



**Mohamed v Rubis Energy Kenya PLC (Civil Application  
E087 of 2022) [2023] KECA 351 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 351 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E087 OF 2022  
SG KAIRU, JA  
MARCH 31, 2023**

**BETWEEN**

**FUAAD MAHMOUD MOHAMED ..... APPLICANT**

**AND**

**RUBIS ENERGY KENYA PLC ..... RESPONDENT**

*(Being an application for extension of time to file a notice of appeal from  
the decision of the superior court in Kwale ELC No. 26 of 2021 (formerly  
Mombasa ELC No. 192 of 2019) (Dena, J.) dated 16th August 2022)*

**RULING**

1. In its judgment delivered on August 16, 2022, the Environment and Land Court (ELC) at Kwale (A E Dena, J), among other reliefs, awarded the applicant, who was the plaintiff in the suit ELC Case No 26 of 2021, Kshs 10,615,173 in respect of rent for May 2019 to April 2022 and ordered the respondent, which was the defendant, to return to him the original certificate of lease dated June 2, 2005 in respect of Title Number Kwale/Tiwi 2394.
2. The applicant is aggrieved by part of the judgment to the extent that his claim in respect of the unexpired period of the lease was dismissed. He intends to challenge the judgment on that basis. Under Rule 77(2) of the [Court of Appeal Rules 2022](#), the applicant was required to lodge a notice of appeal within 14 days from August 16, 2022. He should have done so by August 30, 2022 at the latest. He did not do so.
3. In his present application dated November 11, 2022 made under Rule 4 of the [Court of Appeal Rules](#), the applicant seeks an order for extension of time for filing and serving a notice of appeal. Learned counsel for the applicant Mr V Omollo in his written submissions which he orally highlighted before me on March 1, 2023 urged, citing the case of [Vishva Stone Suppliers Company Limited v RSR Stone \(2006\) Ltd \[2020\] eKLR](#), that the Court should exercise its unfettered discretion in favour of the



- applicant and that the respondent will not suffer any prejudice. There was no appearance for the respondent despite notice of hearing having been served on its advocates Daly & Inamdar Advocates.
4. Extension of time, as stated by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No 16 of 2014 [2014] eKLR* is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court. The Supreme Court expressed that a party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other considerations, that Court stated, include whether there will be prejudice suffered by the respondent if the extension is granted; whether the application is brought without undue delay; and public interest.
  5. Similarly, in *Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR* Waki, JA stated that:

“The exercise of this Court’s discretion under Rule 4... 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, (possibly) 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: See *Mutiso v Mwangi Civil Appl NAI 255 of 1997(UR)*, *Mwangi v Kenya Airways Ltd [2003] KLR 486*, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General Civil Appl NAI 8/2000 (UR)* and *Murai v Wainaina (No 4) [1982] KLR 38*.”
  6. In effect, although the Court has unfettered discretion under Rule 4 of the *Court of Appeal Rules*, that discretion should be exercised judicially. Each case must be considered on its own facts.
  7. In this case, the explanation offered by the applicant in his affidavit in support of the application is that, being not wholly satisfied with the judgment, he sought the opinion of a solicitor in the United Kingdom who advised him that he has an arguable appeal against the judgment in so far as it deprives him of any rentals in respect of the unexpired period of the lease and that he accordingly instructed his advocates to present this application.
  8. The applicant was represented by counsel before the ELC as he is also represented in this matter. He does not state when he sought the opinion of a solicitor or when such opinion was received. As already stated, judgment of the ELC having been delivered on August 16, 2022, the applicant had until August 30, 2022 to file a notice of appeal. The present application was filed on November 11, 2022. That is a delay of 42 days that is not explained. Without a satisfactory explanation of that delay, I have no material on which to peg the exercise of the Court’s discretion.
  9. The application fails and is dismissed with no orders as to costs as the respondent did not participate in the same.

**DATED AND DELIVERED AT MOMBASA THIS 31<sup>ST</sup> DAY OF MARCH 2023.**

**S GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

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

*Signed*



DEPUTY REGISTRAR

