



REPUBLIC OF KENYA



**Kapu (K) Limited & 2 others v Patel & 4 others (Civil Application
E160 of 2024) [2024] KECA 618 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 618 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E160 OF 2024**

P NYAMWEYA, JA

MAY 24, 2024

BETWEEN

**KAPU (K) LIMITED 1ST APPELLANT
SUNDIP JAGDISHROY PATEL 2ND APPELLANT
HINA SUNDIP PATEL 3RD APPELLANT**

AND

**JAGDISHROY M PATEL 1ST RESPONDENT
PRIME BANK LIMITED 2ND RESPONDENT
NIKISUHI INVESTMENTS LIMITED 3RD RESPONDENT
PRAFULCHANDRA MANIBHAI PATEL 4TH RESPONDENT
KAPU LIMITED 5TH RESPONDENT**

*(Being an application for extension of time to file a Notice of Appeal
against the rulings and stay of proceedings (J. Mong'are, J.) delivered on
19th February 2024 in HCC Commercial & Tax Case No. 272 of 2014)*

RULING

1. The issue that presents for determination in this ruling, is whether the Applicants herein should be granted leave to appeal and extension of time to file an appeal out of time against a ruling delivered on given on 19th February 2024 by the High Court at Nairobi (Mongare J.) in High Court Commercial & Tax Case No. 272 of 2014 declining to grant the Applicants leave to further amend their defence. The Applicants have in this respect filed an application by way of a Notice of Motion dated 28th March 2024, in which they seek the said extension of time. Further, that the Notice of Appeal dated 4th March



2024 and filed on 8th March 2024 be deemed to have been properly filed, and the costs of the application do abide the outcome of the Appeal.

2. The application is supported by an affidavit sworn on 28th March 2024 on behalf of the Applicants by Sundip Jagdishroy Patel, the 2nd Applicant herein. The Applicants state that they are aggrieved by the ruling given on 19th February 2024 by the High Court at Nairobi, and wish to file an appeal against it for the reasons that the learned trial Judge misguided herself on the law and failed to take into account the Applicants' evidence supporting the application. However, that the ruling having been delivered on 19th February 2024, the time for filing a Notice of Appeal under Rule 77 of the Court of Appeal Rules expired on 4th March, 2024, and on account of an inadvertent error by their counsel on record, a Notice of Appeal was filed on 8th March, 2024, four days behind time. In addition, that the trial Court has now scheduled the hearing of the main suit on 15th April 2024, and if the instant application is not considered and the necessary reliefs granted the intended appeal by the Appellant will be rendered nugatory. A copy of the notice of appeal was annexed as was the Applicants' draft Memorandum of Appeal.
3. The Applicants' advocate, Omolo Joseph Agutu, also filed an affidavit dated 28th March 2024 attesting to his inadvertent failure to file the Notice of Appeal within time, and also filed submissions dated in 17th May 2024, in which the decision by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR was cited for the factors that should be considered in an application for extension of time. The counsel submitted that the Applicants had explained the reason for the delay which was caused by counsel on record, who misapprehended the timelines for filing the notice of appeal on account of their workload; that the notice of appeal was filed only four days late; and the application for extension of time was filed within just 30 days after expiry of the time for filing the Notice of Appeal.
4. None of the Respondents filed a response to or submissions the application, which I heard in chambers today. This application is therefore unopposed. The principles governing the exercise of the discretion to extend time under Rule 4 of the Court of Appeal Rules were well stated in the case of *Leo Sila Mutiso vs Rose Hellen Wangare Mwangi*, Civil Application No. Nai 255 of 1997 (ur) as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted”
5. Rule 77(2) of the *Court of Appeal Rules* of 2022 in this respect requires that a Notice of Appeal is lodged within fourteen days of the decision intended to be appealed against. It is not in dispute that the Applicants did not file a Notice of appeal within the required timelines, and the relevant period of delay that requires to be explained is the one between delivery of the impugned ruling on 19th February 2024, and the date of lodging of this application on 28th March 2024. The Applicants have explained that the delay was caused by the inadvertent failure by their advocates to file the Notice of Appeal within time. I have considered the reasons for the delay, and it is notable that the delay in filing the Notice of Appeal was one of four days, and that the application for extension of time was also lodged less than a month later. I therefore find the reasons for the delay to be sufficient and adequate, and that the delay was in the circumstances excusable and not inordinate.



- 6. On the chances of the intended appeal succeeding, all that I need to be persuaded at this stage is that the Applicants have demonstrated the existence of plausible grounds of appeal and not their merit. The counsel for the Applicant in this respect availed a draft memorandum of appeal, in which the main ground is that the impugned ruling was not supported by the evidence and applicable law, which in my view requires further argument and consideration.
- 7. I therefore find that the Applicants merit the exercise of this Court’s discretion for the above stated reasons. I accordingly allow the Applicants’ Notice of Motion application dated 28th March 2024, on the terms that the Applicants are granted extension of time to file and serve a Notice of Appeal against the judgment delivered by Mongare J. on 19th February 2024 in High Court Commercial & Tax Case No. 272 of 2014, within thirty (30) days of the date of this ruling. There shall be no order as to the costs of the application.
- 8. Orders accordingly.

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

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

