



**Ikanyi v Kenya Commercial Bank Limited (Civil Application  
30 of 2020) [2024] KECA 1766 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1766 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 30 OF 2020  
F SICHALE, JA  
DECEMBER 6, 2024**

**BETWEEN**

**DAVID NGETHE IKANYI ..... APPLICANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

*(Being an Application for Extension of Time to file an appeal against the Judgment of the High Court of Kenya at Nairobi (M.A Odera J), dated 16th October 2019 in (Milimani High Court Commercial & Tax Division Civil Suit No. 106 of 2014)*

**RULING**

1. By the motion on notice dated 7<sup>th</sup> February 2020, brought pursuant to the provisions of Rule 4 and 47 of the *Court of Appeal Rules*, David Ngethe Ikanyi (the applicant herein), has invoked the jurisdiction of this Court sitting as a Single Judge to grant the following orders:
  - “i. Spent.
  - ii. That upon hearing this application inter-parties, this honourable court be pleased to grant the applicant leave to lodge a Notice of Appeal out of time and file an appeal out of time against the judgment delivered on 16<sup>th</sup> October 2019, by the high court in Milimani HCCC Civil Suit No 106 of 2014.
  - ii. That upon grant of leave to file a notice of appeal out of time and file an appeal out of time, the draft Notice of Appeal, the Draft Memorandum and Record of Appeal lodged herein be deemed as duly filed upon payment of the requisite filing fees.
  - iii. That the costs of this application be provided for.”



2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Philip Chuma Mburu, counsel who has the conduct of this matter on behalf of the applicant who deposed inter alia that the impugned judgment was delivered on 16<sup>th</sup> October 2019.
3. That, upon the close of the defence case, Sewe J who was handling the matter was transferred to another station, judgment having not been delivered and upon following up with the registry, counsel was advised that the same would be delivered on notice.
4. He further deposed he made several follow ups with the registry as to when the judgment would be delivered to no avail and it was not until January 2020, that he contacted the respondent's advocate who informed him that judgment had been delivered in October 2019.
5. He thus deposed that the delay in filing the intended appeal was not intentional as he was never aware that judgment had been delivered and that further the applicant had a meritorious appeal with high probability of success as per the annexed Draft Memorandum of Appeal.
6. The motion was opposed vide a replying affidavit sworn on 30<sup>th</sup> June 2022, by Fredrick Ochwa, counsel who has the conduct of this matter on behalf of the respondent who deposed inter alia that it was misleading for the applicant to allege that they were never served with a notice of delivery of judgment as the court had on 11<sup>th</sup> October 2019, served both parties with a notice of delivery of judgment and that further, the matter was last in court on 12<sup>th</sup> March 2019, for mention to confirm filing of submissions and that during the said date, the parties were present and the court directed that it would deliver judgment on notice.
7. He thus deposed that the delay in filling the Notice of Appeal had not been sufficiently explained.
8. He further deposed that the applicant had failed to demonstrate that he had an arguable appeal as the Draft Memorandum of Appeal raised general grounds of appeal and did not address specific issues to be taken on appeal.
9. The applicant did not file submissions despite being served with a copy of the hearing notice on 4<sup>th</sup> September 2024.
10. It was submitted for the respondent that the assertion by the applicant that he did not know the date of the judgment was misleading, as the court issued notices to the parties as to when the judgment would be delivered and that further, the matter was last in court on 12<sup>th</sup> March 2019, for confirmation of filing of submissions where both parties were present and that a diligent litigant more so the plaintiff (the applicant herein), would have constantly followed up with the court as to when the judgment would be delivered which the applicant did not do, only to resurface 1 year later enquiring from the respondent's advocate as to whether judgment had been delivered.
11. Regarding prejudice, it was submitted that this matter has been in court since the year 2014 and that judgment was finally rendered in 2019, exonerating the respondent from any wrongdoing and that further, the applicant got judgment against the 2<sup>nd</sup> respondent and the court had already ordered compensation for any loss that he may have suffered.
12. Consequently, it was submitted that the motion was unmeritorious and I was urged to dismiss the same with costs to the respondent.
13. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the respondent's submissions, the cited authorities and the law.



14. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not have now taken a well beaten path. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion the Court should do so judiciously.
15. See *Mwangi v Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (Civil Application No Nai 255 of 1997 (unreported), the Court expressed itself thus;

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are; first the length of the delay, secondly, 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.”
16. In the instant case and as regards the length of the delay, it is indeed not in dispute that the impugned judgment was delivered on 16<sup>th</sup> October 2019, whereas the instant motion is dated 7<sup>th</sup> February 2020. There has therefore been a delay of about 4 months, which delay in my view is not inordinate/unreasonable for reason (s) that I will allude to shortly.
17. Turning to reason (s) proffered for the delay, the applicant asserted that the same was due to the fact that judgment was to be delivered on notice and in the instant case, no notice was ever served on his advocates and consequently judgment was delivered in their absence and it was not until January 2020. that they became aware of the same upon enquiring from the respondent’s advocates.
18. I have considered the reason given for the delay and I consider the same to be reasonable/plausible for the following reasons; first of all whereas the notice for delivery of judgment dated 9<sup>th</sup> October 2019, appears to bear the respondent’s advocates stamp acknowledging the same, the same is not replicated as far the applicant’s advocates are concerned. It is therefore doubtful as to whether the applicant’s advocates indeed received the said notice for delivery of judgment.
19. Additionally, the applicant has contended that he has been out of the country for some-time, a fact that the respondent has not controverted.
20. Ultimately therefore, I am of the considered opinion that the delay herein has been sufficiently explained to the satisfaction of this Court.
21. As to the arguability or otherwise of the intended appeal, it would not be in my place to determine the same sitting as a Single Judge and I will therefore not delve further into this issue.
22. Finally on prejudice, the respondent has not even attempted to demonstrate to this Court the prejudice that they would suffer if the instant motion were to be allowed. To the contrary, if the same is allowed, both parties will have their day in Court and they will have the opportunity to ventilate their respective positions before the Court.
23. The totality of my findings therefore is that that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time within which to file the intended appeal.



24. Accordingly, the applicant’s motion dated 7<sup>th</sup> February 2020, is merited and the same is hereby allowed as prayed. The applicant shall proceed to file the intended appeal within a period of 30 days from the date of this ruling failure to which these orders shall stand vacated.

25. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024.**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

