



**Ndiritu v Kinuthia (Civil Application E356 of 2024)  
[2024] KECA 1592 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1592 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E356 OF 2024  
F SICHALE, JA  
NOVEMBER 8, 2024**

**BETWEEN**

**JOHN MALOGO NDIRITU ..... APPLICANT**

**AND**

**MOSES KINUTHIA ..... RESPONDENT**

*(Being an Application for Extension of Time to file an Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Mong'are J), dated 13th May 2024 in (Nairobi Milimani HCCOMM NO. E456 OF 2022)*

**RULING**

1. By the Motion on Notice dated 9<sup>th</sup> July 2024, brought pursuant to the provisions of Article 159 of *the Constitution*, Sections 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 (“the rules”) and all other enabling provisions of the Law; John Malogo Ndiritu (the applicant herein), has invited this Court sitting as a Single Judge to issue the following orders:
  - “i. Spent.
  - ii. That this Honourable Court be pleased to extend the time within which to file and serve the respondent with the applicants Notice of Appeal within such time as may be directed, in respect of the Ruling of the Commercial and Admiralty Division of the High Court of Kenya at Nairobi (Lady Justice J.W.W Mong'are) dated and delivered on 13<sup>th</sup> May 2024 in Milimani HCCOMM No. E456 of 2022.
  - ii. That costs of this application be provided for.”



2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that on 13<sup>th</sup> May 2024, Mong'are, J had delivered a Ruling in Milimani HCCOMM No. E456 of 2022 allowing an application for summary judgment in favour of the respondent to the tune of Kshs 104,000,000/= in a suit where he had filed no defence but had sought an order for consolidation of suit and leave to file a defence out of time, in essence dismissing his application dated 5<sup>th</sup> January 2023, seeking consolidation and leave to file defence out of time.
3. That, when the impugned ruling was delivered, his advocates with the innocent assumption that the same constituted interlocutory judgment filed an application seeking to set aside the same and on 8<sup>th</sup> July 2024, the learned judge intimated to the parties that the ruling dated 13<sup>th</sup> May 2024, was only appealable and that she was divested of the jurisdiction to set it aside, pursuant to which they subsequently filed a notice of withdrawal of the said application and moved expeditiously to this Court seeking to appeal against the aforesaid ruling out of time.
4. He thus deposed that the mistake to move the high court and not file a Notice of Appeal was purely inadvertent mistake of his counsel which should not be visited upon him.
5. He further deposed that he had an arguable appeal which raised arguable issues worthy of ventilation on appeal.
6. The motion was opposed vide a replying affidavit sworn by the respondent on 22<sup>nd</sup> July 2024, who deposed inter alia that the delay by the applicant was inexcusable as he well aware of the application for summary judgment and duly filed his submissions on 24<sup>th</sup> November 2023, against the said application and that now he could not be heard to say that he innocently assumed that the ruling delivered on 13<sup>th</sup> May 2024, constituted interlocutory judgment and that further the delay was foreseeable and within his control.
7. The motion was canvassed by way of written submissions. It was submitted for the applicant that the instant motion was filed on 9<sup>th</sup> July 2024, which was approximately a delay of 42 days which is neither inordinate nor prejudicial to the respondent as the applicant was at all material times innocently before the high court seeking a stay of execution and setting aside of the ruling as evidenced by the record.
8. It was further submitted that unless the instant application was allowed, the applicant would be gravely prejudiced by the execution of the sum of Kshs 104,000,000 which on defence was not owing and that the entire appeal rests on the applicant's constitutional rights to be heard and that the same would not prejudice the respondent who will eventually have his day in court.
9. On the other hand, it was submitted for the respondent that the delay in filing the appeal herein which was about 48 days was inordinate and inexcusable, bearing in mind that the applicant was at all times aware of the ruling having been represented when the same was delivered.
10. Regarding the reasons offered for the delay namely; that the applicant innocently assumed the impugned ruling constituted interlocutory judgment which could be set aside, it was submitted that the reason was neither candid nor satisfactory.
11. As to the possibility of the appeal succeeding, it was submitted that none of the grounds raised in Memorandum of Appeal highlight a single arguable defence raised in the grounds of opposition which the learned judge did not consider and that no serious argument could be mounted against the ruling on summary judgment.
12. It was further submitted that the respondent would be greatly prejudiced if the instant motion was allowed as the applicant had been indebted to the respondent for a long time and that further the



parties had signed a Deed of Settlement in which the respondent was to be repaid the sums owing by January 2019 and that this did not happen despite several demands which forced the respondent to file suit before the high court which rightfully allowed the application for summary judgment.

13. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival written submissions by the parties, the cited authorities and the law.
14. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not have now taken a well beaten path. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion the Court should do so judiciously.
15. See *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge Should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend 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.”
16. In the instant case and as regards the length of the delay, it is indeed not in dispute that the impugned judgment was delivered on 13<sup>th</sup> May 2024 and the instant motion is dated 9<sup>th</sup> July 2024. There has therefore been a delay of 56 days which delay is certainly inordinate.
17. Turning to the reasons advanced for the delay, it was contended that the same was inadvertent owing to innocent assumption by the applicant’s advocates that the impugned ruling constituted interlocutory judgment which was amenable to being set aside.
18. I don’t find the reason advanced for the delay to be plausible/ reasonable as the applicant has all along been ably represented by counsel who was present when the ruling was being delivered and I do not find the reason advanced namely; that his counsel was under the impression that the impugned ruling amounted to interlocutory judgment to be tenable. Ultimately, therefore I do not find the reasons offered for the delay to be plausible/reasonable.
19. With regard to the possibility of the intended appeal succeeding, it would not be in my place to determine the merits or otherwise of the same and I will therefore make no further comments regarding the same. Suffice to state the applicant was afforded an opportunity to file defence but instead opted to inter alia file an application for consolidation of suit.
20. As regards prejudice, I am satisfied that the respondent will stand to suffer a high degree of prejudice if the instant motion is allowed as opposed to the applicant since the applicant has been indebted to the respondent for a long time.
21. Given the circumstances, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time within which to file the intended appeal.
22. Accordingly, the applicant’s motion dated 9<sup>th</sup> July 2024, is without merit and the same is hereby dismissed in its entirety with costs to the respondent.



It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER 2024.**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

***SIGNED***

**DEPUTY REGISTRAR.**

