



**Wangui & 4 others v NCBA Bank Kenya PLC (Civil Appeal (Application)
E858 of 2023) [2024] KECA 1227 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1227 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E858 OF 2023
SG KAIRU, JA
SEPTEMBER 20, 2024**

BETWEEN

**VIRGINIA SUSAN WANGUI 1ST APPELLANT
CATHERINE WANGARI KIMANI. 2ND APPELLANT
PENNIE NJERI CHEGE 3RD APPELLANT
RIKIE NGIGE 4TH APPELLANT
SIMON NGIGI KIMA 5TH APPELLANT**

AND

NCBA BANK KENYA PLC RESPONDENT

*(An appeal from the Ruling of the High Court of Kenya at Nairobi
(F. Mugambi, J.) dated 13th October, 2023 in HCCC No. 884 of 2021)*

RULING

1. In their application dated 11th December 2023 filed within this appeal, invoking Rule 4 of the Court of Appeal Rules among other provisions, the applicants seek orders that the Court “be pleased to allow the appellants to file their Notice of Appeal out of time” and that “their Notice of Appeal be considered as duly filed.” The application is based on the grounds appearing on the face of the application and in the supporting affidavit of Charles M. Ongoto, Advocate for the applicants.
2. I heard the application on 14th May 2024 when learned counsel Miss. Mwalloh held brief for Mr. Ongoto for the applicants and orally highlighted the applicants’ written submissions. Mrs. Ochieng, learned counsel, appeared for the respondent relying on the respondent’s replying affidavit sworn by Jackie Kwambukha Ochieng and equally highlighted the respondent’s written submissions.



3. It is urged for the applicants that upon delivery of the impugned Ruling by the High Court on 13th October 2023, the applicants filed and served a Memorandum of Appeal dated 26th October 2023; that there was an oversight in filing a Notice of Appeal; that despite the applicants' advocates clerk having been given instructions to expeditiously file the Notice of Appeal, he failed to do so and the Advocate for the applicants only became aware of this when the matter was raised in a replying affidavit sworn on 20th November 2023 in opposition to the applicants' application for stay of execution. It is urged that the applicants were not heard before the High Court and the appeal raises substantial issues for determination.
4. It was submitted on the strength of the decision of the Court in *Vishva Stone Suppliers Company Limited vs. RSR Stone [2006] Limited*, [2020] eKLR, among other decisions, that wrongs committed by advocates and their staff should not be visited on innocent clients; that the Court has unfettered discretion; that the failure to file the Notice of Appeal was not intentional but due to honest oversight which has been plausibly and satisfactorily explained; that the matter involves a colossal amount of over Kshs. 200 million and the applicants will suffer substantial loss and irreparable damage if this application is declined.
5. In opposition to the application, it is urged for the respondent that the application is based on an incompetent appeal which was lodged un-procedurally without a Notice of Appeal; that the object of the present application is to breathe life into an incompetent appeal; that the applicants should have withdrawn the incompetent appeal and commence the process afresh; that in any event the appeal is aimed at frustrating the respondent from exercising its statutory right of sale.
6. It was submitted that a Notice of Appeal is jurisdictional, and not a procedural technicality, and in the absence of a Notice of Appeal underpinning this appeal on which the present application is filed, the Court lacks jurisdiction to entertain it. In that regard, counsel referred to the decision in *Apungu Arthur Kibira vs. Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR;
Independent Electoral and Boundaries Commission vs. Jane Cheperenger & 2 others [2015] eKLR.
7. The principles applicable in applications such as this are well known. In *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR Waki, J.A stated that:
“The exercise of this Court’s discretion under Rule 4... 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 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: See *Mutiso vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina (No 4)* [1982] KLR 38.”
8. Subsequently, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014 [2014] eKLR pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to



the satisfaction of the court. Other factors include whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay. Public interest is also a relevant consideration.

9. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. Each case must be considered on its own facts. In this case, the application, as submitted by counsel for the respondent, is anchored on an appeal without a Notice of Appeal. Although that is what the applicant seeks to cure by the present application, I am persuaded that the proper course would have been for the applicant to withdraw the appeal (admittedly filed before a Notice of Appeal had been lodged) and to commence the process afresh. As Githinji, JA. stated in *Equity Bank Limited vs. West Link Mbo Limited*, Civil Application *No. 78 of 2011* [2013] eKLR, “...the prerequisite for mounting an appeal to this Court in civil cases and related matters is the lodging a Notice of Appeal...”.
10. I accordingly uphold the objection by counsel for the respondent that to the extent that the application is based on ‘an appeal’ which was instituted un-procedurally without a Notice of Appeal, the same is incompetent. The application is hereby struck out with costs to the respondent. Being of this view, I will refrain from addressing the merits or otherwise of the application.
11. Orders accordingly.

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

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

