



Koome & 2 others v Kenya Tea Development Agency Holdings Limited & 3 others (Civil Application E117 of 2024) [2024] KECA 1873 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KECA 1873 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E117 OF 2024
A ALI-ARONI, JA
DECEMBER 19, 2024**

BETWEEN

**ASHFORD KOOME 1ST APPLICANT
GIBSON BUNDI 2ND APPLICANT
PATRICK MUTHURI 3RD APPLICANT**

AND

**KENYA TEA DEVELOPMENT AGENCY HOLDINGS LIMITED 1ST
RESPONDENT
KTDA MANAGEMENT SERVICES LIMITED 2ND RESPONDENT
KIONYO TEA FACTORY COMPANY LIMITED 3RD RESPONDENT
GREENLAND FEDHA LIMITED 4TH RESPONDENT**

(Being an application for leave to file a notice of appeal out of time from the Ruling of the High Court at Meru (E.M. Muriithi, J.) delivered on 31st October 2024 in HCCC No. 34 of 2019)

RULING

1. Before the court is a notice of motion dated 21st November 2024 brought under Articles 159(2)(d) & 164 of *the Constitution* of Kenya, 2010, sections 3A and 3B of the *Appellate Jurisdiction Act*; and rule 4 & 75 of the Court of Appeal Rules; seeking to file the notice of appeal against the judgment in HCCC No. 34 of 2019 out of time.
2. The application is predicated on the grounds on the face of the application stating that the applicant was under an innocent, albeit erroneous, impression that a notice of appeal ought to be filed within thirty (30) days from the date of the decision intended to be appealed against; that this application has been expeditiously brought upon learning otherwise; that the respondents will not be prejudiced



- in any way should the application be granted; that it is in the interests of justice that the application be allowed to enable the appellants appeal against the ruling of the High Court which is manifestly erroneous and unjust.
3. The application is further supported by the affidavit of the applicant in which he deposes that; this is a public interest suit touching on a number of issues affecting the tea industry and over 650,000 small-scale farmers throughout Kenya; that the said suit was struck out based on the sub-judice rule on 31st October 2024, pursuant to an interlocutory application by the respondents; one of the glaring errors in the ruling of the learned judge's finding is that as a resident of Murang'a County, the applicant ought to have sought to be enjoined in a similar suit that was earlier filed at the Murang'a High Court by the Murang'a County Government; yet it can be discernible from the pleadings that the applicants are not residents of Murang'a County and neither are the issues raised in their suit similar to those raised in the Murang'a case; in addition the action of striking out the public-spirited litigation with costs is drastic; further the ruling was not delivered in the presence of the parties as indicated thereon but was sent via email which the 1st applicant opened two days later on 2nd October, 2024; the applicants were under an erroneous impression, albeit innocently, that a notice of appeal is to be filed within thirty (30) days from the date of the decision to be appealed against; that the applicants has just recently learnt in the course of a conversation with a lawyer friend that they ought to have filed the notice of appeal within fourteen (14) days hence they are about five (5) days outside time; that the applicants implore this Honourable Court to pardon their innocent mistake by extending the time in order to enable them file what they believe is a meritorious appeal; the applicants have acted diligently in bringing this application; and the respondents will not be prejudiced in any way if this application is granted.
 4. The application is opposed by a replying affidavit of George Mutwiri, the 2nd respondent's legal counsel, sworn on behalf of the 1st to 4th respondents. He deposes that; the application dated 21st November 2024 is frivolous, scandalous, vexatious, and a toto abuse and/or waste of this Honourable Court's time; the 1st applicant acknowledges that he was aware of the judgment date and that the same was sent to him in his email on 31st October 2024 but he only opened the same 2 days later; the excuse that the 1st applicant was not aware of the timelines within which to lodge a notice of appeal is neither here nor there, as ignorance of the law is not a defence; the instant application as filed is incompetent, frivolous and an abuse of the court process as there is no draft memorandum of appeal annexed thereto and therefore, this Honourable Court has no way of assessing whether the intended appeal raises any triable issues; that the respondents stand to suffer irreparable damage if the instant application is allowed noting that the trial court rightly observed that the applicant's suit was sub-judice, as there exists a similar suit in Murang'a over the same issues which is yet to be determined and thereby forcing the respondents to defend two similar matters; that the applicants does not stand to suffer any prejudice if the instant application is dismissed, since they can apply to be enjoined in HC Petition No. 36 of 2019 and ventilate there issues therein.
 5. The 1st applicant filed submissions dated November 30, 2020. He contends that he has been open with the court on his mistaken belief and demonstrated the intended grounds of appeal in the affidavit. In support of his submissions, he relied on the case of Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees[2020] eKLR, where an extension of time was granted in a matter on all fours with this one.
 6. Further the 1st applicant also relied on the case of Pothiwalla vs. Kidogo Basi Housing Co-operative Society & 31 Others [2005] eKLR, where the court echoed that an applicant seeking for an extension of time must satisfactorily explain the delay and that the delay must not be inordinate.



7. Counsel representing the 2nd & 3rd applicants filed submissions dated 1st December 2024 wherein it is submitted that their previous counsel misinformed them of the time within which to file a notice of appeal; that they have an arguable appeal as evidenced by paragraph 4 of the affidavit in support of the application and urge the court to exercise its discretion in their favour. In support of this argument, learned counsel equally relied on the case of Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustees (supra) to urge that the delay is only of 6 days, and the same has been sufficiently explained and that the suit is of public Interest.

8. Rule 4 of the Court of Appeal Rules provides as follows:

“The court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

In the case of Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees, Civil Application (supra), this Court stated as follows:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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.” (emphasis added)

9. Further, in the said case, the applicant was faced with a delay of 86 days, and Ouko J.A. (as he then was) had this to say:

“It is my view that apart from the fact that the applicant has been candid on why there has been delay in lodging and serving the notice of appeal, the period of delay itself was not inordinate in the strict meaning of the term. They took reasonable steps within the shortest time to convene a directors’ meeting before bringing this application.”

10. In the case of Imperial Bank Ltd (under receivership) vs. Alnashir Poppat & 18 Others [2018] eKLR, this Court had this to say on an extension of time; -

“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.” (emphasize added.)

11. As I exercise discretion donated by rule 4 of this Court’s Rules, I am minded that I should not do so whimsically or capriciously but based on the peculiar circumstances of the case, considering the cause of the delay, the period involved, the possible prejudice if any likely to be suffered by the other side and balancing the interest of both sides; where one party has a judgment that favours them and the other has a constitutional right to pursue an appeal, including the need to conclude cases timeously.
12. I am faced with applicants who are candid about the cause of the delay, which is a paltry five days. In as much as ignorance of the law is not a defence, the explanation given is excusable against other circumstances and too short to prejudice the respondents. The likely grounds of appeal have been enumerated in the affidavit to include an error in the findings of the trial judge that the applicants are residents of Murang’a and can be enjoined in a similar suit before the Murang’a High Court, whose issues are similar, yet they are not.
13. Against the above, I am inclined to allow the application as I find that a plausible, satisfactory, and honest explanation was given to the court in the circumstances, and the delay is certainly not inordinate. It has also not been demonstrated how a delay of less than a week would be prejudicial to the respondents.
14. The notice of appeal be lodged within the next 14 days and served within 7 days thereafter.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF DECEMBER, 2024.

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

