



Vision Institute of Professionals Limited v Adhiambo & 4 others (Civil Application E064 of 2024) [2024] KECA 1182 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1182 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E064 OF 2024
M NGUGI, JA
SEPTEMBER 20, 2024**

BETWEEN

VISION INSTITUTE OF PROFESSIONALS LIMITED APPLICANT

AND

EUNICE FIBI ADHIAMBO 1ST RESPONDENT

ANDREW MOKAYA MAUBI 2ND RESPONDENT

DENNIS MAKHANU CHELOTI 3RD RESPONDENT

JACKSON MWAIWA KAVIKU 4TH RESPONDENT

FIRST COMMUNITY BANK LIMITED 5TH RESPONDENT

(Being an application for leave to file an appeal out of time from the ruling of the High Court of Kenya at Nairobi (Mulwa J.) dated 16th November, 2023 in Civil Case No. E144 of 2020)

RULING

1. In the application dated 16th February, 2024, the applicant seeks extension of time to file an appeal out of time against the ruling dated 16th November 2023 in Civil Case No. E144 of 2020. The application is expressed to be brought under Article 159 of *the Constitution*, section 3, 3A and 3B of the Appellate Jurisdiction Act and rules 4, 31, 39(b), 41, 42, 43, 47 and 53 of the Court of Appeal Rules, 2010. I observe that the Rules now applicable are the 2022 Rules.
2. The application is based on the grounds set out on its face and is supported by an affidavit sworn by Michael Chirchir on 16th February, 2024. The applicant avers that it lodged a suit before the High Court at Nairobi claiming against the respondents jointly loss of Kshs. 34,163,308 resulting from fraud committed by agents of the 5th respondent, the applicant's banker, in collusion with the 1st to 4th respondents who were, at the time, the applicant's employees serving in the accounts department.



3. The 1st respondent, Andrew Mokaya Maubi, raised a preliminary objection, asserting that the suit ought to be determined by the Employment and Labour Relations Court (ELRC). The trial court allowed the preliminary objection and the file was transferred to the ELRC. The applicant avers that it did not know of this ruling in good time as on the day the matter was scheduled for ruling on 16th November 2023, the court did not sit and no reasons or directions were given.
4. The applicant further contends that it was only able to trace the file at the registry after receiving an email from the 5th respondent stating that the matter had been assigned case number ELRCC E972/2023 and was slotted for mention before the ELRC for directions on 14th February, 2024. It further avers that upon obtaining a copy of the ruling, it was dissatisfied with the decision of the court to transfer the file to the ELRC, but noted that the time for launching an appeal had already lapsed. The applicant further avers that it shall suffer miscarriage of justice because the claim filed relates to actions of fraud committed by the applicant's bank, the 5th respondent, in which the representatives of the bank colluded with the 1st to 4th respondents. It asserts that the matters in issue are not of an employment nature; that when the matter came up for mention before the ELRC, counsel for the 5th respondent informed the court that the 5th respondent was not a relevant party to the suit as there was no employment relationship between it and the applicant.
5. The applicant asserts that the delay in lodging the appeal is not so inordinate and is not due to fault on its part but due to the fact that there was no notice of when the ruling was delivered and the file, having been transferred, was not available at the civil registry for perusal. The applicant further avers that the intended appeal has great merit and raises crucial issues on which court is clothed with jurisdiction to determine the issues raised by the applicant.
6. The application is opposed. Dennis Makhanu Cheloti filed a replying affidavit sworn on 29th February, 2024; Eunice Phoebe Adhiambo has sworn an affidavit on 27th February 2024 in opposition to the application and Andrew Mokaya Maubi has sworn an affidavit on 6th March 2024 also in opposition to the application. The essence of the opposition by the respondents is that the applicant was aware of when the impugned ruling was to be delivered as its counsel was present in court on 25th September 2023 when the matter came up for mention to confirm filing of submissions and taking of a ruling date. The respondents aver further that the ruling was delivered on the scheduled date contrary to the applicant's assertion, and that the notice of receipt of the High Court file by the ELRC went out to all parties on 24th November, 2023. The respondents assert that the present application is an afterthought following orders of the ELRC declining to address the question of jurisdiction.
7. The parties hereto have filed written submissions in support of their respective positions on the application. The applicant has filed submissions dated 6th March 2024 while the 1st respondent's submissions are dated 13th March 2024. The 2nd respondent's submissions are dated 14th March 2024 and the 3rd and 4th respondent's submissions are dated 11th March 2024. The 5th respondent has not filed a reply or submissions in response to the application.
8. In its submissions, the applicant adverts to the provisions of rule 4 and the jurisprudence emerging therefrom with respect to the unfettered discretion of the Court to extend time under the said rule. It reiterates the reasons for its failure to lodge its appeal on time and asserts that it has an arguable appeal as demonstrated in its draft memorandum of appeal.
9. In his submissions, the 1st respondent submits that the applicant has not been diligent and has not given a reason for not filing its notice of appeal. He further submits that the respondents will suffer prejudice if they have to undergo a hearing at the Court of Appeal while they could have the substantive issues in the suit determined at the ELRC.



