



REPUBLIC OF KENYA



**Kubri Road Works Limited v Kariuki & another (Civil Application
E065 of 2024) [2024] KECA 1144 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1144 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E065 OF 2024
M NGUGI, JA
SEPTEMBER 20, 2024**

BETWEEN

KUBRI ROAD WORKS LIMITED APPLICANT

AND

PAUL NGIGE KARIUKI 1ST RESPONDENT

MAHAT SUBDOW HASSAN 2ND RESPONDENT

*(Being an application for leave to file an appeal out of time from
the ruling of the High Court of Kenya at Kiambu (D. Chepkwony
J.) dated 19th September, 2023 in Civil Appeal No. 112 of 2020)*

RULING

1. The applicant, Kubri Road Works Limited, has filed an application dated 14th February, 2024 seeking leave to file its appeal out of time against the ruling of the High Court at Kiambu (D. Chepkwony J.) dated 19th September, 2023 in Civil Appeal No. 112 of 2020. The application is brought under rule 4 of the Court of Appeal Rules and is based on the grounds set out on the face of the application and is supported by an affidavit sworn by Abdiwahab Mohammed Ali, a director of the applicant, on 14th February, 2024.
2. A brief background to the application is that the applicant was the 2nd defendant in Thika CMCC No. 332 of 2016 in which judgment was entered against it on 20th August, 2020. The applicant was dissatisfied with the decision and it filed Kiambu Civil Appeal No. 112 of 2020. The appeal was, however, dismissed by the High Court (Chepkwony, J) on 19th September, 2023 for want of prosecution.
3. The applicant asserts that it is desirous of filing an appeal before this court but that there was a delay in acquiring the typed ruling and certified proceedings from the High Court, occasioning the delay in



filing the appeal. It further avers that by the time it received the typed ruling and certified proceedings, it had run out of time to file its appeal. It asks the court to adopt the memorandum of appeal, typed ruling and certified proceedings as well as accompanying documents annexed to its application.

4. The application is opposed by a replying affidavit sworn by David Karanja Thuo, counsel for the 1st respondent, sworn on 7th March 2024. Mr. Thuo avers that the impugned ruling was delivered on 19th September, 2023 and the applicant's Notice of Appeal was lodged in the High Court on 23rd October, 2023. He further avers that the applicant was obligated to file an appeal two months from the date of filing of the notice of appeal, and that it was not necessary for the applicant to obtain the proceedings and judgment as a petition of appeal could have been filed while awaiting the proceedings and judgment, and a supplementary record of appeal could have been lodged.
5. The 1st respondent further avers that the applicant has not shown when it applied for the proceedings and ruling, and when the same were provided. Counsel further avers that there is no certificate of delay from the lower court, and the applicant has not annexed a copy of the intended appeal to prove that the same is meritorious.
6. The 2nd respondent did not file an affidavit or submissions in response to the application.
7. The applicant and the 1st respondent have filed submissions in respect of their opposing position on the application. The applicant's submissions are dated 15th April 2024 while the respondent's submissions and further submissions are dated 7th March 2024 and 11th April 2024 respectively.
8. I have read and considered the respective averments and submissions on record. Rule 84 (1) of the Court of Appeal Rules, 2022 provides that:
 - (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –
 - (a) a memorandum of appeal, in 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 of 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.
9. Rule 4 of this Court's Rules vests in the Court discretion to extend time for the doing of any act required under the Rules.

The factors which the Court should consider in exercising its discretion have been enunciated in various decisions-see, for instance, *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999]2 EA 231 and *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees* [2020] eKLR. These are the length of the delay, the reasons for the delay, (possibly) the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is granted. In *Fakir Mohamed v. Joseph Mugambi & 2 Others, CA No. Nai. 332 of 2004*, this Court stated as follows:

“The exercise of this Court's discretion under rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time



limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors ...”

10. In the matter before me, the impugned ruling was delivered on 19th September 2023. The applicant lodged its notice of appeal dated 3rd October, 2023 in the High Court on 23rd October, 2023. As contended by the 1st respondent in his further submissions dated 11th April, 2024, the notice of appeal was therefore not filed within the 14 days prescribed under rule 77(2) of this Court’s Rules. It is therefore apparent that there is no valid notice of appeal before this Court.
11. Rule 84(1) of the Court of Appeal Rules requires that the record of appeal be filed within 60 days of filing of the notice of appeal. Under the proviso to Rule 84(1), where there is a delay in obtaining certified copies of proceedings, an applicant can rely on a certificate of delay if it had applied for proceedings within 30 days of the date of the ruling or judgment sought to be appealed against, and a copy of the letter bespeaking the proceedings copied to the opposing party.
12. The applicant attributes the delay in filing its appeal on the failure by the trial court’s registry to supply it with typed proceedings and a certified copy of the ruling. Since the applicant has not placed before the court any evidence that it did apply for the proceedings, or that it copied such application to the respondents, or that a certificate of delay has been issued by the trial court, I find that it has not adequately explained the delay of close to five months that it has taken before filing the present application.
13. Further, having found that the applicant did not lodge its notice of appeal within the prescribed time line, I find that the application for extension of time to lodge its record of appeal rests on a void, there being no valid notice of appeal before the Court. Accordingly, it is my finding that the application dated 14th February, 2024 is devoid of merit, and it is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

MUMBI NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

