



**Moi University v Otto Mruttu & Partners Limited t/a Otto Mruttu & Partners Architects
(Civil Application E005 of 2024) [2024] KECA 670 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KECA 670 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E005 OF 2024
S OLE KANTAI, JA
JUNE 14, 2024**

BETWEEN

MOI UNIVERSITY APPLICANT

AND

**OTTO MRUTTU & PARTNERS LIMITED T/A OTTO MRUTTU & PARTNERS
ARCHITECTS RESPONDENT**

*(Being an application for extension of time to file an appeal out of time
against the Ruling of the High Court at Nairobi (J.W.W. Mongare,
J.) dated 20th November, 2023 in H.C. Comm. No. E918 of 2021)*

RULING

1. I am asked in the motion brought under various provisions of law including rule 4 of the Court of Appeal Rules that I allow the applicant to file an appeal out of time from the ruling dated 20th November, 2023 (Mongare, J.) in High Court Comm. No. E918 of 2021 and that Notice of Appeal and Memorandum of Appeal annexed to the application be deemed as properly filed and served upon payment of requisite court fees. The motion is supported by grounds on its face and a supporting affidavit of Petrolina C. Chepkwony, a Senior Legal Officer of the applicant (Moi University). It is stated amongst other things that counsel on record for the applicant who is an in-house lawyer immediately informed the applicant of the ruling when it was delivered seeking instructions; that a decision whether to appeal could only be made by the applicant's Management Board due to the huge amount of money involved; that the Board deliberated about the case on 11th December, 2023; instructions were given to the lawyer on 19th December, 2023 to appeal against the ruling when time to file notice of appeal had expired; that delay in appealing is not deliberate or inordinate; that the applicant is aggrieved by the said ruling and wishes to appeal; that the intended appeal is arguable; and finally, that the respondent will not be prejudiced if leave is granted.



2. In a replying affidavit the respondent Otto Mruttu says, inter alia, that the ruling intended to be appealed was on an application for judgment on admission; that judgment on admission arose from the applicants' clear, unequivocal and unambiguous admission of a debt of Kshs.200,004,283.30 being a sum owed to the respondent; that delay in filing the application is inordinate; that the intended appeal has no chance of success; that the respondent will be prejudiced if leave is granted because the applicant has not paid the admitted sum for over 5 years. The respondent gives a history of the dispute that led to the filing of the suit and the application for judgment on admission where his firm was engaged by the applicant as a lead consultant for certain works in Nairobi; that the respondent presented his final fee note upon completion of works but it was not paid; that by a letter dated 27th May, 2020 the applicant admitted in writing that it owed the respondent Kshs.260,004,283.31 as final total fees payable to the respondent as at October, 2019; that part of the sum was settled leaving the balance subject of the suit and the ruling.
3. The applicant did not file a defence to the suit leading to judgment being entered in default; the default judgment was set aside upon the applicant filing an application in that regard where the Judge allowed the applicant to enjoin the Ministry of National Treasury & Planning and the Ministry of Education to the suit and file its defence; the applicant filed its defence and filed an application to enjoin the 2 ministries as third parties; that application was unnecessary as *Civil Procedure Act* does not require a defendant to a suit to file such an application but merely requires such a party to serve a Third Party Notice; that the said application was not prosecuted; that the defence admitted the debt owed to the respondent; that when the respondent applied for judgment on admission the applicant which had been served did not attend court leading to entry of judgment. Further that the applicant has not sought leave of the High Court to appeal as required by Order 43 Civil Procedure Rules; that there is no evidence that the applicant's management board was unable to meet immediately after the ruling to give instructions on filing of an appeal; that there is inordinate delay from 11th December, 2023 when the said board met and the filing of the application dated 4th January, 2024.
4. The principles that guide the Court in determining an application of this nature are well known and were well summarized in the oft-cited case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2 EA 231 as follows:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well stated 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. What is the period of delay involved here?
6. The ruling intended to be appealed was delivered on 20th November, 2023. The motion before me is dated 20th December, 2023 and I am told that it was filed on 4th January, 2024. That is to say that the motion was ready for filing 1 month after ruling was delivered and was filed about two weeks after it was ready for filing going by the date endorsed on the application.
7. The applicant states, as reason for delay, that its board of management could not attain a quorum to deliberate on the ruling and only did so on 11th December, 2023. The lawyer seised of the matter who is an employee of the applicant says that instructions to file an appeal were then given on 19th December, 2023 leading to the application which I have said was filed on 4th January, 2024.



8. I do not think that it is unreasonable for a big corporation like Moi University to have a system where big decisions are made by a board of management. I do not also think that it is unreasonable for such a corporation to have quorum hitches for such meetings and on the whole I think that the period 20th November, 2023 when ruling was delivered to 4th January, 2024, about 45 days, when the motion was filed is not inordinate.
9. What about other relevant factors which I need to consider? Does the intended appeal have any chance of success?
10. I have seen correspondence and pleadings where the applicant admitted the debt owing to the respondent. It stated at paragraph 4 of the defence:
“ ...
 - d. It did not neglect and/or refuse to pay the sum of Kshs.289,029,412.74 to the plaintiff.
 - e. It did not fail, ignore or neglect to pay interest on delayed payments and interest thereof to the plaintiff.
 - f. It has been communicating and negotiating with the plaintiff at all times.
 - g. It has demonstrated goodwill by paying 60,000,000 out of the agreed total sum due of Kshs.260,004,283.31/= (sic) to the plaintiff despite facing difficult financial challenges which is in public knowledge.
 - h. It has continually, in the full knowledge of the plaintiff, sought for additional funding from the National Treasury Planning and the Ministry of Education to pay the Plaintiff the amount owing.”
11. The applicant admitted owing to the respondent the sum of Kshs.200,004,283.31 not only at the said paragraph 4 of the defence but also at paragraph 6 and also in witness statement made by Dr. Peter Rutto, its Registrar of Administration, Planning and Development.
12. In tracing the history of the matter Mongare, J. found in the impugned ruling that default judgment had been set aside; the applicant was allowed to enjoin 2 ministries to the suit but had not done so. There was admission of the debt and the motion praying for judgment on admission was allowed.
13. I cannot in those circumstances see how the intended appeal has any chance of success.
14. I agree with the respondent that he is prejudiced in the matter as he has waited for a long time without being paid fees for professional services rendered to the applicant. It is, in my view, in the interest of justice and public administration that unnecessary litigation should not continue to clog the judicial system where, as here, a litigant has readily admitted a debt, has not paid it and says it wants to appeal. The trial court has found that the debt is due as admitted.
15. It is my considered opinion that the applicant is not deserving of my exercise of discretion in this matter. The motion fails and I dismiss it with costs to the respondent.

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

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original
signed

DEPUTY REGISTRAR

