorandum and record of appeal dated 14<sup>th</sup> August 2023.
4. Based on an affidavit of service sworn by Francis Maina process server on 16<sup>th</sup> October 2023, the application was served on the respondent's advocates W. J. Ithondeka & Co Advocates on 22<sup>nd</sup> August 2023 but there is no response to it.
  5. I heard the application on 22<sup>nd</sup> November 2023 and despite notice of hearing having been served on the respondent's advocates on 7<sup>th</sup> November 2023, there was no appearance. The application is therefore not opposed. Nonetheless, the applicant is obliged to satisfy the court that it is deserving of exercise of the Court's discretion in its favour.
  6. There is a long history to the matter. On 14<sup>th</sup> September 2015, the High Court entered judgment in favour of the respondent for Kshs. 984,758.00; USD 123,281.00 and USD 25,000.00 based on an application for judgment on admission. It appears that the judgment remained unsatisfied for some time whereupon the respondent, as the judgment creditor, made an application dated 20<sup>th</sup> February 2018 for leave to execute the judgment against the directors of the applicant. That application was allowed, and an order to that effect made by the High Court on 1<sup>st</sup> July 2021.
  7. The applicant was aggrieved by that order. Few months later, on 17<sup>th</sup> September 2021, the applicant made an application before the High Court for leave to file a notice of appeal out of time and for stay of execution of the ruling of 1<sup>st</sup> July 2021. In a ruling of the High Court delivered on 28<sup>th</sup> July 2022, slightly over one year later, the High Court extended time for the applicant to file a notice of appeal, which was to be filed within 14 days from 28<sup>th</sup> July 2022. In compliance, the applicant filed the notice of appeal dated 11<sup>th</sup> August 2022. In its ruling of 28<sup>th</sup> July 2022, in addition to extending time for filing of the notice of appeal, the High Court granted the applicant a conditional order for stay of execution of the ruling of 1<sup>st</sup> July 2021, conditional upon the applicant paying to the respondent 50% of the decretal amount within 30 days and the balance to be deposited in an interest earning account within 30 days of the ruling. The applicant is silent on whether it fulfilled those conditions.
  8. Having filed the notice of appeal on 11<sup>th</sup> August 2022 with the leave of the High Court, under Rule 84 of the *Court of Appeal Rules*, the applicant had sixty days after lodging the notice of appeal to lodge the memorandum and record of appeal. In effect, the memorandum and record of appeal should have been lodged by about 10<sup>th</sup> October 2022. That was not done. Going by the date on the memorandum of appeal, it was done on or about 14<sup>th</sup> August 2023. A delay of approximately 10 months.
  9. What I need to consider, among other things, is whether that delay has been satisfactorily explained, because, although, the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially and as the Supreme Court of Kenya stated in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR 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 and the party seeking extension of time has the burden to lay a basis to the satisfaction of the court. In the same case, the Supreme Court expressed 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 consideration. See also *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR.
  10. The question therefore is whether the delay of over 10 months in filing the memorandum and record of appeal is satisfactorily explained. What explanation has the applicant proffered for the delay? In her affidavit in support of the application Nawaz Popat, a director of the applicant deposes that the



- applicant was granted leave by the High Court on 28<sup>th</sup> July 2022 to appeal against the decision of 1<sup>st</sup> July 2021; that the applicant’s former advocates did not apply for copy of proceedings until 11<sup>th</sup> January 2023 which “is outside the timelines under Rule 84 of the *Court of Appeal Rules* and was also not copied to the respondent and/or his advocates”; that the failure to apply for the typed proceedings within the timelines of rule 84 disentitles the applicant from benefiting from a certificate of delay that may be issued by the Registrar and that the failure to obtain the typed proceedings was a mistake by the then advocates for the applicant which should not be visited to the applicant.
11. Nawaz Popat deponed further that in April 2023, she instructed the firm of Githumbi Gachaga & Achoki Advocates which made an application to court to take over the matter from the previous advocates, which application was heard and allowed on 9<sup>th</sup> August 2023. That in the meantime, she had also requested the former advocates to continue pursuing proceedings which they did through various letters.
  12. The record of the application shows that there is a letter dated 29<sup>th</sup> July 2022 addressed to the High Court by the firm the firm of Kimani, Kiarie & Associates Advocates in which reference is made to “a ruling rendered...on the 28<sup>th</sup> of July 2022” and requesting for “a copy of the said ruling in preparation of an appeal.” There is then the notice of appeal dated 11<sup>th</sup> August 2022. That is followed by another letter dated 11<sup>th</sup> January 2023 by the same firm addressed to the Deputy Registrar of the High Court in what the advocates wrote was “a follow up on our letter dated 25<sup>th</sup> November 2022” requesting the Deputy Registrar to avail “certified copies of the record of proceedings and rulings delivered on 28<sup>th</sup> July 2022 and the ruling dated 1<sup>st</sup> July 2021...to enable us process an appeal.” The letter of 25<sup>th</sup> November 2022 referred to therein is not part of the record before me. There is another letter dated 22<sup>nd</sup> May 2023 also addressed to the Deputy Registrar of the High Court by the firm of Kimani, Kiarie & Associates Advocates in which reference is made to the ruling delivered on 1<sup>st</sup> July 2021 and requesting the Deputy Registrar to “urgently furnish...copies of the typed proceedings to enable us prepare the record of appeal...”. There is no reference in that letter to the earlier letters. None of those letters bear a court stamp or evidence of delivery to the High Court registry and none of them, on the face of them, were copied to the advocates for the respondent.
  13. The 30 days within which the applicant should have applied for a copy of the proceedings of the High Court began to run 28<sup>th</sup> July 2022, the date of the decision against which it desired to appeal. The request for a copy of the proceedings should therefore have been made within that period for the applicant to benefit from the proviso to rule 84 of the *Court of Appeal Rules*.
  14. The applicant has proceeded on the wrong footing that the extension of time granted by the High Court on 28<sup>th</sup> July 2022 for the filing of the notice of appeal, and on the basis of which the notice of appeal dated 11<sup>th</sup> August 2022 was filed, also extended the 30-day period under Rule 84. It did not. In addition to seeking an extension of time to file a notice of appeal, the applicant ought to have sought extension of time within which to apply for a copy of the proceedings under Rule 84.
  15. Clearly, many mistakes have been made by the advocates for the applicant notwithstanding which, considering there is no opposition to the application, I reluctantly allow the application dated 18<sup>th</sup> August 2023, with the result that the record of appeal filed herein be deemed as having been filed and served.
  16. I make no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.**

**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**

