



REPUBLIC OF KENYA



**Mokaya v Yehua & another (Civil Application E375 of 2021)
[2023] KECA 330 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 330 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E375 OF 2021
AK MURGOR, JA
MARCH 17, 2023**

BETWEEN

GEORGE CARROL MOKAYA APPLICANT

AND

BHAI YEHUA 1ST RESPONDENT

QUEST CIVIL ENGINEERING COMPANY LIMITED 2ND RESPONDENT

(An application for extension of time to file and serve the Memorandum of appeal and record of appeal out of time against the ruling and order of the High Court at Nairobi (J. Kamau, J.) delivered on 30th May 2019 in HC Civil Suit No. 256 of 2016.)

RULING

1. By a notice of motion dated October 18, 2021 brought pursuant to section 3A and 3B of the [Appellate Jurisdiction Act](#), rule 4 of the [Court of Appeal Rules](#) and article 159(2)(d) of the [Constitution](#), the applicant, George Carrol Mokaya, seeks for time to be extended to lodge and serve a memorandum and record of appeal.
2. The notice brought pursuant to the grounds on its face and an affidavit in support sworn by Beatrice Meso, counsel for the applicant, contended that on May 30, 2019, the applicant had instituted proceedings against the respondents claiming Kshs 4,700,000 and Kshs 390,000 being special damages for breach of contract; that the suit was undefended and the applicant filed a request for *ex parte* judgment to be entered against the respondents on April 24, 2017; that judgment was entered on May 26, 2017, and the matter thereafter set down for formal proof; that on May 30, 2017, the trial court dismissed the applicant's suit against the respondents, yet the matter was undefended; that dissatisfied with the ruling, the applicant filed and served a notice of appeal dated June 13, 2019 and requested for the certified typed proceedings which they served upon the respondents' advocates.



3. She contended that the deputy registrar of the trial court, informed the advocates that the certified typed proceedings were ready for collection upon payment of the requisite fees on February 20, 2020; that she collected the certificate of delay on July 30, 2021, only to learn from the certificate of delay that the proceedings had been available prior to the date of collection and that by the time the certificate was issued, the prescribed time for filing the appeal had lapsed.
4. It was further averred that the delay in collection of certified proceedings was out of the applicant's control, and that the delayed issuance of the certified proceedings, judgment and certificate of delay prevented the applicant from filing and serving the memorandum and record of appeal within the prescribed time; that they then filed the appeal, and later filed the certificate of delay through a supplementary record of appeal, since it was unclear how time in the certificate of delay was computed. For the purposes of ensuring substantive justice the applicant prayed for leave to file the memorandum and record of appeal out of time as she had an arguable appeal which ought to be determined on its merits; and that the respondents did not stand to suffer any prejudice if this application was allowed, since they never bothered to be part of these proceedings despite having variously been served with the pleadings.
5. Counsel invited the court to consider decisions in *Fakir Mohammed v Joseph Mugambi & 2 others* (2005) eKLR, *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and *Liberato Kivanga Manga v Prime Bank Limited* [2021] eKLR.
6. The respondents did not file any replying affidavit or written submissions, despite having been served with the hearing notice and directions by the deputy registrar of this court.
7. Under rule 4 of this *Court's Rules*, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – civil application No Nai 251 of 1997.
8. To begin with, it will be essential to compute the period of delay in seeking to file the memorandum and record of appeal. The applicant filed a notice of appeal on June 13, 2019 and claims to have thereafter filed the memorandum and record of appeal. But a careful consideration of the motion and supporting affidavit does not disclose when it was filed, if it was filed at all. As such, to ascertain the period of delay, I will rely on the date this motion was filed. Therefore, if the notice of appeal was filed on June 13, 2019, and this motion was filed on October 18, 2021, then the period of delay can be computed as 28 months.
9. Concerning the reason for the delay, the applicant's case is that the delay was occasioned by the failure of the deputy registrar of the trial court to issue them with the certificate of delay.
10. In this regard, a further consideration of the motion does not disclose that the applicant provided any copies of the essential documents usually relied upon in an application such as this, in particular, the impugned certificate of delay, referred to in his motion and the affidavit in support. Without such documents, I am unable to ascertain when the certificate of delay was issued to the applicant, how long it took to prepare the certified proceedings and judgment, when the proceedings were ready for collection, when the applicant was notified to collect the proceedings, when the proceedings were collected, or whether the period of delay was equivalent to the period taken to prepare the proceedings. I would add that, despite the complaint that the deputy registrar was responsible for the delay, there was nothing supportive of the allegations.



11. In the case of *Trade Bank Ltd In liquidation v LZ engineering Construction Ltd and another* civil appln Nai 282/98, this court observed;

“The inaction” which was being overlooked was a delay of nearly 3 months. We think it is now settled that where there is such a long delay or in action or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the applicants placed before the learned single judge no material upon which he could exercise his discretion.”

12. Clearly, besides the averments in the affidavit in support which are not supported by the crucial materials upon which I can rely to determine whether or not time should be extended, there is nothing upon which I can exercise my discretion to extend time. In brief, the applicant has not in any way explained why it took 29 months to file the memorandum and record of appeal.

13. In so far as the likely success of an appeal is concerned, once again the applicant has not annexed a copy of the judgment or a draft memorandum of appeal. I have therefore not been placed in any position to establish whether or not the appeal has any chances of success. Similarly, since the respondents have not participated in these proceedings, I am not able to ascertain one way or the other whether extending time to file the appeal will be prejudicial to them.

14. In sum, the applicant has failed to fulfil the threshold requirements necessary to satisfy a rule 4 application, as a consequence of which, I decline to exercise my discretion to extend time for filing of the notice of appeal, and accordingly dismiss the motion dated October 18, 2021. Since the respondents did not participate in this application, I make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

