



Joseph (Suing on Behalf of 2468 Investors) v Asset Recovery Agency & 8 others (Civil Application E060 of 2023) [2024] KECA 1898 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KECA 1898 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E060 OF 2023**

**JW LESSIT, J
SEPTEMBER 27, 2024**

BETWEEN

MORRIS EBITIMI JOSEPH (SUING ON BEHALF OF 2468 INVESTORS) APPLICANT

AND

- ASSET RECOVERY AGENCY 1ST RESPONDENT**
- FLUTTERWAVE PAYMENT TECHNOLOGY LIMITED 2ND RESPONDENT**
- BOXTRIP TRAVEL & TOURS LIMITED 3RD RESPONDENT**
- BAGTRIP TRAVELS LIMITED 4TH RESPONDENT**
- ELIVALANT FINTECH LIMITED 5TH RESPONDENT**
- ADGURU TECHNOLOGY LIMITED 6TH RESPONDENT**
- HUPESI SOLUTIONS 7TH RESPONDENT**
- CRUZ RIDE AUTO LIMITED 8TH RESPONDENT**
- SIMONS KARANJA NGIGE 9TH RESPONDENT**

(An application for extension of time to file and serve a Notice and Record of Appeal against the Ruling the Anti-Corruption and Economic Crimes Court at Nairobi (E.N. Maina, J.) delivered on 9th February 2023 in ACEC Suit No. E039 of 2022)



RULING

1. In this Notice of Motion dated 24th February 2023, I have been asked to grant the following prayers:
 2. The Honourable Court be pleased to grant the Applicant leave to file and serve notice and record of appeal out of time against a ruling issued by Justice Esther Maina, J. on 9th February 2023.
 3. The Applicant be granted an extension of time within which to lodge and serve his Notice, Memorandum and Record of Appeal.
 4. Costs of this application be provided for.”
2. The application is supported by grounds on the face of the application and the affidavit of Morris Ebitimi Joseph, the applicant herein, sworn on his own behalf and that of the 2,468 investors on whose behalf he is suing.
3. The gist of the application is that the applicant was late in filing the Notice of Appeal by two days, according to the applicant. The ruling intended to be appealed was delivered on the 9th February 2023 and that the applicant had until the 23rd February 2024 to file the notice. The applicant explains that the delay was caused by the applicant in that after his advocate on record communicated to him of the ruling, he did not give instructions to file the notice in good time; that the delay is only two days and is therefore not inordinate. The applicant deposes further that this Court has unfettered discretion to allow the application; that the Court should ensure that substantive justice is achieved without paying undue regard to procedural technicalities and substantive justice herein requires that the applicant be allowed to file the appeal and ventilate its issues before this Court
4. The application is opposed through a replying affidavit sworn by Ms. Mercy Mwaniki a Legal Counsel to the 2nd respondent, dated 3rd May 2024. The counsel deposes that the impugned ruling of the trial Court that the applicant seeks to appeal related to two suits; ACEC No. E039 of 2022 and ACEC No. E044 of 2022. It is deposed that the applicant sought to be enjoined in each of the named suits as an Interested Party. Both parties were dismissed. The application in E039 of 2022 was dated 17th November, 2022, and the ruling delivered on 9th February 2024. The application in E044 of 2022 was dismissed on 9th February 2023.
5. It is deposed that the plaintiff in both suits, who is the 1st respondent in this application gave notice of withdrawal of suit No. E044 of 2022 dated 28th April 2023, and the notice adopted as an order of the Court on 9th November 2023. Likewise the 1st respondent’s notice of withdrawal of the suit No. E039 of 2022 is dated 13th December 2022 and the same was adopted as an order of the Court on 28th December 2023.
6. The applicant did not file a response to the 2nd respondent’s replying affidavit.
7. The brief background of the case is that Asset Recovery Agency, the 1st respondent herein, filed the suit in the High Court Anti-Corruption and Economic Crimes Court [ACEC] No. E039 of 2022, against the 2nd to the 9th respondents.
8. Going by the impugned ruling of the High Court, on the 1st day of July 2022, the High Court issued preservation orders against the 2nd to 9th respondents upon an application by the 1st respondent, on the basis that money held in several disclosed bank accounts were proceeds of crime.



