



**Wangui & 4 others v NCBA Bank Kenya PLC (Civil Appeal (Application)  
E858 of 2023) [2024] KECA 1631 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1631 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E858 OF 2023  
M NGUGI, JA  
NOVEMBER 8, 2024**

**BETWEEN**

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

**AND**

**NCBA BANK KENYA PLC ..... RESPONDENT**

*(Being an application for leave to file a notice of appeal and memorandum of appeal out of time)*

**RULING**

1. In the application dated 25<sup>th</sup> September 2024, the applicants ask the Court to allow them to file their notice of appeal and memorandum of appeal out of time from the ruling and order of the High Court at Nairobi by (F. Mugambi J.) dated 13<sup>th</sup> October 2023 in High Court Civil Suit No. 884 of 2021.
2. The application is expressed to be brought under Article 25 and 50(1) of *the Constitution*, sections 1A, 1B and 3A and Order 22 rule 52 and Order 51 rule 1 of the Civil Procedure Rules.
3. The application is based on the grounds set out on its face and is supported by an affidavit sworn by Simon Ngigi Kimani on 25<sup>th</sup> September 2024. The applicants aver that the High Court delivered a ruling against the them on 13<sup>th</sup> October, 2023, which they intend to appeal against. They aver further that they did not file a notice of appeal within the required time, which was an oversight, as their advocates had been assured that the notice had been filed, after giving instructions to the firm's clerk that it should be filed expeditiously, with due regard to the statutory time limits.



4. Mr. Ngigi deposes that he was assured that the notice of appeal had been filed, and only later learnt that it had not been filed. The applicants now ask this Court to allow them to file the notice and memorandum of appeal out of time; that they did not intentionally fail to file the documents on time; that the delay was due to an oversight; and they should thus not be denied adjudication of their appeal on merit due to procedural lapses; and that their omission to file a notice of appeal should not prejudice their right of appeal.
5. They further aver that they were condemned unheard by the High Court contrary to their constitutional right to be heard as guaranteed under Article 25 and 50(1) of *the Constitution*. They contend that it is in the interests of justice that this Court gives them a chance to present their case through this appeal. They aver that the respondent has already commenced the process of execution, and they stand to suffer irreparable damage and substantial financial loss if their appeal is not allowed. They assert that this Court has judicial discretion to issue extension of time orders under rule 4 of the Court of Appeal Rules 2010.
6. A notice of appeal dated 11<sup>th</sup> December, 2023, but yet to be lodged, is annexed to the application. The applicants have not filed submissions in respect of the present application, but there are submissions on record dated 24<sup>th</sup> January, 2024, a perusal of which indicates that they relate to the application dated 11<sup>th</sup> December 2023.
7. The respondent has not filed a response to the present application.
8. In the application dated 11<sup>th</sup> December 2023, the applicants sought essentially the same orders as they seek in the present application. The application was heard and determined in a ruling by Gatembu, JA dated 20<sup>th</sup> September 2024. In his ruling, Gatembu, JA held that the application before him was based on an appeal that was un-procedurally filed and was thus incompetent. In striking out the application, Gatembu JA stated:
  - “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. 7 8 of 2 01 1 [213] eKLR:  
“...the prerequisite for mounting an appeal to this Court in civil cases and related matters is the lodging (of) 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.”
9. It seems to me that the Court, in the above ruling, was trying to steer the applicants in the proper direction if they were to salvage their intended appeal. They did not heed the directions, instead filing the application now before me in exactly the same circumstances as in their previous application.



10. Their application dated 24<sup>th</sup> September 2024 is anchored on the same appeal, filed unprocedurally, as was before Gatembu JA in the application dated 11<sup>th</sup> December 2023. That being the case, it seems to me that I cannot properly determine the same issues as have already been determined by Gatembu JA, without an indication that the circumstances, namely the withdrawal of the unprocedurally filed appeal, have changed. I accordingly find the application dated 24<sup>th</sup> September 2024 to be without merit, and I hereby strike it out.

11. As the respondent did not file a response or submissions, I make no order as to costs.

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

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

