



REPUBLIC OF KENYA



KENYA LAW
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**Macharia v Omuka (Civil Application E443 of 2022)
[2023] KECA 194 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 194 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E443 OF 2022
KI LAIBUTA, JA
FEBRUARY 17, 2023**

BETWEEN

OSBORNE MACHARIA APPLICANT

AND

KEVIN ABRAHAM OMUKA RESPONDENT

(Being an application for extension of time to lodge a Notice of Appeal out of time, against the Ruling and Orders of the High Court of Kenya at Nairobi (D.O. Chepkwony, J.) dated 26th July 2022 in H.C.C.C No. E206 of 2020)

RULING

1. The applicant, Osborne Macharia, seeks extension of time pursuant to rule 4 of this Court's Rules to lodge a notice of appeal; and orders that the Memorandum of Appeal attached to his Notice of Motion dated 28th November 2022 be deemed as duly filed. The application is supported by his annexed affidavit notarised in Canada on 23rd November 2022.
2. The grounds on which the application is made are that the impugned ruling was delivered on 26th July 2022 without notice; that he became aware of the ruling on 28th October 2022 and filed the notice on 25th November 2022; that the 14 days period within which he ought to have lodged his notice of appeal had lapsed; that if the orders sought are not granted, he stands to suffer irreparable loss; and that the delay in lodging his notice of appeal was not deliberate. According to the applicant, his counsel, M/s. Nzamba Kitonga Advocates LLP, "physically tried to trace the lower court's file with intent of getting a copy of the ruling with no success."
3. In his further affidavit sworn on 14th December 2022, the applicant further depones that his advocates had applied for a copy of the ruling on 29th June 2022 prior to its delivery on suspicion that the same might have been delivered earlier.



4. M/s. Nzamba Kitonga Advocates filed written submissions and bundle of authorities dated 19th December 2022 in support of the applicant's Motion. Counsel cited 8 authorities, including *Leo Sila Mutiso vs. Rose Helen Wangari Mwangi* [1999] 2 EA p.231; *Fakir Mohamed vs. Joseph Mugambi and 2 Others* [2005] eKLR and *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees* [2020] eKLR highlighting the guiding principles in applications for extension of time under rule 4 of this Court's Rules.
5. The respondent, Kevin Abraham Omuka, opposes the Motion vide his replying affidavit sworn on 5th December 2022 in which he depones that the ruling date was communicated to the parties by the court via email and SMS; that, when the ruling was scheduled for delivery on 26th July 2022, learned counsel Miss Karuri was present in court holding brief for Mr. Weche for the applicant; that the 5 months delay in lodging the notice of appeal was an afterthought; that the inordinate delay has not been satisfactorily explained; that the applicant has been indolent, and only rushed to file this application after he was served with the related court order; and that the applicant has not explained what loss he is likely to suffer if his application is declined.
6. Opposing the Motion, counsel for the respondent filed written submissions and list of 4 authorities dated 6th February 2022. On the authority of *Vishva Store Suppliers Company Limited vs. RSR* [2006] eKLR, counsel highlighted the principles that, to merit extension of time, the applicant must give satisfactory reason for the delay; that the application for extension of time must be made without delay; that the applicant must show that the intended appeal is arguable; and that the respondent would not be unduly prejudiced by the extension of time.
7. It is noteworthy that the applicant's Motion comes 5 months after delivery of the impugned ruling, which was delivered in the presence of counsel holding brief for his advocates; and that no plausible reason has been given for the delay which, in my view, was inordinate. It is curious that neither the applicant nor his counsel has contradicted the respondent's averment that a Miss. Karuri had held brief for the applicant's counsel when the ruling was delivered. While his intended appeal may be arguable, the applicant was indolent and undeserving of the Court's discretion under rule 4 (see: *Mohamed Shally Sese vs. Fulson Company Ltd and Another* [2006] eKLR). The applicant's statement that his advocates were looking for the court file without success does not hold in the absence of any written request to the Registrar in that regard. Moreover, nothing stopped learned counsel from lodging the requisite notice in good time as they sought to trace the court file.
8. Having carefully considered the applicant's Motion, the affidavits in support, the respondent's replying affidavit, and the rival submissions of the respective counsel, I form the view that the applicant has not approached this Court with clean hands (see: *John Njue Nyaga vs. Nicholas Njiru Nyaga and Another* [2013] eKLR) The record as put to me does not demonstrate that the applicant has taken any steps to obtain certified copies of the proceedings other than his letter of 26th June 2022 requesting for a copy of the impugned ruling. In view of the foregoing, I find that the applicant's Motion has not satisfied the guiding principles for exercise of this Court's discretion under rule 4. The same fails and is hereby dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023 DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

