



**Karia v Mount Kenya Bottlers Limited (Civil Appeal (Application)  
127 of 2019) [2024] KECA 1256 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1256 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 127 OF 2019  
J MOHAMMED, JA  
SEPTEMBER 20, 2024**

**BETWEEN**

**FRANCIS WAWERU KARIA ..... APPLICANT**

**AND**

**MOUNT KENYA BOTTLERS LIMITED ..... RESPONDENT**

*(An application for extension of time to file the Memorandum of Appeal and Record of Appeal out of time and for leave to amend the memorandum of appeal dated 10.6.2019 against the decision of the ELRC at Nyeri (Nzioki wa Makau, J.) dated 18th September 2018 in ELRC Cause No. 262 of 2016)*

**RULING**

**Background**

1. Before me is an application dated 16<sup>th</sup> May 2023 brought by Francis Waweru Karia (the applicant) expressed to be brought under Rules 4, 16 and 44 of the Court of Appeal Rules, 2010 now Court of Appeal Rules, 2022 (this Court's Rules) which seeks for orders in the main:
  1. That the applicant be granted extension of time to file the memorandum and record of appeal out of time;
  2. That the memorandum of appeal and the record of appeal filed in this Court by the applicant on 10<sup>th</sup> June, 2019 be deemed as duly filed and served;
  3. That the applicant be granted leave to amend the memorandum of appeal dated 10<sup>th</sup> June, 2019 in terms of the draft memorandum of appeal attached to the instant application;
  4. That the applicant be and is hereby granted leave to file a supplementary record of appeal containing the amended memorandum of appeal; and



5. That the costs of this application be in the cause.

Mount Kenya Bottlers Limited is the respondent herein.

2. The application is supported by the applicant's affidavit and premised on the grounds on the face thereof to wit: that the applicant changed advocates on 29<sup>th</sup> March, 2023. That his current advocates advised him that the memorandum and record of appeal were filed out of time and there was need to amend the memorandum of appeal to indicate the final prayers sought by the applicant in the event that the appeal succeeds; that the instant application was filed without delay after the anomalies were discovered; that the respondent will not suffer any prejudice if the orders sought are granted; and that it is just that the orders sought are granted to allow the appeal be heard and determined on merit.
3. The applicant rehashed the said grounds in his supporting affidavit deponing that the delay adds up to 66 days from the time the proceedings were availed. The applicant further deponed that the proposed amendments as per the draft memorandum of appeal are prayers for compensation of loss of income at Kshs.47,253.00; outstanding dues as set out in the pension scheme rules; one month's salary in lieu of notice at Kshs.47,253.00; unpaid leave for one year at Kshs.47,253.00; and costs of the suit.
4. No reply was filed by the respondent despite having been duly served with a hearing notice.
5. During the hearing of the application, the applicant was represented by Waweru Macharia & Co Advocates who had filed his written submissions.

Counsel submitted that the applicant was not aware of the anomaly until he changed advocates, which necessitated the filing of the instant application. Counsel relied on the case of *ECN v FNN* (2004) eKLR where it was stated that:

“This Court has unfettered discretion in applications for extension of time and that a mistake of counsel should not be visited on a litigant.”

6. As regards amendment of the memorandum of appeal, counsel cited the case of *John Mugumbi & Mugumbi & Co Advocates vs Kiama Wangai* (2021) eKLR where it was stated that:

“Parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments.”

7. Counsel further submitted that although the memorandum of appeal and the record of appeal were filed out of time, the delay of 66 days is not inordinate. Counsel submitted that the applicant has an arguable appeal regarding whether the summary dismissal was substantively and procedurally fair. Counsel urged this Court to allow the application.

## Determination

8. I have carefully considered the application, the grounds and affidavit in support thereof, written submissions, authorities cited and the law. The discretion that I am being called upon to exercise in this application is provided under Rule 4 of this Court's Rules which states that:

“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 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”



9. The principles governing the exercise of the discretion to extend time under Rule 4 of this Court's Rules were well stated in the case of *Leo Sila Mutiso vs Rose Hellen Wangare Mwangi*, [1999] 2 EA 231 as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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.”

10. Rule 4 of this [Court's Rules](#) requires me to exercise my discretion judiciously. There has to be valid and clear reasons upon which discretion can be favourably exercised.

11. Rule 84 of this [Court's Rules](#) provides for institution of appeals as follows:

1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
  - a. a memorandum of appeal, in four copies;
  - b. the record of appeal, in four copies;
  - c. the prescribed fee; and
  - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule

2. within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

12. Counsel confirmed that the memorandum and record of appeal have been filed albeit out of time. The delay of 66 days is attributed to the applicant's erstwhile advocates.

13. The Supreme Court decision in [Fabim Yasin Twaba v Timamy Issa Abdalla & 2 others](#) [2015] eKLR laid down guidelines for exercise of discretion in extending time:

- “1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
4. Where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if extension is granted;



6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” (Emphasis supplied.)
14. The applicant’s reason for the delay is that his erstwhile advocates caused the same. This has been subject of several judicial pronouncements. This Court (Waki, JA.) in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* [2015] eKLR, stated as follows:
- “In this case, however, the erstwhile advocates are simply accused of inaction. In the case of *Rajesh Rughani –Vs- Fifty Investment Ltd. & Another* [2005] eKLR the Court of Appeal held,
- “It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.
15. The applicant has not demonstrated any steps taken to find out if his erstwhile advocates had filed the memorandum and record of appeal once instructions had been given. He left the matter in the hands of his erstwhile advocates. As stated by this Court (Odek, JA.) in *Church of God East Africa & Another vs. Dinah Buluma* [2019] eKLR.
- “It behooves a client/litigant to exercise diligence and follow up the progress and outcome of his/her case.”
16. Further, in *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] eKLR the Court held that:
- “The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.” [Emphasis supplied.]
17. I find that in the circumstances of this case, the delay in filing the memorandum and record of appeal is inordinate and the reasons for the delay advanced by the applicant are not plausible and satisfactory.
18. As regards the success of the intended appeal, the applicant contends that the appeal has overwhelming chances of success. However, I am guided by the sentiments of this Court in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated as follows:
- “This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”
19. In the circumstances, I find that the applicant has failed to meet the threshold for extension of time. The upshot is that the application lacks merit and it is hereby dismissed with no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**JAMILA MOHAMMED**



.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

