



**Maccu Motors Limited v Patel & 2 others (Civil Application  
E091 of 2024) [2024] KECA 1621 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1621 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E091 OF 2024  
A ALI-ARONI, JA  
NOVEMBER 7, 2024**

**BETWEEN**

**MACCU MOTORS LIMITED ..... APPLICANT**

**AND**

**BIKHABHAI MATHURBHAI PATEL ..... 1<sup>ST</sup> RESPONDENT**

**DR FRANK KAMUNDI MWONGERA ..... 2<sup>ND</sup> RESPONDENT**

**CYPRIAN UBURI NGARURO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for an extension of time for filing of the record of  
appeal against the Judgment of the Environment and Land Court at Meru  
(E.C. Cheronu, J.) delivered on 3rd June 2019 in ELC Case No. 31 of 2018)*

**RULING**

1. Before the court is a notice of motion dated 20<sup>th</sup> September 2024 brought under Article 159(2) of *the Constitution*, sections 3, 3A, and 3B of the *Appellate Jurisdiction Act* and rule 4 of the Court of Appeal Rules 2022, seeking for an extension of time for filing of the appeal against the judgment dated 3<sup>rd</sup> June 2019 in ELC Case No. 31 of 2018 out of time.
2. The application is predicated on the grounds on the face of the application stating that; the Environment and Land Court at Meru in ELC No. 31/2018 (formerly 124 of 1997) delivered a judgment on 3<sup>rd</sup> June 2019 which the applicant is dissatisfied with; the applicant timeously filed a notice of appeal on 6<sup>th</sup> June 2019 and obtained a certificate of delay dated 16<sup>th</sup> September 2019; that the applicant filed a record of appeal on 22<sup>nd</sup> October 2019 and served all parties; that vide an application dated 1<sup>st</sup> November 2019, the court in its ruling of the 6<sup>th</sup> September struck out the record of appeal for having been filed out of time; the applicant has an arguable appeal that raises serious fundamental



issues on points of law; the applicant (who consists of many farmers from larger Meru) would suffer irreparable loss if the leave sought is not granted.

3. The application is further supported by the affidavit of Duncan Marete, the applicant's Chief Executive Officer in which he deposes that a letter dated 3<sup>rd</sup> June 2019 applying for proceedings was written to the Deputy Registrar and was copied to the relevant counsels on record and a deposit of Kshs. 1,000/- for the proceedings paid on the same day; that subsequently, a copy of proceedings was obtained on 22<sup>nd</sup> August, 2019; on 22<sup>nd</sup> October, 2019 the record of appeal was filed and served on all parties; that the court while ruling on the respondents' application dated 1<sup>st</sup> November, 2019, struck out the record of appeal on 6<sup>th</sup> September, 2024 on the basis that the same was filed out of time; that by filing the record of appeal on 22<sup>nd</sup> October, 2019, the applicant had demonstrated its seriousness in having the appeal heard and determined on its merits; the appeal raises serious issues of the law and it is only fair and just that the court renders its decision based on merits; that from the record available, the subject matter Meru Municipality Block 11/50 is a prime property at the heart of Meru Town, worthy of millions of shillings drawn from farmers from the larger Meru community and it is in the interest of justice that the leave sought be granted; the ruling striking out the record of appeal was made on 6<sup>th</sup> September, 2024 and this application has been made and filed expeditiously and without undue delay.
4. The application is opposed by the replying affidavit of the 3<sup>rd</sup> respondent, Cyprian Iburi Ngaruro, sworn on behalf of his co- respondents, Bikhabhai Mathurbhai Patel and Dr. Frank Kamundi Mwongera. He deposes that the judgment in Meru ELC No. 31/2018 (formerly HCCC No. 124/1997) was delivered on 3<sup>rd</sup> June, 2019; that the applicant then lodged a notice of appeal on 7<sup>th</sup> June, 2019; applied for the proceedings and a certified copy of the decree therein but did not serve upon them as is required under rule 82(2) (now 84(2)) of the rules of this Court; the applicant later lodged a record of appeal in Civil Appeal 281 of 2019 on 22<sup>nd</sup> October, 2019; upon being served with the aforesaid record of appeal the respondents applied for the striking out of the said record of appeal for being lodged outside the prescribed 60 days, in a notice of motion dated 1<sup>st</sup> November, 2019; rather than move the court for extension of time to lodge the record of appeal; the applicant elected in his response to the said notice of motion dated 1<sup>st</sup> November, 2019 to oppose the same, falsely claiming on oath that it had caused service of its exhibit DM-03 which is annexed to the affidavit in support of the instant application; the applicant, having knowledge of its omission to serve exhibit DM-03 could have withdrawn the appeal within a reasonable time and moved the court for extension of time to lodge a notice of appeal out of time; and it is more than 4 years since judgment was delivered.
5. The 3<sup>rd</sup> respondent further deposes that they are entitled to enjoy the fruits of their judgment without being subjected to a never-ending state of litigation; the fate of the notice of appeal as well as the certificate of delay now relied upon in the instant application were sealed in the ruling of this Court delivered on 6<sup>th</sup> September 2024; the application before this Court is not supported by a competent notice of appeal which is the only document capable of vesting jurisdiction on this Court to extend the time to lodge the record of appeal out of time; the application is incompetent, a misapprehension of the rules of this Court, and an abuse of the process and should be dismissed with costs to the respondents.
6. I have considered the application, the supporting affidavit, and, the response thereto. The issue for determination is whether the applicant deserves the orders sought. Rule 4 of the Court of Appeal Rules governs the extension of time. The rule allows this Court to exercise discretion to extend the time limited by the rules for doing any act authorized or required by the rules.



In the case of *Dominic Okodoi vs. Republic* [2021] eKLR, this Court held as follows:

“Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to –

‘... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act

...,’ on such terms as it thinks just.”

In the case of *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA the court set out the principles to be applied in the exercise of its discretion in the determination of any application under rule 4 when it stated:

“the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”

Further, the case of *Fakir Mohammed vs. Joseph Mugambi & 2 Others* [2005] eKLR lends clarity to the question of the court’s jurisdiction in the determination of applications made under rule 4. The court observed as follows:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it 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, 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.”

7. It is undisputed that the applicant lodged his notice of appeal within the time stipulated by the rules, and what the court struck out was the record of appeal for the reason that it was filed out of time and without the leave of the court.
8. The applicant’s counsel’s letter bespeaking the proceedings show that the same was copied to the respondent although this is denied, which then got the applicant outside the proviso to rule 84 of the rules. The notice of appeal having been filed within time and having not been struck out remains valid.
9. This application has been filed timeously which shows the applicant’s zeal in wanting to pursue the appeal and further the anomaly that bedeviled the record of appeal initially is sought to be rectified by this application.
10. In the end I allow the application. The record of appeal be filed within the next 30 days of the date hereof. Costs to abide by the outcome of the appeal.

**DATED AND DELIVERED AT NYERI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**ALI-ARONI**



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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

