



**First Community Bank Limited v Mohamud & another (Civil Application
E033 of 2023) [2023] KECA 367 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 367 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E033 OF 2023
KI LAIBUTA, JA
MARCH 31, 2023**

BETWEEN

FIRST COMMUNITY BANK LIMITED APPLICANT

AND

ABDIKADIR ARAB MOHAMUD 1ST RESPONDENT

MOHAMED ISSA BARE 2ND RESPONDENT

*(Being an application for extension of time to lodge an appeal out of time
against the Ruling and Orders of the High Court of Kenya at Nairobi
(M. W. Muigai, J.) dated 8th February 2021 in HCCC NO. 154 OF 2018)*

RULING

1. Before me is a Notice of Motion dated February 7, 2023 made under Rule 4 of the Court of Appeal Rules in which the Applicant First Community Bank Limited prays for: extension of time to file the intended appeal; in the alternative, the Court be pleased to consider the notice of appeal dated December 22, 2022 and the memorandum of appeal dated February 6, 2023 as duly filed ; and that the costs of the application be provided for.
2. The intended appeal is from the ruling and orders of the High Court of Kenya at Nairobi (M. W. Muigai, J.) dated February 8, 2021 in HCCC No. 154 of 2018.
3. The Motion is supported by the annexed affidavit of Amran Abdikadir, the applicant's legal officer, sworn on February 7, 2023. The application is also made on the following grounds set out on the face of the Motion, namely: that the impugned ruling was delivered on February 8, 2021 in determination of the respondents' application for review dated October 28, 2020; that the impugned ruling and orders caused the applicant gross prejudice in the nature of a colossal sum of KShs. 16,000,000 being the purchase price of four (4) units received from the highest bidder at the auction conducted on September 2, 2020; that the purchaser of the four units now demands refund of the purchase price;



that the intended appeal is not frivolous; and that it is in the interest of justice that the applicant be granted leave to file the intended appeal out of time. According to Amran Abdikadir, the delay in filing the intended appeal was occasioned by the applicant's decision to first apply for review of the impugned ruling, albeit unsuccessfully.

4. In support of the Motion, learned counsel for the applicant, M/s. Omusolo Mungai Advocates, filed written submissions and list of authorities dated February 23, 2023 citing the cases of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 others* [2013] eKLR and *Vishva Stone Suppliers Company Limited vs. RSR Stone (2006) Limited* [2020] eKLR highlighting the principles that guide this Court in determination of applications under rule 4 of the *Court of Appeal Rules*. They urged me to grant the orders sought.
5. In response to the applicant's Motion, learned counsel for the respondents, Mr. Kennedy Ochieng, filed a replying affidavit sworn on March 6, 2023. According to Mr. Ochieng, the applicant having applied for review of the impugned orders of February 8, 2021 cannot seek to appeal against those orders. Counsel cited the case of *Nicholas Kiptoo Arap Korir Salat (ibid)* and the High Court decision in *HA vs. LB* [2022] eKLR where the court correctly held that the options of review and appeal against a decision cannot be pursued concurrently or one after the other. He urged me to dismiss the applicant's Motion.
6. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to "... 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 ...," on such terms as it thinks just.
7. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that "the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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."
8. The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. In principle, the discretion is unfettered. In its celebrated decision, the Court observed:

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors."
9. The Applicant's prayer for extension of time to file an appeal is dependent on my findings on the following factors:
 - a. whether the intended appeal is arguable with a possibility of success;
 - b. the length of the delay, and whether such delay is inordinate;



- c. the reasons for the delay in filing the intended appeal; and
 - d. whether the Respondent would be unduly prejudiced by extension of time as sought.
10. With regard to the requirement that the applicant demonstrates that it has an arguable appeal, it is noteworthy that it has neither annexed a draft memorandum of appeal to its Motion nor alluded to what it considers to be advanced as the grounds of the intended appeal. Accordingly, the applicant has failed to demonstrate that it has an arguable appeal with the likelihood of success. In the circumstances, I need not proceed to inquire into the length of the delay, the reasons for the delay, or whether the respondents stand to suffer prejudice on account of extension of time to file the intended appeal. In any event, having elected to apply for review of the impugned ruling on an application for review, the applicant lost its right of appeal as this Court has time and again explained .
11. It is noteworthy that the applicant preferred to apply for review of the ruling dated February 8, 2021 whereupon its application was dismissed on December 15, 2022. In my considered view, the applicant cannot be seen to turn around and prefer an appeal, and option it had previously abandoned in preference for review.
12. The Court of Appeal in *The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi* [2007] eKLR, when considering an application for extension of time to file a Notice of Appeal, held that:

“...the Board gave instructions that an application be filed for review of the ruling of Hayanga J made on 26th September, 2003. It is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances, we think, the options available to the Board were exhausted when the application for review was determined by the superior court and we doubt that the intended appeal would be valid even if it was filed.

An aggrieved party under Order XLIV of the *Civil Procedure Rules* can only apply for the review of a decree or order either where “no appeal has been preferred” or where “no appeal is allowed”. An appeal is allowed on orders made under Order 9A r 2 *Civil Procedure Rules*, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal is however only a formal notification of an intention to appeal and it cannot be said that the aggrieved party had “preferred” an appeal at that stage and was thus precluded from exercising the option of review.

... the Board was at liberty to pursue the option of review of the orders made on 26th September, 2003 despite the filing of a notice of appeal to challenge the same orders. We have no hesitation however in stating that upon the exercise of that option and pursuit thereof until its conclusion, there would be no further jurisdiction exercisable by an appellate court on the same orders of the court.”

13. Considering a similar application in *Gerald Kitbu Muchanje vs. Catherine Muthoni Ngare & another* [2020] eKLR, Asike Makhandia J.A also held that:

“The applicant was aggrieved by the judgment of the trial court. Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original



Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of Martha Wambui v Irene Wanjiru Mwangi & Another (2015) eKLR, the court stated that “From the above provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...” See also the case of Multichoice (K) Ltd V Wananchi Group (K) Ltd & 2 Others (2020) eKLR. This is exactly what happened here. Contrary therefore to the submissions by the applicant, the law on the issue is purely settled.”

14. As is the case here, the applicant preferred to seek review of the impugned ruling and, therefore, cannot turn around and seek to go on appeal against the same decision on account of dismissal of its application for review. In view of the foregoing, the applicant’s Notice of Motion dated February 7, 2023 is incompetent and is hereby dismissed with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 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

