



J&K Investments Limited v Gazemba Wekesa & Co Advocates (Civil Application E588 of 2023) [2024] KECA 533 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KECA 533 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E588 OF 2023**

F TUIYOTT, JA

MAY 9, 2024

I ALLOW THE NOTICE OF MOTION DATED 14TH DECEMBER, 2023 IN THE ALTERNATIVE PRAYER WITH THE RESULT THAT THE NOTICE OF APPEAL DATED 27TH OCTOBER 2023 AND SERVED UPON THE RESPONDENT ON 7TH NOVEMBER 2023 IS HEREBY DEEMED AS PROPERLY SERVED. COSTS SHALL BE IN THE APPEAL.

BETWEEN

J&K INVESTMENTS LIMITED APPLICANT

AND

GAZEMBA WEKESA & CO ADVOCATES RESPONDENT

(Being an application for extension of time to serve a notice of appeal out of time from the Ruling of the High Court of Kenya at Nairobi (S. Majanja, J) delivered on 27th October, 2023 in MISC. COMM. APPLICATION NO. E377 OF 2023 As consolidated with E437 OF 2023)

RULING

1. By a notice of motion dated 14th December, 2023, the applicant is seeking orders from this Court to extend the period for service of the filed notice of appeal upon the respondent or alternatively, to validate the service done upon the respondent on 27th November, 2023 and deem it as proper service.
2. In support of the application is an affidavit sworn by Olendo Cecilia, counsel for the applicant, on 14th December, 2023 where she explains that; the applicant being dissatisfied with the Ruling delivered by Judge Majanja in Misc. Comm. Application No, E377 of 2023 dated 29th May, 2023, filed a notice of appeal on 27th October, 2023; unfortunately and purely out of error, the said notice of appeal was not served upon the respondent on time and as required by the Rules of this Court; it was not until 27th November, 2023 that the said error was noticed; and the same was served physically upon the respondent 24 days later. Apologetic to Court and the opposing counsel for the oversight, counsel urges this Court to grant the extension order lest the applicant suffers substantial loss. Counsel further



pleads with the Court not to visit the mistakes of the advocates upon the applicant who had issued proper instructions to them.

3. Frank Ochieng' Walukwe trading under Gazemba Wekesa & Co. Advocates, the respondent herein, *vide* a replying affidavit sworn on 6th February, 2024 contends that the application is an afterthought and was prompted by the filing of a garnishee application by the respondent in which the respondent sought to garnishee three (3) bank accounts owned by the applicant. He urges this Court not to grant the orders sought in the application as the notice of appeal was served exactly a month later upon filing contrary to the mandatory terms of Rule 79(1) of the *Rules* of this Court and the applicant has failed to give reasons for the delay. He further contends that there is a legitimate expectation that the respondent (perhaps meant applicant) being represented by an advocate ought to observe the laws that define the operations of the Court. He asserts that *Rule 84* is also yet to be complied with by the applicant as a letter bespeaking proceedings is yet to be served upon the respondent and the respondent is similarly unaware of any such letter being filed. It being so and the applicant having failed to address the failure, then the appeal herein should be held as being defective.
4. I have considered the application, the response and submissions filed by the parties in support and against the application.
5. The discretion granted to this Court by Rule 4 of the *Court of Appeal Rules* when considering an application for extension of time, although wide, must be exercised judiciously. Extension of time is not a right of a party but an equitable relief available to a deserving party at the discretion of the court. The party entreating the extension must lay a basis to the satisfaction of the Court, and the Court in considering such extension will consider; the length of the delay; the explanation for delay; whether there will be prejudice suffered by the respondent if the extension is granted; whether the application is brought without undue delay; in appropriate instances, public interest; and possibly, the merit of the intended appeal. See *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR.
6. The applicant duly filed its notice of appeal on time within the time prescribed under Rule 77(2). The applicant however breached Rule 79(1) which provides;
 - “(1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal.”
7. The notice of appeal filed on 27th October, 2023 ought to have been served on or before 3rd November, 2023. Having effected service on 27th November, 2023, there was delay of about twenty-four (24) days or so. The present application dated 14th December, 2023 is brought another seventeen (17) after the date of late service.
8. The reason for the delay is attributed to the applicant's advocate's inadvertent error. This Court has in the past held that a bona fide mistake by counsel may, on occasion, entitle an applicant to the exercise of the Court's discretion in his favour. In doing so, the Court will examine the nature and quality of the mistake. See *Itute Ingu & another v Isumael Mwakavi Mwendwa* [1994] eKLR.
9. The nature of mistake here is failure to diligently serve an already duly filed notice of appeal. That does not seem to be such a monumental transgression when the notice was served 24 days late, not an inordinate lateness in the circumstances of this matter.
10. While it may be true that the application before Court was prompted by the filing of a garnishee application by the respondent, the present application was brought just 17 days after the omission to serve the notice of appeal on time was noticed. A second issue raised by the respondent, as I understand



it, that the lodging of the appeal itself is out of time is not a call to be made by a single judge. It is an issue that the respondent can take up in a striking out motion. The delay has been explained to the satisfaction of the Court. The delay is not inordinate. Further, it has not been demonstrated that the respondent will suffer prejudice if the extension was to be granted. All these lead to one answer; the application is merited.

11. I allow the Notice of Motion dated 14th December, 2023 in the alternative prayer with the result that the notice of appeal dated 27th October 2023 and served upon the respondent on 7th November 2023 is hereby deemed as properly served. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

