



**Tumaz & Tumaz Enterprises Limited v Oliver Chapa Chonga and
Mwasaha Mwangodza t/a Aquascapes Consulting (Civil Application
E141 of 2022) [2023] KECA 607 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 607 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E141 OF 2022
M NGUGI, JA
MAY 26, 2023**

BETWEEN

TUMAZ & TUMAZ ENTERPRISES LIMITED APPLICANT

AND

**OLIVER CHAPA CHONGA AND MWASAHA MWAGODZA T/A AQUASCAPES
CONSULTING RESPONDENT**

*(Being an application to adduce additional evidence pursuant to Rule 31 of the Court of
Appeal Rules 2022, in an application for extension of time to file an appeal out of time)*

RULING

1. I have before me a somewhat peculiar situation. The pleadings indicate that the applicant filed an application by way of notice of motion dated December 5, 2022 brought under sections 3(1), 3A and 3B of the *Appellate Jurisdiction Act* and Rule 4 of the Court of Appeal Rules. The main prayer sought in the application is that this Court extends time to file and serve a notice of appeal against the ruling of the High Court at Kakamega (WM Musyoka J) dated October 7, 2022 in High Court Miscellaneous Civil Application No E106 of 2021.
2. It appears that in response to that application, the respondent filed an affidavit disputing the reason that the applicant had given for seeking extension of time-that the ruling of Musyoka J had been given on October 7, 2022 without notice to it, and that it had only learnt that the ruling had been delivered on November 28, 2022, by which time the 7-day period prescribed by the law for lodging a notice of appeal had lapsed. The affidavit from the respondent has not been placed before me. It appears, however, from the averments of the applicant's counsel, Javier Munzala and Flavian Mulama, both sworn on February 6, 2023, that the respondent deposed that Flavian Mulama was in court, holding brief for Mr. Munzala, when the ruling was delivered.



3. Following the response from the respondent, the applicant filed a second application dated February 7, 2023. This application is expressed to be brought under sections 3(1), 3A and 3B of the [Appellate Jurisdiction Act](#), Rule 31 and 44 of the [Court of Appeal Rules, 2022](#) and seeks orders, reproduced verbatim, that:

- i. This the Honourable Court be pleased to grant leave to Tumaz & Tumaz Enterprise Limited to adduce the Typed Proceedings of the record before the High Court in Kakamega Miscellaneous Civil Application No E106 of 2021 as additional evidence to be relied on during the hearing of the application dated 5th December, 2022.
- ii. This the Honorable Court be pleased to grant such other or further orders as it may deem just and expedient in the circumstances of this case.
- iii. The costs of this Application do abide to the outcome of the intended appeal.

4. The reasons advanced for this application are that in the application dated December 5, 2022, the applicant seeks extension of time to file an appeal against the ruling and orders of Musyoka J made on October 7, 2022. The applicant has come across new and additional evidence which is relevant to its application dated December 5, 2022 which was not available to the applicant at the time of filing the said application. Though it had applied for the typed proceedings on December 1, 2022, the proceedings only became available to it on February 3, 2023.

5. Ordinarily, when an opposing party raises an issue in an affidavit in response to an application, the normal response is to file a further affidavit. I believe that Rule 45 of the [Court of Appeal Rules](#) covers what the applicant intends to achieve with its application dated February 7, 2023. It provides that:

45.

- (1) Each formal application to the Court shall be supported—
 - a. by one or more affidavits of the applicant; or
 - b. by one or more affidavits of some other person or persons having knowledge of the facts.
- (2) An applicant may, with the leave of a judge or with the consent of the other party, lodge one or more supplementary affidavits and application for such leave may be made informally but shall be in writing. (Emphasis added)

6. For a reason that is not clear from the pleadings, the applicant has elected to file a second application under Rule 31 of the [Court of Appeal Rules](#). A simple reading of this Rule, however, will demonstrate that it is not intended to address situations such as the applicant finds itself in. The Rule states as follows:

31. On an appeal from a decision of a superior court acting in the exercise of its
 - (1) original jurisdiction, the Court shall have power—
 - a. ...;



b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court.

7. The application dated February 7, 2023 is, in my view, totally misconceived. The applicant has the option of invoking Rule 45(2) to file a supplementary affidavit or affidavits to place before the Court the additional information it wishes to. The application dated February 7, 2023 is accordingly dismissed. As there was no response thereto by the respondent, there shall be no order as to costs.
8. The applicant is at liberty to take appropriate action with respect to its application for extension of time dated December 5, 2022 and thereafter have it placed before a single judge for hearing and determination.

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

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

