



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwandoro v Kenya Commercial Bank Limited (Civil Appeal (Application)
E023 of 2023) [2024] KECA 824 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 824 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E023 OF 2023
AK MURGOR, JA
JULY 12, 2024**

BETWEEN

JULIUS KIRIMO MWANDORO APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

(Being an application for an extension of time to file the Notice of Appeal, out of time against the judgment and decree of the Employment and Labour Relations Court at Mombasa (B. Ongaya, J.) delivered on 23rd April 2021 in Mombasa ELRC Cause No.38 OF 2019)

RULING

1. The applicant, Julius Kirimo Mwandoro, filed a Notice of motion dated March 20, 2023 pursuant to section 3A of the *Appellate Jurisdiction Act*, rule 4 of the *Court of Appeal Rules, 2010* and article 159 of the *Constitution* seeking *inter alia* that this Court extend time for filing of the Notice of appeal dated May 10, 2023 and filed on the same day, and to deem the Notice of Appeal as properly filed.
2. The applicant's motion is brought on the grounds that; the applicant filed a Notice of appeal on May 10, 2021 in Mombasa ELRC Cause No. 38 of 2019 out of time by only 2 days; that thereafter, the respondent sought to have the Notice of appeal struck out in an application dated October 24, 2022 filed in this Court in Civil Application No. E044 of 2021. It was averred that sometimes on March 17, 2023 this Court delivered a ruling directing the applicant to apply to this Court as appropriate within fourteen 14 days for orders to extend time for filing of the Notice of appeal; that the applicant moved with speed and without delays as directed. It was further averred that the record of appeal has since been filed and served, and that the applicant is keen to have his appeal heard and determined by this Court; that no prejudice will accrue to the respondent were time to be extended.
3. The application is opposed by way of a replying affidavit of Lilian Sogo the respondent's Head Counsel - Litigation, where it is deposed that; the applicant has not explained, at all, the delay in filing the Notice



of appeal, but merely points to his default and states that he has now filed an appeal that should be heard on merit; that for this reason, the applicant is not entitled to the exercise of discretion by this Court. Further, it was deponed that even were time for filing of the Notice of appeal to be extended it would not validate the Record of appeal filed as Civil Appeal No. E045 of 2021, for the reason that the record has been lodged on the basis of the faulty Notice of appeal, and the applicant has not sought for time to be extended to file the Record of appeal. Consequently, it was averred, that extending the time to file the Notice of appeal is an exercise in futility.

4. The applicant filed written submissions, and when the application came up for hearing on a virtual platform, learned counsel appearing for the applicant, Mr. Sharia relied on the submissions in entirety, where it was submitted that there is no law that bars the filing of the present motion after the ruling in Civil Application No E044 of 2021; that the ruling of this Court rightly found that the reason for the delay was as a result of counsel's misapplication of the rules on computation of time. It was further asserted that the Record of appeal was filed within time, and no application was filed to have the record of appeal struck out nor is there an Order striking out the record of appeal; that the applicant has already filed and served the Record of appeal.
5. For their part, learned counsel for the respondent Mr. Kongere also filed written submissions which were also relied upon save that counsel reasserted the position as set out in the submissions that no explanation had been provided for the delay in filing the Notice of appeal.
6. Under rule 4 of this *Court's Rules*, it is settled that, this Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997.
7. In the motion, the applicant seeks for time to be extended to file and serve the Notice of appeal dated 10th May 2021 out of time on account of a delay of two days. The judgment was rendered on 23rd April 2021 and the Notice of appeal was filed on 10th May 2021. It is therefore true that there was a delay of 2 days in filing of the Notice.
8. Concerning the reason for delay, an interrogation of the motion and affidavit in support does not disclose what led to the delay of 2 days. Instead, the applicant has pointed to the ruling of this Court of 17th March 2023 in Civil Application No. E044 of 2021, where the Court concluded that the applicant's counsel miscalculated the dates for filing of the Notice and directed him to file this application for extension of time. In the motion, he merely avers that pursuant to the directions, he has filed the application now before me.
9. In the case of *Motorways Kenya Limited v Kenya Engineering Workers Union* [2018] eKLR, Waki, JA held that;

“Any delay, however, even for one day, ought to be explained otherwise it is rendered inordinate. And there lies the 'achilles heel' of this application.”
10. In the case of *Lucas Chagwonoy & 6 others v Stanley Chebiator* [2019] eKLR Odek, JA held:

“... the delay is for a period of four days. On the surface and prima facie, a delay of 4 days is not an inordinate delay. However, neither the notice of Motion nor the supporting affidavit has given any explanation or reason for the delay of four days. In the absence of an explanation



or reason for delay, I find that there is no factual or legal basis for me to exercise my discretion to extend time.”

11. Similarly in this case, and as distinctly pointed out by the respondent, nothing in the application discloses why the applicant delayed in filing the Notice of appeal by two days, as the Motion and the affidavit in support are devoid of an explanation. By merely pointing to the ruling of this Court of March 17, 2023, the applicant would wish me to believe that the delay was on account of a miscalculation of the dates for filing of the Notice. But if indeed that was the case, nothing would have been easier than for the applicant to have so expressed this in the application. Additionally, no affidavit was sworn by counsel for the applicant owning up to having miscalculated the dates for filing the Notice. Parties are bound by their pleadings. In short, no reason has been provided for the delay of 2 days, and on this basis, there is no material upon which I can exercise my discretion to extend time for filing of the Notice of appeal.
12. Turning to whether the appeal has any chance of success, and whether extending time will be prejudicial to the respondent, though the applicant contends that he has filed the Record of appeal, this was not attached and neither was a draft memorandum of appeal, nor the judgment of the trial court attached so as to enable me to ascertain the nature of the dispute or the viability of the appeal. I am not therefore able to discern whether or not the appeal has any chances of success, or indeed the likely prejudice to either party were time to be extended to file the Notice of appeal out of time.
13. In sum, the applicant having failed to fulfil the threshold requirements necessary to satisfy a rule 4 application, I decline to exercise my discretion to extend time for filing of the Notice of appeal, and accordingly dismiss the motion dated March 20, 2023. I make no orders as to costs.
14. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

