



Gachuba t/a Mwangi Gachuba Advocates v Hatari Security Guards Limited (Civil Application E863 of 2023) [2024] KECA 680 (KLR) (14 June 2024) (Ruling)

Neutral citation: [2024] KECA 680 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E863 OF 2023
LA ACHODE, JA
JUNE 14, 2024**

BETWEEN

MWANIKI GACHUBA T/A MWANGI GACHUBA ADVOCATES ... APPLICANT

AND

HATARI SECURITY GUARDS LIMITED RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal, against the Judgement and Decree of the High Court at Nairobi (Mong'are J), dated 19th May 2023 in HC COM MISC E770/2021))

RULING

1. This is an application for extension of time to file and serve a Notice of Appeal. It is dated 6th November 2023 and is brought under Article 48 and 50(1) of the *Constitution*, Section 3A and 3B of the *Appellate Jurisdiction Act*, rule 1(2) and rule 4 of the *Court of Appeal Rules 2010*. The applicant is seeking orders that:
 - i. Time for filing and service of the Notice of Appeal, the letter bespeaking proceedings and the Record of Appeal be extended.
 - ii. The Notice of Appeal and letter bespeaking proceedings both dated and served on 6th September 2023 be deemed as duly served.
 - iii. The Record of Appeal dated 31st October 2023 and served on 1st November 2023 be deemed as duly filed within time.
 - iv. Costs of the application to abide the result of the appeal.
2. The grounds upon which this application is founded are that the applicant had no notice of the judgement delivered on 19th May 2023 and only became aware of it on 31st August 2023. On 6th



September 2023 he filed and served the Notice of Appeal and the letter of even date bespeaking proceedings. The applicant received the certified copy of proceedings, judgement and decree on 6th October 2023 and on 1st November 2023, he filed and served the Record of Appeal dated 31st October 2023. The Notice of Appeal was thus, filed outside the prescribed period of 14 days by 90 days.

3. This application arose out of a dispute over taxation of costs between the applicant and the respondent herein. On 30th June 2022 the Deputy Registrar approved the bill of costs dated 15th October 2021 and being aggrieved, the respondent filed a Reference in the High Court against the decision of the Registrar. On 19th May 2023 Hon. Mongare J. found that there was no advocate-client relationship and made an order vacating and setting aside the ruling of the Deputy Registrar. The learned Judge struck out the bill of costs and ordered the costs of the application to be borne by Mr. Mwaniki Gachuba Advocate.
4. The applicant's averments were that the Court has discretion to extend the time for filing and serving the Notice and Record of Appeal and the letter bespeaking proceedings; that the respondents will not suffer injustice; the application is filed without unreasonable or inordinate delay and the delay such as there is, is explainable and excusable. The Applicant further avers that the intended appeal has merit, is not frivolous as it raises triable issues of law and fact and it has a very high probability of success, hence justice will be best served if extension of time is granted.
5. The respondent opposed this application by way of a Replying Affidavit sworn on 4th December 2023 by Stephen Mwangi Kimani, on behalf of the respondent company. He averred that this application has no merit and is an abuse of court process. He averred that the intended appeal is vexatious, unfounded and has minimal chance of success. Further that the reason offered for the delay is unsatisfactory.
6. The applicant did not file written submissions as directed by the Deputy Registrar. The respondent filed submissions dated 4th December 2023 through the firm of G.N.K & Associates LLP and reiterated the contents of the Replying Affidavit. In reliance of *Leo Sila Mutiso v Rose Helen Wangare Mwangi* (Civil Application No. Nai 255 of 1997) the respondent enumerated the factors for consideration by the Court, when determining a matter for extension of time. The Respondent submitted that the delay herein was inordinate and the excuse provided by the Applicant was unsatisfactory. Further, that they will suffer prejudice as they have been dealing with this matter since it was first filed in 2017 at the Public Procurement Administrative Review Board.
7. Although the application is stated to be brought under rule 4 of the *Court of Appeal Rules 2010*, it is dated 6th November 2023 and is therefore, governed by Rule 4 of the *Court of Appeal Rules, 2022* which clothes this Court with the jurisdiction to determine this matter as follows:

“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.”

8. This Court outlined the factors for consideration in granting extension of time to file an appeal in *Imperial Bank Ltd (inreceivership) and Another v Alnasir Popat and 18 Others* [2018] eKLR, 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”

9. Regarding the delay, the applicant filed and served the Notice of Appeal and the letter bespeaking proceedings on 6th September 2023, after the delivery of the judgement on 19th May 2023. On 1st November 2023 the applicant filed and served the Record of Appeal. I have focused on the Notice of Appeal because it forms the foundation for the procedure for filing an appeal. It is only after the Notice of Appeal is filed and served that all other legal documents get to follow. The Notice of Appeal was filed over 90 days late. Rule 77 of the Court of Appeal rules 2022, requires a Notice of Appeal to be filed within 14 days after the date of the ruling, the applicant intends to lodge an appeal against. A delay of over 90 days is, in my view, inordinate.
10. The only excuse given for the delay is that the applicant was not aware of the date when the judgement was delivered. The hearing notice marked MG 2 shows that the applicant was duly notified of the date of 16th March 2023, for highlighting of the submissions. He was not in attendance, and thereafter, there is no evidence that he did make any effort to follow up to know the outcome of the case that day. If he had, he would have known that judgement was reserved to be delivered on 19th March 2023. I find that the reason he has given is inexcusable, bearing in mind that the applicant is an advocate and is knowledgeable in such matters. He was therefore, the author of his own misfortune.
11. Regarding whether or not the intended appeal is arguable, the applicant attached a draft memorandum of appeal raising issues as to whether: The trial Judge should have excused herself from determining the Reference having sat as a member of Public Procurement Administrative Review Board; The Chamber Summons dated 30th June 2022 was incompetent due to lack of clarity as to the items of the ruling; An Advocate-Client relationship existed; The respondent in the matter was liable to pay fees by virtue of being party in the request for review and whether the bill of costs ought to have been struck out?
12. However, I am alive to the fact that whether the intended appeal has merits or not is not an issue to be determined by a Court when dealing with an application of this nature, but by the Court dealing with the merits of the appeal. (See *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan* [2016] eKLR.)
13. Lastly, the respondents urged that they stand to suffer prejudice due to the time it has taken to recover their costs, since the matter was first filed in 2017 at the Public Procurement Administrative Review Board. The applicant in rebuttal stated that they will suffer injustice if the extension is not granted. Considering the applicant's constitutionally underpinned right to be heard, against the prejudice the respondent stands to suffer by being denied the enjoyment of the fruits of a determination that was in his favour. I find that in as much as the applicant has the right to be heard, he has shown disinterest in the matter, as demonstrated by his failure to appear for the hearing that was scheduled for 16th March 2023 in the High court, and failure to follow up to know what transpired in court in his absence until over 90 days had lapsed.
14. In light of the foregoing, I find that the Application dated 6th November 2023 is lacking in merit and is dismissed in its entirety with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.

L. ACHODE

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JUDGE OF APPEAL



I certify that this is a
true copy of the original

Signed

DEPUTY REGISTRAR

