



**Kenya National Highways Authority v Motrex Limited & 6 others (Civil Appeal (Application) E024 & E025 of 2024 (Consolidated)) [2024] KECA 1758 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KECA 1758 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E024 & E025 OF 2024 (CONSOLIDATED)**

**JW LESSIT, JA  
DECEMBER 6, 2024**

**BETWEEN**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPLICANT**

**AND**

**MOTREX LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MDALU MRABU MDAU ..... 2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY ..... 3<sup>RD</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE'S COURT MARIAKANI ... 4<sup>TH</sup> RESPONDENT**

**THE DIRECTOR PUBLIC PROSECUTIONS ..... 5<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
CIVIL APPEAL (APPLICATION) E025 OF 2024**

**BETWEEN**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPLICANT**

**AND**

**MOTREX LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**WILLY WAWERU NGIGI ..... 2<sup>ND</sup> RESPONDENT**

*(Applications for leave for extension of time and for the admission of the Notice of Appeal out of time from the Judgment of the High Court of Kenya at Mombasa (Sewe, J.) dated 1st February 2024 in H. C. Petition Case No. 39 of 2024 and H. C. Petition Case No. 40 of 2024)*



## RULING

1. I have consolidated these two applications because, even though they arise from two different judgments, the parties are the same save for the 2<sup>nd</sup> respondents who are drivers of different vehicles belonging to the 1<sup>st</sup> respondent. Further, even though two vehicles were involved, whereby the applicant detained them for offences touching on the weigh bridge; the circumstances leading to the detention of the vehicles in each suit were similar. The judgments intended to be appealed are similar and the final disposition and final orders are exactly the same. The final point why I decided it was prudent to consolidate the two cases is the fact that the supporting affidavits and the replying affidavits in both cases are by the same persons and are similar in content. There was no need therefore to write different rulings in these two matters.
2. What I am being asked to do in these applications is to grant leave to the applicant to file notice of appeal out of time and to deem the notice of appeal filed on the 12<sup>th</sup> March 2024 as properly on record. The applications are brought pursuant to rules 1(2), 4, 42(1) and 43(1) of the Court of Appeal Rules (the Rules) and other enabling provisions of the law.
3. The factors that the Court has to consider in an application of this nature are well settled. The power of the Court to extend time is essentially discretionary. The Court has to consider the length of the delay, the reason of the delay among others. There are a plethora of cases that give guidelines. The Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR laid down the principles that govern the exercise of discretion in applications of extension of time as follows:
  3. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
4. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
  1. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
  2. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
  3. Whether there will be any prejudice suffered by the respondents if the extension is granted.
  4. Whether the application has been brought without undue delay; and
  5. Whether in certain cases, like election petitions, public interest should be consideration for extending time.”
4. The applicants deposed that the judgment sought to be appealed was delivered on the 1<sup>st</sup> February 2024; that the notices of appeal were lodged on 12<sup>th</sup> March 2024; that the letter be-speaking the proceedings was dated 11<sup>th</sup> March, 2024 and was served upon the respondents; and that the judgment was obtained on the 20<sup>th</sup> February 2024.
5. In the supporting affidavit in each application as sworn by Ms. Brenda Rao, counsel for the applicant sworn of even date as the application, counsel deposed that the delay in the filing of the notice of appeal was caused by the delay in obtaining the judgment in order to advice the applicant; further that the reason for the delay was a technical hitch as once the judgment in the case was delivered, the e-portal



was de-activated showing that the file was closed making it difficult to obtain the judgment. Counsel deposed that the delay was not intentional, neither was it deliberate. She also deposed that the applicant had a good appeal with high chances of success.

6. Mr. Iqbal Ahmed Bayusuf has sworn a replying affidavit in response to each application dated 14<sup>th</sup> April 2024 opposing the applications on grounds the delay involved in each case was inordinate and inexcusable having been filed 40 days after

the delivery of the judgment; that the letter bespeaking proceedings was dated one day before the notices of appeal was filed. The deponent also challenged the supporting affidavits in each case as being incompetent having been sworn by counsel without the authority of the applicant, yet it deposed to contentious issues between the parties.

7. I have considered the applications, the affidavits filed for and against the applications, and the submissions by counsel. The first consideration I make is the length of the delay. Judgment was delivered on the 1<sup>st</sup> of February 2024 while the notice of appeal was filed on 12<sup>th</sup> March 2024. Rule 77 of the Rules prescribes as follows:

77. Notice of appeal

1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.”

8. The applicant should have filed its notice of appeal within 14 days of the date of the judgment intended to be appealed. 14 days from 1<sup>st</sup> February was 15<sup>th</sup> February, the notice was not filed until 12<sup>th</sup> March, 2024. That was 26 days out of time

9. As to the explanation offered by the applicant for the delay, counsel for the applicant deposed that the applicant first

waited for the judgment to enable them make an informed decision. An applicant need not wait for the judgment before filing a notice of appeal. However, given the explanation that it was needed to enable the applicant make an informed decision, the wait was in the circumstances understandable.

10. I have also considered the prejudice each party stands to suffer. The applicant has an undisputed right of appeal and denying them the order sought will deny them that right. The respondents on the other hand were not specific as to the exact prejudice they stand to suffer. I also read the judgment of the superior court. The final orders made was a declaratory order and a monetary award. I am satisfied that the respondent does not stand to suffer as much prejudice as the applicant would if the orders sought are declined.

11. The 1<sup>st</sup> respondent has challenged the affidavit sworn in support of the application by the counsel contending that the affidavit swore to contentious issues between the parties, and that it was better that the applicant themselves swore to the issues.

“Rule 9 of the Advocates (Practice) Rules states:

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or



by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence

whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

12. The issue is whether the affidavit swore to contentious issues. I have considered the affidavit and find that the counsel swore to facts that were formal and within her personal knowledge as counsel for the applicant. There was nothing contentious in the issues discussed in the affidavit. I find no merit to the challenge raised over the supporting affidavit.
13. Having carefully considered these applications, I find that the delay involved in these cases was not inordinate. I am also satisfied that the reasons advanced for the delay were reasonable and acceptable. Further upon balancing the interest of the parties in the application, I am persuaded that the respondents do not stand to suffer prejudice. Finally, I have looked at the memorandum of appeal annexed to the applications. I find that they raise pertinent issues that would require the Court to determine on appeal.
14. Finally, I do find merit in this applications and order as follows:
  1. The applications dated 12<sup>th</sup> March 2024 are allowed;
  2. Leave be and is hereby granted to the applicant to file notice of appeal out of time;
  3. The notice of appeal filed in each respective application on the 12<sup>th</sup> March 2024 be and are hereby deemed to be properly on record;
  4. The applicant shall file and serve the notice of appeal dated 12<sup>th</sup> March 2024 within 21 days of the date of this ruling;
  5. The costs of this applications shall abide the outcome of the appeals.

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

**J. LESIIT**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**Deputy Registrar**

