



REPUBLIC OF KENYA



**KENYA LAW**  
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**Alzubidi v Standard Chartered Bank Ltd & 9 others (Civil Application E100 of 2024) [2024] KECA 1829 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1829 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E100 OF 2024  
WK KORIR, JA  
DECEMBER 20, 2024**

**BETWEEN**

**ZAIN ABUBAKAR MOHAMED ALZUBIDI ..... APPLICANT**

**AND**

**STANDARD CHARTERED BANK LTD ..... 1<sup>ST</sup> RESPONDENT**

**LAMU MARINE & ALLIED PRODUCTS LTD ..... 2<sup>ND</sup> RESPONDENT**

**HABIBA MOHAMED AL-AMIN ..... 3<sup>RD</sup> RESPONDENT**

**JANMOHAMED HASSANALI VERJEE ..... 4<sup>TH</sup> RESPONDENT**

**KARIM ABDUL VERJEE ..... 5<sup>TH</sup> RESPONDENT**

**NAZIR JANMOHAMED VERJEE ..... 6<sup>TH</sup> RESPONDENT**

**BKS REGISTRARS LTD ..... 7<sup>TH</sup> RESPONDENT**

**RS SAINI ..... 8<sup>TH</sup> RESPONDENT**

**KENESEC SERVICES ..... 9<sup>TH</sup> RESPONDENT**

**SAMAKI (TWO THOUSAND) LTD ..... 10<sup>TH</sup> RESPONDENT**

*(Being an application for leave to file a Notice of Appeal out of time against the judgment and decree of the Court of Appeal at Mombasa (Gatembu, Nyamweya, & Lesiit, JJ.A) issued and dated 22nd September 2023 in Civil Appeal No. E029 of 2021)*

**RULING**

1. Before me is a notice of motion dated 10<sup>th</sup> September 2024 filed by Zain Abubakar Mohamed Alzubidi pursuant to sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 4 and 49 of the Court of Appeal Rules, 2022. Through the application, the applicant is mainly seeking leave to file an



appeal against the judgment of this Court out of time and stay of execution pending the hearing and determination of the intended appeal. However, pursuant to rule 55 (1) of this Court's Rules, 2022, my jurisdiction, sitting as a single Judge, is limited to addressing the prayer seeking extension of time for filing a notice of appeal.

2. In the motion, the applicant seeks enlargement of time to file an appeal against the decision of this Court (Gatembu, Nyamweya, & Lesiit, JJA) as rendered on 22<sup>nd</sup> September 2023 in Civil Appeal No. E029 of 2021. The application is premised on the grounds adduced in the application and the averments made in the supporting affidavit sworn by the applicant. In summary, it is the applicant's deposition that the delay in lodging the appeal was caused by the applicant's erstwhile counsel, who failed to honour instructions to file an appeal against the judgment intended to be appealed. It is averred that the intended appeal raises triable issues and that the respondents will not be prejudiced if the order sought is granted.
3. The 1<sup>st</sup> respondent filed a replying affidavit sworn on 26<sup>th</sup> September 2024 by Vitalis Muthoka through which it was averred that the application is not prejudicial to the 1<sup>st</sup> respondent.
4. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the application through a replying affidavit sworn by Mohamed Madhbuti on 6<sup>th</sup> November 2024. Through the affidavit, it is averred that the applicant herein was not an appellant but a respondent in Civil Appeal No. E029 of 2021 and having not filed a cross-appeal in that appeal, he cannot bring the present application. It is also deposed that the application is incompetent for want of a proper Notice of Appeal under rule 36 of the Supreme Court Rules and that rule 4 of this Court's Rules under which the application has been brought is inapplicable in the circumstances. Another ground advanced in opposition to the application is that the application for extension of time has been brought without certification that the intended appeal meets the conditions for adjudication of the same by the Supreme Court.
5. When the application came up for hearing on 21<sup>st</sup> November 2024, learned counsel, Mr. Munyua appeared holding brief for Dr. Arwa for the applicant. Learned counsel, Mr. Sundeep Sarvia was present for the 10<sup>th</sup> respondent while learned counsel, Ms. Kimwele appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. There was no appearance for the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents and apart from the 1<sup>st</sup> respondent, none of these respondents had responded to the application.
6. Mr. Munyua relied on the written submissions dated 15<sup>th</sup> November 2024 to urge the applicant's case. Even though learned counsel urged the application for extension of time and the application for stay of execution in the submissions, I will not reproduce the submissions concerning the application for stay of execution for the reason already stated. Learned counsel reiterated the applicant's right of appeal in the present case. He referred to Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another [2015] eKLR and the Black's Law Dictionary, 8<sup>th</sup> Ed. 2004 in support of the proposition that once a party is aggrieved by a judgment, the right of appeal crystallizes. In response to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' averment that a notice of appeal cannot be filed without certification, learned counsel submitted that an application seeking an extension of time to file an appeal cannot be defeated by a failure to pursue certification. According to counsel, an order of certification without leave to appeal out of time would have no significance if the time to appeal was not extended. Counsel for the applicant referred to the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR to highlight the guiding principles for extending the time for lodging an appeal. In explaining the delay, counsel submitted that the same was a result of the applicant's previous counsel's failure to lodge the appeal despite the applicant's explicit instructions. Counsel submitted that the mistake of counsel should not be visited upon the applicant and that as a litigant, the applicant was not aware of the failure of the previous counsel to comply with



the rules. Counsel urged that the respondents will not be prejudiced if the leave sought is granted. Counsel reiterated that the reasons advanced by the applicant were reasonable and satisfactory. He urged the Court to allow the application.

