



**Madara & 2 others v Chite & another (Civil Application E057 of 2024)
[2024] KECA 1805 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1805 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E057 OF 2024
WK KORIR, JA
DECEMBER 20, 2024**

BETWEEN

**JAMES NYAMWATA MADARA 1ST APPLICANT
JANMA GROUP OF COMPANIES 2ND APPLICANT
JANMA LTD 3RD APPLICANT**

AND

**GEORGE STEPHEN CHITE 1ST RESPONDENT
AZAN MOTORS LTD 2ND RESPONDENT**

*(Being an application for leave to file an appeal out of time against
the judgment and decree of the High Court at Mombasa (K. Magare,
J.) dated 24th October 2023 in Civil Appeal No. 111 of 2022)*

RULING

1. The matter which is the subject of the instant application commenced before the Chief Magistrate's Court at Mombasa, where on 7th July 2022, a judgment for Kshs.1,530,000.00 plus costs was entered in favour of the respondents. The applicants preferred an appeal to the High Court, which was dismissed by Magare, J. in a judgment delivered on 24th October 2023, in Mombasa High Court Civil Appeal No. 111 of 2022. The applicants are once again desirous of pursuing their right of appeal but have faced the challenge of lapse of time.
2. Through a notice of motion dated 28th May 2024 filed pursuant to sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rule 4 of this Court's Rules, the applicants seek an order enlarging the time for filing a Notice of Appeal against the judgment of the High Court. They also seek an order to deem as duly filed a draft Notice of Appeal that they have annexed to the application.



3. The applicants' case is that they only learned of the delivery of the judgment of the High Court when they were served with a proclamation notice dated 23rd February 2024. It was then that they moved to the High Court through the notice of motion dated 6th March 2024 seeking leave to appeal out of time. The application before the High Court was later withdrawn on 17th April 2024, paving way for the present application. In the affidavit in support of the application, the 1st applicant restates the aforesaid history and adds that the present application has been brought without undue delay, that the intended appeal has high chances of success, and that the respondents will suffer no prejudice if time is enlarged.
4. The 1st respondent filed a replying affidavit in opposition to the application. It is his averment that the application is an afterthought meant to deny him the fruits of a judgment already entered in his favour. He rehashed the historical background of the dispute from the trial court all the way to the present application. According to the 1st respondent, the applicants have neither tendered any plausible explanation for the delay in filing the appeal nor offered any security. He prays that the application should be dismissed with costs.
5. The 2nd respondent had not filed any response by the time the application was heard on 21st November 2023. The applicants and the 1st respondent had, however, filed their written submissions.
6. For the applicants, the submissions were dated 8th July 2024, wherein counsel commenced by referring to the case of *Paul Wanjobi Mathenge vs. Duncan Gichane Mathenge* [2013] eKLR in appreciation of the discretionary nature of the Court's jurisdiction under rule 4 of this Court's Rules. Counsel proceeded to reiterate the grounds in support of the application and urged that there were legitimate reasons for the delay and that the intended appeal has high chances of success. Counsel cited *Sokoro Savings & Credit Corporation Society Ltd vs. Mwamburi* [2023] KECA 381 (KLR) and urged that the application be allowed in the interest of justice.
7. The firm of Ganzala & Ganzala Advocates filed submissions dated 9th July 2024, urging the 1st respondent's opposition to the application. Learned counsel likewise relied on *Sokoro Savings & Credit Corporation Society Ltd vs. Mwamburi (supra)* to identify the various factors to be considered in determining an application for extension of time. Counsel reiterated the grounds adduced by the 1st respondent in opposition to the application and submitted that no plausible reason had been offered for the delay of 8 months and that the 1st respondent would be prejudiced if the application were allowed.
8. I have considered the pleadings and the submissions of the parties who participated in the application. The main issue for determination in this application is whether the applicants have proffered satisfactory reasons to warrant the exercise of my discretionary jurisdiction to extend time under rule 4 of this Court's Rules, 2022. The Court in *Imperial Bank Limited (In Receivership) & Another vs. Alnashir Popat & 18 Others* [2018] eKLR, laid down some of the factors to be considered in such an application 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. In taking into account the last



consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal...