9. By an application dated 17th November 2022, Morris Ebitumi Joseph, the applicant herein, who claimed to sue *on behalf of 2468* investors, pursuant to Articles 48, 50 and 159 of the *Constitution*, Orders 1 rule 8 and 13 and 51 rule 1 of the Civil Procedure Rules and sections 81, 83(4) and 91(1) of the *Proceeds of Crime and Anti-Money Laundering Act*, inter alia, sought orders:

“That this Court be pleased to join the applicant forthwith in these proceedings as an interested party.

The applicants are reasonably apprehensive that the court will issue an order of forfeiture of funds held by the 2nd respondent at Guaranty bank, equity bank and Ecobank Limited; which funds are subject of preservation orders issued on 1st July 2022 to its detriment as they hold an identifiable stake in the subject funds...”

10. In the impugned ruling, the learned trial Judge ruled that it is the pre-requisite for an application for joinder to demonstrate that the applicant has an identifiable stake in the suit in which they seek to be enjoined. That it is trite that even in the case with an Interested Party (as the applicant was) the issues determined by the court remain those presented by the principal parties in that suit and not otherwise. That as the 1st respondent intimated that it intended to withdraw the suit as against all the respondents; the learned trial Judge, applying the principles set down by the Supreme Court in the cases of Francis Karioko Muruatetu & Another vs. Republic & 5 others [2016] eKLR and Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR found that there shall no longer be any dispute between the principal parties to determine and to allow this application would therefore be an exercise in futility. The learned Judge concluded that the intended Interested Party’s claim could not stand alone, since once the suit was withdrawn there shall be no issues left for determination. The application was therefore dismissed in its entirety. It is this ruling that the current application arises.
11. I have considered the application by the applicant dated 23rd February 2023 together with the affidavits in support and opposition respectively, to the same. None of the parties filed any submissions in his matter. I will therefore determine it based on the material placed before me.
12. The application is brought under rule 4 of the Rules of this Court. Rule 4 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.
13. The factors to consider in an application for extension of time like this one have been discussed by various Judges of this Court. One such decision is Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013] eKLR where the Court of Appeal, while referring to other authorities observed:
- “The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”
14. There are two facets to this application. First facet being the issue whether the application to extend time to file and serve a Notice of Appeal is merited. The second facet is whether the Court has jurisdiction to grant the orders sought.



15. I will first deal with the first facet. The power of the Court to extend time is unfettered, and there are a plethora of cases that support that proposition, including Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge (supra). However, that power must be guided by set principles. I am mandated to consider factors, including the period of the delay and the reasons for the delay.
16. Rule 75 of the Rules of this Court gives the timelines for filing a notice of appeal as follows:
 - “75. Notice of appeal
 - a. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
 - b. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”
17. In this case, the impugned ruling was delivered on the 9th February 2023. Under the rules, the applicant should have filed the notice of appeal on or before 22nd February 2023. The application to extend time is dated 24th February 2023. Contrary to the applicant’s submission, the delay involved is one day. The applicant has offered an explanation for the delay in filling the notice. The delay not being inordinate, the explanation that the applicant delayed to instruct his advocate on record to file the notice is reasonable and acceptable.
18. The second facet raises a jurisdictional issue whether the orders sought can be granted. The issue raised by the 2nd respondent in response to the application is that the suit before the High Court was withdrawn by the plaintiff, the 1st respondent to this application and that therefore the suit ceased to exist. The applicant did not file a response to the replying affidavit of the 2nd respondent, leaving the averment uncontested.
19. Mercy Mwangi, the Legal Counsel for the 2nd respondent attached the Notice of Withdrawal filed by Asset Recovery Agency, dated 13th December 2023, marked as Exhibit MW-3. And the Order of the trial Court made by E. Maina, J. dated 27th February 2023 marked Exhibit MW-4. Exhibit allowed the Notice of Withdrawal of the suit (Civil ACECA No. 039 of 2023) and marked the file/case closed. The order was made by the Judge on the 27th February 2023 and issued by the Deputy Registrar of the Court on the 28th February 2023.
20. I find that the facts placed before me clearly shows that the applicant seeks extension of time to file and serve a Notice of Appeal in a case that was closed by the party that filed it in the first instance. Secondly. The applicant was not a party in the case before the High Court, and the attempt to be enjoined in the suit was dismissed before the case was closed. In the result then, I find that the application is incompetent. Secondly, I find that I lack the jurisdiction to grant the orders sought.
21. The result is that the application is dismissed in its entirety. Given the nature of the case and the outcome, I order that the applicant and the 2nd respondent bear their respective costs of this application.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

J. LESIIT

.....

JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

