



Director of Public Prosecutions v Mwiraria & 6 others (Criminal Application E007 of 2023) [2023] KECA 633 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KECA 633 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E007 OF 2023
MSA MAKHANDIA, JA
MAY 26, 2023**

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

DAVID MWIRARIA 1ST RESPONDENT
DAVE MUNYA MWANGI 2ND RESPONDENT
JOSEPH MBUI MACARI 3RD RESPONDENT
DAVID LUMUMBA ONYONKA 4TH RESPONDENT
RASHMI CHAMANLAL KAMANI 5TH RESPONDENT
DEEPAK KUMAR KAMANI 6TH RESPONDENT
INFOTALENT LIMITED 7TH RESPONDENT

(An application for extension of time to File Notice of Appeal dated 28th October 2022 out of time in an intended appeal from the Judgment of the High Court of Kenya at Nairobi (E.N. Maina, J.) dated 19th October, 2022 in Nairobi HC ACEC Revision No. E005 of 2021)

RULING

1. In the application dated February 10, 2023, the Director of Public Prosecutions “the applicant”, is seeking an order under rule 4 of the [Court of Appeal Rules](#), that this Court be pleased to extend time to enable the applicant to physically re-file the notice of appeal against the decision of the High Court of Kenya at Nairobi, Maina, J. delivered on October 19, 2022 in Nairobi HC ACEC Revision No. E005 of 2022.

In the alternative, it prays that, the notice of appeal dated October 28, 2022 be deemed to have been filed within time. There is also an antecedent prayer for an order that the Deputy Registrar of the High



Court Anti-Corruption Division in Nairobi be directed to accordingly lodge the said notice of appeal to enable service of the same.

2. The application is premised on the grounds on the face of the application and in the affidavit of Eva Kanyuira dated February 13, 2023. To wit, that the applicant was and is still dissatisfied by the decision of the High Court upholding the decision of the trial court, that the exhibits in the nature of MLA documents presented by the applicant in the trial court had to comply with the requirements of the Evidence Act, and or had to be certified. That the delay in filing the notice of appeal was occasioned by a technological hitch.
3. That the applicant had on November 1, 2022, filed a notice of appeal dated October 28, 2022 through its e-Filing platform, “the ODPP Uadilifu System”, which is linked to the Judiciary e-Filing portal, and through which the applicant had been filing its pleadings and other documents to the court. However, it transpired that the same had not been formally filed and accepted by the Judiciary portal as at February 3, 2023. The applicant reached out to the court registry to inquire the status of the said notice of appeal only to be informed that the same had not been filed. Although the applicant in an effort to show that he had filed the notice of appeal on time and had corresponded severally with the Registrar of this court over the issue, thought it wise and out of abundant caution to file the instant application to extend time within which to physically re-file the said notice of appeal.
4. The application is opposed by the 5th and 6th respondents who through their joint replying affidavit dated April 25, 2023 sworn by 6th respondent. He depones that the application is an afterthought as the matter has proceeded since the ruling set to be appealed was delivered. That the notice to appeal has never been served on the respondents and in any case the court documents are filed in the Judiciary e-filing system and not on Uadilifu system as alleged by the applicant. That on October 27, 2022 the applicant informed the court that it had no intention of appealing the decision and the case was fixed for hearing on 9th to January 13, 2023.
5. That the applicant thereafter closed its case and directions were given on the filing of submissions on no case to answer. In any event, the applicant had not explained why it had to wait for five months in order to follow up with their notice of appeal. That the respondents have suffered great prejudice by the pending case. It has been in the corridors of justice for the last eight years. That the 5th respondent resides in Dubai and has to travel to Kenya for both mentions and hearings hence allowing the application will be tantamount to sanction the abuse of the court process.
6. Upon the directions of this Court, the parties filed written submissions, which I have carefully read and considered. The applicants’ submissions are dated March 27, 2023 while the 5th and 6th respondents’ submissions filed by the firm of Ahmednasir Abdullahi are dated April 27, 2023. They all reiterate and expound on the grounds in support of the motion, affidavits in support and in opposition to the motion, which I need not rehash.
7. The principles applicable in an application for extension of time under rule 4 of the Court of Appeal Rules were stated by Waki, J.A in Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR as follows:

“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 vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai vs. Wainaina (No 4)* [1982] KLR 38.”

8. In the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others* [2014] eKLR, the Supreme Court of Kenya pronounced that: extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; extension of time is a consideration on a case to case basis; delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and, that public interest should be a consideration.
9. In the present case, the applicant states that the delay was occasioned by technological hitches, to wit, that it had on November 1, 2023, filed in time a notice of appeal dated October 28, 2023 through its e-Filing platform - the ODPP Uadilifu System. This system is linked to the Judiciary e-Filing portal, and through which the applicant had been filing its pleadings and other documents to in court. However, it transpired that the same had not been formally filed as at February 3, 2023. The applicant thereafter reached out to the court assistants within this court’s registry to inquire about the status of the said notice of appeal only to be informed that the same had not been filed. Although the applicant in an effort to show that he had filed the notice of appeal on time exchanged several correspondences with the Registrar, it thought it wise to file the instant application. The applicant exhibited to her supporting affidavit email exchanges with the Registrar of this court and the ICT officers.
10. The judgment of the High Court having been delivered on October 19, 2022, the notice of appeal should have been filed on or before 2nd of November, 2022. However, the same was discovered not to have been electronically filed by 7th of February 2023 when the applicant made a follow-up. That follow-up culminated in the filing of the instant application. It is apparent that the application was filed immediately after the applicant discovered that the notice of appeal it had thought had been electronically filed, was indeed not filed. The explanation for the delay given by the applicant is, in my view, credible and satisfactory. It is evident that the applicant did not just sit back and do nothing upon learning on February 7, 2023 that their notice of appeal had not been filed. It immediately mounted this application.
11. In the circumstances, I do not think the delay is inordinate. Although the respondents have suggested that they will suffer great prejudice if the time for filing and serving the notice of appeal is extended, the said prejudice has not been demonstrated save to only mention that the 5th respondent is a resident of Dubai who has been attending both mentions and hearings diligently. I do not think that allowing the application so that the applicant can have its day in court will at all prejudice the 5th and 6th respondents so much that can make the scales of justice tilt in their favour. It has also been stated that the applicant had since closed its case and directions were given as to the filing of submissions on no case to answer. This assertion is neither here nor there. It is irrelevant in the consideration of this application.
12. In conclusion therefore, I allow the application dated February 10, 2023 in terms that the time limited for physically filing the notice of appeal, is extended and the notice of appeal dated October 28, 2022 be is hereby deemed as duly filed and served in time upon payment of the requisite court fees by the applicant.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

ASIKE-MAKHANDIA



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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