7. Learned counsel, Mr. Sundeep Sarvia did not file any written submissions. He informed the Court that the 10<sup>th</sup> respondent supported the application.
8. Similarly, learned counsel, Ms. Kimwele for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any submissions. Counsel reiterated the contents of the replying affidavit dated 6<sup>th</sup> November 2023 and urged the Court to consider the averments on lack of jurisdiction and dismiss the application on that ground.
9. In my view, the question of the jurisdiction of this Court to entertain the instant application comes to the fore. The applicant has annexed a notice of appeal dated 15<sup>th</sup> August 2024 filed under rule 77 of this Court's Rules, 2022. The intended appeal is against a judgment of this Court and will therefore be prosecuted before the Supreme Court. In that case, the applicable rule regulating the lodging of the notice of appeal is rule 36 of the Supreme Court Rules. Perhaps a rehash of the Supreme Court's dictum in *Sirikwa Squatters Group vs. Fanikiwa Limited & 20 Others* [2024] KESC 23 (KLR) affirms this point thus:

“The *Supreme Court Act* and the Supreme Court Rules, 2020 provide the substantive and procedural law for this Court. There is no basis therefore to rely on other laws unless expressly provided for, and unless there is a lacuna.”

10. Having found that the applicable law for filing a Notice of Appeal in respect of an intended appeal to the Supreme Court is the Supreme Court Rules, I am of the considered opinion that it is not within my jurisdiction to determine whether a Notice of Appeal can be validly filed before the Supreme Court prior to certification that the intended appeal is on a matter of general public importance. Even as I decline the invitation by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to speak to the validity or otherwise of the Notice of Appeal, I will refer the parties to rule 36 (4) of the Supreme Court Rules which provides that:

“In lodging an appeal on a matter of general public importance, it shall not be necessary to obtain such certification before filing the notice of appeal.”

They may also want to see the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR on the issue. I will say no more on this aspect of the submissions.

11. Turning to the prayer for extension of time, the relevant provision is rule 15 (2) of the Supreme Court Rules, which provides as follows:

“The Court may extend the time limited by these Rules or by any decision of the Court.”

Reading the above provision in consonance with rule 2 and section 2 of the *Supreme Court Act*, there is no doubt that the word “Court”, as used in rule 15 (2) above, refers to the Supreme Court of Kenya as established under Article 163(1) of *the Constitution*. It is a well-established principle of law that jurisdiction is derived either from *the Constitution* or statute. The jurisdiction to extend time, in this instance, is reserved for the Supreme Court.

12. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* (supra), while dealing with the import of rule 53 of the repealed Supreme Court Rules, 2012, which is what was replicated in rule 15 of the current Supreme Court Rules,



determined that the power to extend time indeed belonged to the Supreme Court. In that regard, the Supreme Court stated that:

“Hence, this Court by virtue of rule 53 of the Supreme Court Rules has discretionary powers to extend time within which certain acts can be undertaken. This can be perceived by the use of the word “may” in crafting of the rule.” (Emphasis supplied)

13. Perhaps it is also important to point out that unlike section 7 of the *Appellate Jurisdiction Act*, which empowers the High Court to extend the time for giving notice of the intention to appeal to this Court (Court of Appeal), the *Supreme Court Act* does not have a similar provision bestowing such power upon the Court of Appeal. I did pointedly ask counsel for the applicant and the 10<sup>th</sup> respondent to address me on the issue of my jurisdiction to extend the time for filing a Notice of Appeal in respect of an intended appeal to the Supreme Court. They submitted that they were relying on rule 4 of this Court of Appeal Rules, 2022 and the fact that the Notice of Appeal in respect of an intended appeal to the Supreme Court is filed before this Court. Considering that I may have gotten counsel off guard on the issue of the jurisdiction of this Court to hear and determine the application for extension of time for filing an appeal in the Supreme Court, I gave counsel for the applicant 3 days to file and serve supplementary submissions on the issue but by the time of writing this ruling, almost 3 weeks after the hearing of the application, no supplementary submissions had been filed.
14. Nevertheless, my curiosity was piqued by the submission that this Court has jurisdiction by virtue of the fact that the notice of appeal is filed in this Court. I therefore turned to rule 36 (2) (b) of the Supreme Court Rules which provides that the Notice of Appeal should be “filed at the first instance with the Registrar of the Court, or with the tribunal from which an appeal originates.” In rule 2 of the same Rules, an appeal “includes an intended appeal from the Court of Appeal or any other court or tribunal exercising original jurisdiction.” A strict reading of rule 36 (2) (b) would therefore mean that a Notice of Appeal can only be filed before the Supreme Court or a tribunal and not this Court. However, I will not lay any emphasis on this point, as it is not an issue for determination in the instant application. Whatever the case, even if a Notice of Appeal in respect of an intended appeal to the Supreme Court can be filed in this Court, that alone does not grant me jurisdiction to enlarge time. Therefore, the discretionary relief that the applicant seeks is one, which in my view, I have no power to grant.
15. From the foregoing discussion, the fate of this application is not in doubt. It is for dismissal for the reason that this Court lacks jurisdiction to extend time for filing a Notice of Appeal in respect of an intended appeal to the Supreme Court from the decision of this Court. The motion is therefore dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2024.**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

**W. KORIR**

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**JUDGE OF APPEAL**

