



REPUBLIC OF KENYA



**Urban Solutions Real Estate Limited v Abib t/a Abdi & Associates Advocates & 5 others
(Civil Application E146 of 2023) [2024] KECA 1402 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1402 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E146 OF 2023
K M'INOTI, JA
OCTOBER 11, 2024**

BETWEEN

URBAN SOLUTIONS REAL ESTATE LIMITED APPLICANT

AND

ZAM ZAM BSI ABIB T/A ABDI & ASSOCIATES

ADVOCATES 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

LAW SOCIETY OF KENYA 5TH RESPONDENT

HALAL MEAT PRODUCTS LIMITED 6TH RESPONDENT

(Application for extension of time to appeal from the ruling and order of the High Court of Kenya at Nairobi (Ong'undi, J.) dated 9th February 2023 in HC Pet No. 160 of 2019)

RULING

1. By the notice of motion dated 13th March 2023, the applicant, Urban Solutions Real Estate Ltd. seeks extension of time to appeal against the ruling and order of the High Court of Kenya at Nairobi (Ong'undi, J.) dated 9th February 2023. Specifically, the applicant prays that the period for lodging its notice of appeal be extended or in the alternative, its notice of appeal filed out of time on 12th April 2023, be deemed to have been filed and served on time.
2. The brief background to the application is that the 1st respondent, Zam Zam Abdi Abib t/a Abdi & Associates Advocates filed a constitutional petition in the High Court to forestal prosecution for alleged criminal offences, contending that the prosecution was in violation of her constitutional



rights and fundamental freedoms. The applicant and two others made three separate applications to be joined in the petition, as interested parties. Their applications were founded on the claims that each had against the 1st respondent, who had acted for them in her capacity as an advocate. The 1st respondent opposed the applications for joinder on the basis that the issue raised in the applications were unrelated to the petition which was on alleged violation of her constitutional rights and freedoms whilst the applicant and its colleagues were raising complaints against the 1st respondent.

3. By a ruling dated 9th February 2023, Ong’undi, J. dismissed the applications with costs after finding that it was not necessary to join the applicant and its colleagues in the petition in order to determine the same.
4. On 15th February 2023, the applicant applied to the deputy registrar for a certified copy of the ruling. It filed the notice of appeal on 23rd March 2023, which was about 44 days from the date of the ruling. Clearly, the notice of appeal was filed out of the 14 days prescribed by rule 77(2) of the Court of Appeal Rules.
5. In the affidavit in support of the application, the applicant deposes that the delay in filing the notice of appeal was occasioned by delay in obtaining a certified copy of the ruling; that the applicant’s advocates prepared the notice of appeal on time, but their clerk failed to file the same timeously ; that the failure to file the notice of appeal on time was occasioned by factors beyond the applicant’s control; that the intended appeal is not frivolous and that it is in the interest of justice to extend time.
6. The 1st respondent opposed the application vide grounds of objection dated 24th April 2023 and a replying affidavit sworn on the same date. The substance of the response is that the applicant has not satisfactorily explained the reason for the delay and therefore there is no basis on which the Court can exercise its discretion in the applicant’s favour. It was contended that the applicant’s advocate was in court on the date the ruling was delivered and that he informed the court of the applicant’s decision to appeal and also made an application for stay of further proceedings. The 1st respondent further averred that there was no basis for the assertion that the applicant was waiting for a copy of the judgment before filing the notice of appeal because obtaining a copy of the judgment is not a prerequisite for filing a notice of appeal.
7. None of the other respondents responded to the application.

Similarly, none of the parties filed submissions in accordance with the directions given by the Court and the notice of hearing dated 4th September 2024. Notwithstanding default in filing submissions, I am persuaded that I have before me sufficient material on the basis of which I can determine this application on merits.
8. As rightly pointed out by the 1st respondent, extension of time is not a right of a party. In *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* (supra) the Supreme Court held as follows:
 - 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...”
9. The applicant is therefore obliged to satisfy the Court that there are good reasons why it did not file the notice of appeal within the period prescribed by the Rules.



10. The other considerations that guide the Court in an application for extension of time are well settled. In *Imperial Bank Ltd (In Receivership) & Another v. Alnashir Popat & 18 Others* [2018], the considerations were set out as follows:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

(See also *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*, CA. No. Nai. 255 of 1997 and *Fakir Mohamed v. Joseph Mugambi & 2 Others*, CA. No. Nai 332 of 2004).

11. Instead of filing a notice of appeal within the prescribed 14 days, the applicant filed one after 44 days, which I find to be inordinate delay. This therefore calls for an examination of the reasons that the applicant has put forth to explain the inordinate delay.
12. The applicant relies on two reasons to explain why it did not file the notice of appeal within the prescribed time. The first one blames the court for the delay in availing a copy of the judgment. I agree with the 1st respondent that this is not a genuine reason. The applicant does not dispute that its counsel was present in court during the delivery of the judgment. He must therefore have understood the substance and tenor of the judgment.
13. Secondly, the 1st respondent has deposed, which the applicant has not controverted, that after delivery of the ruling, the applicant’s counsel informed the court that the applicant was proceeding on appeal and applied for stay of further proceedings. That suggests that the applicant had made a decision immediately after delivery of the ruling to lodge an appeal and therefore there was nothing stopping its counsel from lodging the notice of appeal within the prescribed time. Whilst a party may need a copy of the judgment or ruling to draft a memorandum of appeal, such copy is not necessary for purposes of drafting a notice of appeal, which is a mere one page document evincing nothing else save the intention to appeal.
14. The applicant has stated the second reason as follows:

“The applicant’s advocate prepared the notice of appeal and tasked his clerk to file but the same was never filed.”

15. This begs the question: what was the real reason for failure to file the notice of appeal on time? Was it the delay in obtaining a copy of the ruling, or the default on the part of the undisclosed clerk? One would have expected, if indeed the omission was occasioned by the clerk, an affidavit by the said clerk explains the circumstances under which he or she failed to file the notice of appeal.
16. It is well settled that the Court will overlook a genuine and excusable mistake by counsel. In *Belinda Murai & 9 others v. Amos Wainaina*, CA. No. Nai. 9 of 1978, Madan, JA., (as he then was) stated thus:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel



the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so requires. It is all done in the interests of justice.”

17. However, what the applicant has put forward is not an excusable mistake but rather excuses, which do not suffice for the Court to exercise discretion in the applicant’s favour. From the totality of the material before me, there is obvious lack of candour on the part of the applicant, which would disentitle it to an equitable remedy. (See *James Waweru Muturi v Paul Thuo Njambi, CA(A) No. 159 of 2017*).
18. Satisfied as I am that the applicant has not explained the inordinate delay in lodging the notice of appeal, I do not find it necessary to delve into a consideration of the other factors, save to note that the intended appeal involves criminal proceedings which, it is in the best interest of all parties as well as in public interest, to be determined and concluded without undue delay.
19. For the foregoing reasons, I find no merit in this application and dismiss the same with costs to the 1st respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

K. M’INOTI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

