



Mombasa County Government v Kooba Kenya Limited (Civil Application E046 of 2024) [2024] KECA 1474 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KECA 1474 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E046 OF 2024
P NYAMWEYA, JA
OCTOBER 25, 2024**

BETWEEN

MOMBASA COUNTY GOVERNMENT APPLICANT

AND

KOوبا KENYA LIMITED RESPONDENT

(An application for extension of time to file and serve a Notice of Appeal out of time from the decision of the High Court of Kenya at Mombasa (E. K. Ogola J.) delivered on 10th March 2022 in Constitutional Petition No. 12 of 2017)

RULING

1. The issue that presents for determination in this ruling, is whether the Applicant herein should be granted leave to appeal and extension of time to file an appeal out of time, against a judgment delivered on 10th March 2022 by the High Court at Mombasa (E. K. Ogola J.) in High Court Constitutional Petition Number 12 of 2017. The Applicant has in this respect filed an application seeking these orders by way of a Notice of Motion dated 22nd April 2024, which is supported by an affidavit sworn on even date by Mohamed Ali Mohamed, its advocate.
2. The said advocate deponed that the original Petition in the High Court was filed on 17th February 2017, and what was referred to a “1st Judgment” delivered on 13th April 2017, where the Court issued orders inter alia that if need to be, the parties set a date for submissions on damages and compensation. In response to the said orders, the Respondent applied to amend the Petition, and the application was allowed via a ruling delivered on 3rd May 2018. The amended petition was then filed on 24th May 2018 and parties were directed to file their submissions and a “2nd Judgment” was delivered on 10th March 2022 by the same court which is the subject of this application.
3. The Applicant is aggrieved by the 2nd judgment and intends to challenge the same via an appeal to this court and has thus sought extension of time for filing the Notice of Appeal and leave to file



the Appeal out of time. It was averred that prior to the delivery of the said judgment, a notice was issued via the Kenya Law Reports website that the judgment would be delivered on 7th March 2022, but that the trial Court was not sitting on that date, and no further communication was exchanged. Further, that its advocate called the Respondent's advocates, Messrs Oraro & Co. Advocates, on 30th March 2022 enquiring as to the delivery of the judgment, and was informed that the judgment was delivered on 10th March 2022 in the absence of the Applicant's advocates. Upon perusal of the Court file, the Applicant's advocates on record got a copy of the judgment and on 31st March 2022 sought instructions to appeal the same. On 4th August 2023, the Applicant responded to the advocate's letter of 31st March 2022, formally issuing instructions to pursue the appeal.

4. The Applicant averred that the delay in filing an application was occasioned by a delay in issuing instructions for the appeal, and by the time the same was issued time for filing the appeal had long lapsed necessitating this application. The Applicant filed an initial application dated 15th November 2023 praying for similar orders but inadvertently failed to attach the Notice of Appeal and withdrew the application on 11th March 2024, and this instant application was thereafter filed. He urged that the delay was occasioned by mistake of the Applicant and their public officers and counsel on record, and was not calculated to defeat the ends of justice. Further, that the mistake should not be visited on the Applicant to its detriment, as it is a public body. Lastly, that the intended appeal is arguable, and meritorious, as it seeks to challenge inter alia, the jurisdiction of the trial Court, and the quantum of special damages awarded to the Respondent as against the Applicant, which is a public body. In addition, that no prejudice would be visited on the Respondent if the application is granted.
5. In response, the Respondent filed a replying affidavit sworn on 16th May 2024 by Richard Bell, its Chief Executive Officer and Director. He deponed that by dint of a judgment delivered on 13th April 2017, the High Court found that the Respondent's rights under Article 47 of the *Constitution* had been violated, and issued various orders compelling the Applicant to process the Respondent's application for development permission, with respect to what would then have been the first data collection centre in the Greater East Africa. However, that despite the Court's judgment, the Applicant failed to timeously stamp the building plans and issue a certificate of approval for the project, only doing so on 18th July 2017 after the Respondent was forced to file an application citing the Applicant for contempt of Court.
6. The Respondent averred that had the Applicant acted timeously, the project would have been completed in 2017, but unfortunately, due to the delays occasioned by the Applicant, another party commenced and completed a data collection centre in Mombasa and went live in August 2017. As a result, the project lost its commercial viability and the Respondent incurred substantial harm and loss including sunk costs. The Respondent accordingly amended the Petition to better quantify the damages and loss suffered, and the Court on 10th March 2022 awarded it a sum of Kshs.151,000,000/= together with interest from the date of judgment and costs of the Petition.
7. Subsequently, on 30th March 2022, the Respondent's advocate wrote to the Applicant's advocate seeking payment of sums awarded by the Court, but their letter was ignored, and by a letter dated 25th July 2023, the Respondent's advocates wrote to the Applicant forwarding the Certificate of Order against the Government for Kshs.151,000,000/- together with interest at a rate of 12% per annum from 10th March 2022 until full payment, together with the Certificate of Costs against the Government for Kshs.3,397,240.65/-. As no communication was forthcoming from the Applicant, the Respondent was left with little option but to apply for judicial review orders of mandamus seeking to compel them, the Applicant and its principal officer, to make good the judgment of the Court.



