



**Jim's Fresh Vegetable Growers & Exporters Limited v Locland Limited & another
(Civil Application E496 of 2023) [2024] KECA 608 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 608 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E496 OF 2023
LA ACHODE, JA
MAY 24, 2024**

BETWEEN

JIM'S FRESH VEGETABLE GROWERS & EXPORTERS LIMITED . APPLICANT

AND

LOCLAND LIMITED 1ST RESPONDENT

AJIT PATEL 2ND RESPONDENT

(Being an application for leave to file an appeal out of time against the judgement of the Environment and Land Court at Milimani Law Courts (E.O Obaga J), dated 5th May, 2020 in Nairobi ELC No. 277 of 2022)

RULING

1. This application dated 26th October 2023, is said to be brought under Rule 5(2) of the [Court of Appeal Rules, 2022](#). The applicant is seeking extension of time for the applicant to lodge and serve a record of appeal against the judgement of the Superior Court rendered on 5th May 2020 in ELC NO. 277 of 2011.
2. The grounds underpinning this application as stated on the face thereof are that, in a judgement dated 5th May 2020, Hon. E.O Obaga J dismissed the applicant's suit, brought by way of a re- amended plaint dated 12th June 2012 in its entirety and awarded costs to the defendant. The court also entered judgement in favour of the respondent in their counterclaim dated 5th April 2011 against the plaintiff. The applicant was aggrieved by the judgement and promptly filed and served Notice of Appeal on 12th May 2020, signifying intent to file an appeal. The applicant failed to follow up with the filing of the record of appeal.
3. The applicant appointed MS Wambugu & Muriuki Advocates LLP to take over the matter from their previous advocates. A consent to come on board was recorded by the firms. However, the former



advocates failed to hand over the file immediately, until the 16th of May 2023. On following up with the court registry to obtain a copy of typed proceedings for filing of the appeal, counsel was informed that the file had been archived. The typed proceedings were supplied to the applicant's advocates on 28th July 2023. The applicant was subsequently served with a notice to show cause why orders of execution should not issue, and on 31st July 2023 the Deputy Registrar determined the said Notice to Show Cause. The applicant lodged a Notice of Appeal thereafter.

4. The applicant is certain that the appeal is arguable and has chances of success. The applicant asserts that it is likely to suffer prejudice if the extension is not awarded and the respondent proceed to commence execution proceedings.
5. The background to this matter is that the 1st defendant operated a business that later went into liquidation. The applicant (plaintiff at trial) entered into negotiations to purchase the assets of the 1st defendant, including two plots of land, LR No. KajiadoKitengela5110 and KajiadoKitengela8125, measuring 20.3 Ha and 10.12 Ha, respectively. The applicant was put in possession of the suit properties while negotiations continued. There was a draft agreement which was exchanged but was never executed. In or around the year 2010 the defendants indicated disinterest in pursuing the transaction. This prompted the suit by the plaintiff against the defendant.
6. The prayers sought in the suit were: permanent injunction against the defendantsservants or agents from dealing with the properties in issue, specific performance of the said agreement, an order for transfer of title to the properties to the plaintiff, and in the alternative judgement against the defendants in the sum on Kshs.32,500,000 plus interests of 16 percent by way of restitution. The defendants filed a defence and counterclaim seeking the following reliefs: the plaintiff's suit be dismissed, an order for eviction of the plaintiff from the suit properties, mesne profits accrued by the plaintiffs from July 2009 till eviction at rate of Ksh.500,000 per month and Ksh9,570,000 being the balance of the purchase price of the defendants' items and stock taken by the plaintiff.
7. The Superior Court judge considered the matter and ruled in favour of the respondents (the defendants).
8. In opposition to this application, the respondent filed a replying affidavit sworn by Nirav Patel (the director of 1st respondent) on 9th February 2024 and averred that the order for extension of time to appeal is not capable of being granted, because the prayers of the applicant were expressly limited to an interim period pending determination of the application. The respondent deposed that there was no substantive issue for determination in the application for extension of time. Further, that the delay by the applicant to lodge and serve a record of appeal was inordinate, inexcusable and not sufficiently explained. The respondent deposed that the application is an abuse of court process, is vexatious and has not satisfied the threshold for the prayers sought to be granted.
9. This application was disposed of by way of written submissions. MS Wambugu & Muriuki Advocates filed submissions dated 5th February 2024 on behalf of the applicant and stated that the applicant is a deserving party and thus its prayer for extension of time should be granted. They submitted that filing the Notice of Appeal showed intent to file an appeal and in addition, the respondent would not suffer any prejudice since the applicant is willing to deposit security for due performance of the judgement, should the suit proceed on appeal. The applicant urged that the blame ought to be placed on their advocate and not the applicant. The applicant relied on the decision in *Athuman Nusura Juma vs Afwa Mohammed Ramadhan* CA No. 227 of 2015, to urge that the intended appeal having merit, should be given a chance to be argued; and, on *Abbas Sherally & Another vs Abdul Fazaiboy*, Civil Application No. 33 of 2003 in *Musanda vs Asset Recovery Agency & 3 Others* [2022] KECA 135 KLR to urge on the right to fair hearing and that the blame for the advocate's failure should not jeopardize their case.