The above catalogue of considerations is not closed and it possibly cannot be, because exercise of discretion also depends on the circumstances of each case, which human experience tells us differ from case to case. A closed catalogue of considerations would, in any event, be the very antithesis of unfettered discretion.”

9. Applying the stated principles to the instant application, the questions to be answered are whether the applicants have satisfactorily explained the delay in filing the Notice of Appeal and whether the 1st respondent will suffer any prejudice in the event leave to appeal out of time is granted.
10. The judgment the applicants intend to appeal was delivered on 24th October 2023 while the present application is dated 28th May 2024. Under Rule 77 (2) of the Court of Appeal, 2022, the applicant was required to file the Notice of Appeal by 7th November 2023. The delay is therefore approximately 6 months. In explaining the delay, the applicants have advanced two reasons, first, that the judgment was delivered without notice to them, and second, that they erroneously filed an application for extension of time before the High Court, which they had to withdraw before lodging the present application.
11. The respondents have not disputed the averment that the impugned judgment was delivered without notice to the applicants. The notice the 1st respondent refers to in the replying affidavit was the one issued in respect of the delivery of the judgment before the Magistrate’s Court. That being the case, the delay running up to 23rd February 2024, when the applicants are deemed to have known of the judgment, is excusable. However, as was held by the Supreme Court in County Executive of Kisumu vs. County Government of Kisumu & 8 Others [2017] eKLR, the whole period of delay should be declared and sufficiently explained.
12. The question that remains unanswered is whether the applicants have tendered satisfactory explanation for the delay between 23rd February 2024, when they knew of the judgment, and 28th May 2024, when the instant application was filed. The applicants aver that during this period, their counsel moved the High Court for leave to appeal out of time, but along the way, the application was withdrawn, and the present one filed. From the averment, it appears that the applicants were under the mistaken belief that they were before the wrong forum and that the High Court was bereft of jurisdiction to enlarge time for filing a Notice of Appeal in respect of an intended appeal to this Court. However, pursuant to section 7 of the Appellate Jurisdiction Act, and as was held in Trimborn Agricultural Engineering Limited vs. David Njoroge Kabaiko & Another [2000] KECA 419 (KLR), the High Court is clothed with jurisdiction to hear and determine an application for extension of time for filing an appeal to this Court. Be that as it may, it is my view that the erroneous withdrawal of the application before the High Court was the mistake of counsel and there is no reason why that mistake should be visited upon the applicants. In stating so, I associate myself with the holding in Itute Ingu & Another vs. Isumael Mwakavi Mwendwa [1994] eKLR that a bona fide mistake can be excused.
13. Additionally, I note that since becoming aware of the judgment, the applicants have been busy in the corridors of justice in pursuit of an opportunity to exercise their right of appeal. The applicants did not go to slumber but were knocking every door to gain access into the appellate space which access had been shut due to the lapse of time. In the circumstances, I am inclined to accept the reasons advanced for the delay in filing the Notice of Appeal.
14. As to whether the respondents would be prejudiced were the application to be allowed, I note that the only likely prejudice identified by the 1st respondent is that he will be denied an opportunity to execute



the judgment. Perhaps, in this regard, the 1st respondent will find solace in rule 5(2) of this Court's Rules, which provides that the institution of an appeal does not stay execution.

15. From the following analysis, it follows that the notice of motion dated 28th May 2024 is for allowing and is hereby allowed. The applicants' draft Notice of Appeal shall be deemed to have been duly filed upon the payment of the requisite court fees within 7 days from the date of delivery of this ruling. The time for doing all the other activities consequent to the filing of a Notice of Appeal shall be as per the rules of this Court. The costs of this application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