8. It was thus the Respondent's claim that there had been an inordinate unexplained delay of more than 2 months in filing the present application seeking an extension of time to file a Notice of Appeal out of time and leave to appeal; the Applicant was not brought in good faith but a reaction to the judicial review proceedings commenced by the proceedings; the Applicant, from inception, is guilty of conduct that seeks to subvert, delay and defeat the course of justice and has shown no desire, willingness or motivation to abide by the Court's decision; and the Applicant had not laid sufficient basis or demonstrated extenuating circumstances to warrant the Court to exercise its discretion. Lastly, that by allowing the application, it would amount to elongating the litigation 2 years post-judgment.
9. The Applicant's advocates filed written submissions dated 10th June 2024 by the firm of Balala & Abed Advocates and the Respondent filed written submissions dated 25th June 2024 by the firm of Oraro & Company Advocates. Both parties cited various judicial authorities in support of their respective arguments, including the decision by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR on the principles that govern the exercise of discretion in applications for extension of time. The gist of the submissions by the Applicant's counsel was that a full, detailed and accurate account of the causes of the delay which is reasonable enough to excuse the default had been provided, and that the Applicant, being a public entity, was failed by its officers who delayed to issue instructions on time to appeal the subject judgement, and further by its advocates on record. Therefore, that the delay has been satisfactorily explained and meets the test for the Court to exercise its discretion in the Applicant's favour.
10. The Respondent's counsel on the other hand submitted that it is trite that a litigant has a duty to pursue the prosecution of his or her case; twenty-five (25) months of delay is an inordinately lengthy period of delay by any standard, and the Applicant has not sufficiently explained the reason for the delay save to generally lay blame on communication channels between it and its Advocates; sufficient explanation for the entire period of delay had not been given; and that the application is a belated response to the judicial review proceedings seeking enforcement of the judgment and decree of the High Court.
11. I have considered the pleadings and submissions made by the parties. The principles governing the exercise of the discretion to extend time under Rule 4 of the *Court of Appeal Rules* were well stated in the case of *Leo Sila Mutiso vs Rose Hellen Wangare Mwangi*, Civil Application No. Nai 255 of 1997 (ur) 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”
12. In considering an application for extension of time, several key issues are to be considered as was pointed out in the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* (*supra*) namely;
 - i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;



- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted; and
 - vi. Whether the application has been brought without undue delay.
13. Extension of time is therefore an equitable remedy that is only available to a deserving party at the discretion of the Court, and after considering the effects of such an extension on all the parties. Further, a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court, and the Court needs to consider whether there is a reasonable ground for the delay.
 14. Rule 77(2) of the *Court of Appeal Rules* of 2022 in this respect requires that a Notice of Appeal is lodged within fourteen days of the decision intended to be appealed against. It is not in dispute that the Applicant did not file a notice of appeal within the required timelines, and the relevant period of delay that requires to be explained is the one between delivery of the impugned judgment on 10th March 2022, and the date of lodging of the instant application on 22nd April 2024. The Applicant's advocate has explained the delay between 10th March 2022 and 31st March 2022, the reason being that the Applicant was not aware of the delivery of the judgment. The reason for the delay between 31st March 2022 and 4th August 2023 has been given by the advocate as being caused by lack of instructions from the Applicant. It is instructive that the Applicant did not deem it fit to explain why there was a failure to give instructions to its advocate for a period of over one year, and there is therefore no satisfactory reason proffered for the delay from 31st March 2022 until 4th August 2023.
 15. It is also notable that the first application for extension of time was filed by the Applicant's advocate on 15th November 2023, over three months after receipt of instructions, which delay is also not explained. I therefore not only find the reasons for the delay to be insufficient and inadequate, but also that the delay was in the circumstances inexcusable and inordinate.
 16. I accordingly find that the Applicant does not merit the exercise of this Court's discretion for the above stated reasons. I consequently hereby dismiss the Applicant's Notice of Motion application dated 22nd April 2024, with costs to the Respondent.
 17. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

