



**Mombasa Island Cargo Terminal Limited v Asaka (Civil Application  
E082 of 2023) [2024] KECA 556 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 556 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E082 OF 2023**

**KI LAIBUTA, JA**

**MAY 24, 2024**

**BETWEEN**

**MOMBASA ISLAND CARGO TERMINAL LIMITED ..... APPLICANT**

**AND**

**JAMES EDWIN OTIENO ASAKA ..... RESPONDENT**

*(Being an application for extension of time to file and serve the Notice and Record of Appeal out of time from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Mombasa (Nzei, J.) dated 27th July 2023 in E.L.R.C No. 37 of 2019)*

**RULING**

1. By a Notice of Motion dated September 11, 2023 filed pursuant to rule 4 of the [Court of Appeal Rules](#) and supported by the annexed affidavit of Teddy Onyango (the applicant's Legal Officer) sworn on September 4, 2023, the applicant, Mombasa Island Cargo Terminal Limited, seeks extension of time to file and serve the notice of appeal and record of appeal out of time.
2. The applicant's Motion is anchored on the grounds that the notice of appeal was erroneously filed out of time as the applicant's previous counsel failed to do so; that the error was inadvertent and can be cured; that the respondent will not suffer any prejudice or inconvenience if the orders sought are granted; and that the application is brought in the best interest of justice and fairness.
3. In support of the Motion, learned counsel for the applicant, M/s. Munyithia, Mutugi, Umara, Muzna & Company, filed written submissions, list of authorities and case digest dated March 6, 2024. In all, counsel cited 5 judicial authorities, which we have duly considered.
4. In response to the Motion, the respondent filed a replying affidavit sworn on September 21, 2023 deposing that the deponent of the affidavit in support of the Motion has no legal capacity to swear the affidavit; that the applicant has not served him with any letter requesting for typed proceedings; that the applicant has failed to give sufficient reasons for the delay; that the 21-days delay in filing the notice



of appeal is inordinate; that there is no evidence to show that the applicant had instructed counsel to lodge an appeal after delivery of the impugned judgment; that the intended appeal has no prospect of success; and that it is in the interest of justice that the applicant's Motion be dismissed.

5. A second "Replying Affidavit" by the same deponent with regard to a Motion dated "September 22, 2023" accompanies the applicant's Motion. What is inexplicable is the deponent's averment that he is "... the Legal Officer of the respondent herein." Even though the depositions therein closely identify with those in the above-mentioned affidavit in reply, I nonetheless find this affidavit misplaced and a recipe for confusion. Suffice it to observe that no useful purpose would be served by any attempt to decipher the intent and purpose of this subsequent affidavit.
6. Counsel for the respondent, M/s. P. A. Osino & Company, filed written submissions, list of authorities and case digest dated March 3, 2024 in which they cite 5 judicial decisions and 3 statutory authorities, which I have duly considered. In addition, thereto, counsel cited Article 159(2) (a) and (b) of the Constitution, which enjoins courts to administer justice irrespective of the status of the parties, and without delay.
7. Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to "... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act ...," on such terms as it thinks just.
8. The four basic factors to be considered in exercise of the Court's discretion in determination of applications under rule 4 were enunciated in *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA p231. In determining whether to extend time, the Court takes into account: (i) the length of the delay; (ii) the reason for the delay; (iii) the chances of the appeal succeeding if the application is granted; and (iv) the degree of prejudice to the respondent if the application is granted. In principle, the discretion is unfettered, and there is no limit to the number of factors the court would consider so long as they are relevant.
9. In the same vein, the Court of Appeal in *Fakir Mohammed vs. Joseph Mugambi and two others* [2005] eKLR considered additional factors that may be considered in appropriate cases, namely: the effect of delay on public administration; the importance of compliance with time limits; the resources of the parties; and whether the matter raises issues of public importance, all of which the Court viewed as relevant, but not exhaustive.
10. I take to mind the fact that the Applicant's Motion for extension of time to file an appeal turns on the four basic factors enunciated in *Leo Sila Mutiso vs. Helen Wangari Mwangi (supra)*. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. However, it is noteworthy that the applicant has not presented a draft Memorandum of Appeal or other material to demonstrate or, at the very least, suggest that his intended appeal is arguable. I find nothing in the material accompanying the Motion to shed light on the grounds on which the intended appeal will be anchored. The only hint as to what the intended appeal will be founded is contained in counsel's submissions, which are ordinarily intended to draw the Court's attention to the applicant's draft memorandum of appeal, Motion for extension of time, supporting or replying affidavits, the annexures thereto, and the authorities in support, but not to substitute for the requisite memorandum or other pleading.
11. In rejoinder, Mr. Mutugi for the applicant admitted that his firm had not formulated the grounds of appeal because, by the time the applicant's Motion was filed, they had not received a copy of the impugned judgment. He sought to highlight the grounds that would be advanced on appeal once the



orders sought were granted. This Court in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR had this to say on the nature of submissions:

“Submissions cannot take the place of evidence ..... Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.”

12. I hasten to observe that this Court does not grant orders in anticipation under rule 4 and leave it to the applicant to thereafter figure out the grounds on which they intend to anchor the intended appeal. There being no material to demonstrate that the applicant has an arguable appeal with the prospect of success, I need not pronounce myself on the remaining three factors to be satisfied for grant of orders under rule 4 of this *Court’s Rules*.
13. Having carefully considered the applicant’s Motion, the affidavits in support and in reply, the rival submissions of learned counsel, the cited authorities and the law, I reach the conclusion that the applicant’s Motion fails and is hereby dismissed with costs to the respondent. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