10. Ms Mohamed Muigai LLP filed submissions dated 9th February 2024 on behalf of the respondents and reiterated the contents of the replying affidavit. Counsel referred to the conditions in *Nicholas Kiptoo Korir Arap Salat vs IEBC* [2014] eKLR that the applicant has to meet for the granting of the orders sought.
11. Although the applicant stated that the application was brought under Rule 5(2) of the *Court of Appeal Rules*, 2022, this is an application that should have been brought under Rule 4 of the *Court of Appeal Rules*, 2022, which clothes this Court with the jurisdiction to determine it. Rule 4 provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
12. Extension of time is not an automatic right to a party. In determining whether or not to grant extension of time, this Court considers various factors, as demonstrated in the case of *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others* [2018] eKLR, where the Court stated that:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; 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”
13. I begin by considering whether or not the delay was inordinate and inexcusable. The applicant filed a Notice of Appeal on 12th May 2020, after the delivery of judgement on the 5th of May 2020. Under Rule 84, the appeal should have been lodged and served sixty days after the filing of Notice of Appeal. However, the application for extension of time herein was filed on 26th October 2023, a period of more than 3 years later. The applicant was out of time by more than 3 years and was in my view inordinate.
14. On the reasons provided for the delay, I referred to the holding of the Supreme Court in *Nicholas Salat (supra)* that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”
15. In the application before me the applicant stated that its director was taken ill and thus could not follow up to know the status of the case with its advocates. Additionally, the former firm took a while to transfer the applicant’s file to the firm of advocates that took over. Lastly, that it took time to retrieve the superior court record from the archive. The question is whether these reasons are sufficient and excusable.
16. The applicant attached medical records as evidence that its director suffered from multiple illnesses during this period. It is however, shown that he contracted Covid-19 in 2020 and was advised to stay at home. The applicant is a company and it is not said that the director was so incapacitated that he



could not give further instructions to Kaplan & Stratton Advocates, then on record, after they filed the Notice of appeal a week after judgement was delivered. In any case, the advocates were aware that they ought to file the record of appeal within sixty days in accordance with Rule 84. I am therefore not satisfied that the reasons provided by the applicant are excusable in the circumstances of this case.

17. On the arguability of the intended appeal, whether the intended appeal has merits or not, is not an issue to be determined by the Court in this application. That is a matter for the court dealing with the merits of the appeal to determine. That is why the requirement that the intended appeal be arguable is prefaced with the word “possibly”. See- *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan* [2016] eKLR. I have considered the grounds of appeal set out in the memorandum of appeal annexed and it is my view that they are arguable.
18. However, even if the intended appeal is found to be arguable, this does not diminish the fact that it must be filed within the prescribed time. In *Odongo & another vs Housing Finance Co. Ltd & 3 others* (Civil Application E083 of 2023) [2024] KECA 375 (KLR) the Court stated that:

.... The fact that an appeal is arguable cannot supersede the onus placed on an applicant to give plausible reasons for the delay. Without a satisfactory explanation for the delay, an arguable appeal does not result in perfunctory extension of time. To this end, the words in *Reliance Bank Ltd (In Liquidation) v. Grandways Ventures Ltd & 2 others* (supra) rings a bell thus:

‘It may well be that the Applicant has a good appeal but even good appeals must be filed within the prescribed periods and when that is not done, some explanation must be given in explanation of the delay.’”

In the premise, the application dated 26th October, 2023 is found to be without merit and is dismissed.

Costs of the application are awarded to the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

L. ACHODE

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JUDGE OF APPEAL.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