10. The submissions of the 3rd and 4th respondents echo those of the 1st and 2nd respondents in their opposition to the grant of orders for extension of time to file an appeal.
11. I have considered the respective averments and submissions by the parties. 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 principles which the Court should consider have been enunciated in various cases, among them *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 and *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees* [2020] eKLR. The principles that the Court should consider are the length of the delay, the reasons for the delay, the chances of success of the appeal, and the prejudice to be suffered by the respondents should the orders sought be granted.
12. In its decision 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 ...”
13. See also *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR in which the Court held that there is a duty placed on courts to ensure that the factors considered in determining whether or not to extend time are consonant with the overriding objective of civil litigation- the just, expeditious, proportionate and affordable resolution of disputes before the court.
14. In the matter before me I note that the impugned ruling was delivered on 16th November 2023. This was the date on which the ruling was scheduled to be delivered as the applicant concedes. The applicant filed the present application on 16th February 2024. Under rule 77(1) of the Rules of this Court, it is provided that:
 1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
 2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”
15. The applicant should have filed its notice of appeal within 14 days from 16th November 2023. It avers that it was not aware that the impugned ruling had been delivered on 16th of November 2023 due to the fact that the court did not sit on that day. It only became aware that the ruling had been delivered after it received an email from the 5th respondent indicating that the matter was scheduled for mention for directions before the ELRC on 14th February 2024. It has annexed a document headed ‘Notice of Appeal’ which is dated 15th February 2024.
16. It is indisputable that the applicant has not complied with the provisions of rule 77, and there has been a delay in lodging the present application. However, noting that part of the period between 16th November 2023 and 15th February 2024 fell within the Christmas recess, the delay in filing the present application cannot be said to be inordinate.



17. A second factor to be considered in an application under rule 4 is the possibility of the appeal succeeding should the orders of extension of time be granted. At the core of the applicant's intended appeal is the question of jurisdiction. Was the trial court correct in its finding that the applicant's claim was an employment issue for determination by the ELRC, notwithstanding that it raised issues of alleged fraud perpetrated by the 1st- 4th respondents, employees of the applicant, and employees of the 5th respondent, the applicant's banker? While it is not within the remit of the Court sitting as a single judge to pronounce definitively on the possibility or otherwise of an appeal succeeding, it cannot be disputed that the intended appeal raises an important question for consideration on appeal.
18. A third issue for consideration in an application under rule 4 is the prejudice likely to be suffered by the respondents should the Court exercise discretion in favour of the applicant. The respondents argue that they would be prejudiced should they have to argue the question of jurisdiction before this Court while the substantive issues could be determined before the ELRC. In my view, it would serve the interests of the respondents and the applicant best, and be more in keeping with the interests of justice, if the jurisdictional question was settled first, rather than proceed with a trial that would have the issue hanging, unresolved, over it. As has been long established since this Court's decision in *Owners of The Motor Vessel Lillian S. v Caltex Oil (Kenya) Ltd [1989] eKLR*, jurisdiction is everything.
19. Given my findings, therefore, that the delay in bringing this application was not inordinate; that the applicant has an appeal which may well have reasonable chances of success; and that an appeal filed for purposes of resolution of the jurisdictional question would not be prejudicial to the respondents, I am inclined to exercise discretion in favour of the applicant.
20. The applicant seeks an order extending time and granting it leave to file an appeal out of time against the ruling dated 16th November, 2023. It has annexed a notice of appeal dated 15th February 2024 to its application, which was filed out of time and without leave. In light of my findings above, I hereby grant the applicant leave to file and serve a notice of appeal and record of appeal against the ruling of Mulwa J. dated 16th November 2023, such notice of appeal and record of appeal to be filed within 30 days hereof.

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

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

