



Hindafro Enterprises Limited v Barclays Bank of Kenya Limited (Civil Application E075 of 2023) [2023] KECA 529 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 529 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E075 OF 2023
KI LAIBUTA, JA
MAY 12, 2023**

BETWEEN

HINDAFRO ENTERPRISES LIMITED APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

(Being an application for extension of time to serve the Notice of Appeal out of time from the Judgment and Decree of the High Court of Kenya at Muranga (J. Wakianga, J.) delivered on 5th December 2022 in H.C.C.A No. 9 of 2016)

RULING

1. The applicant, Hindafro Enterprises Limited, has moved this Court by Notice dated 25th February 2023 under rule 3 (e) of the [Court of Appeal Rules, 2022](#) (relating to computation of time during Court recess) seeking extension of time to serve its notice of appeal dated 14th December 2022 and lodged in the Registry of the superior court on 16th December 2022 in due compliance with rule 77(1) and (2) of the [Court of Appeal Rules](#).
2. The applicant's Motion is supported by the annexed affidavit of Gerald Andego Magani, learned counsel for the applicant, sworn on 25th February 2023 and a further affidavit sworn on 14th March 2023. The Motion is also anchored on the grounds, inter alia: that the impugned judgment to which the notice relates was delivered on 5th December 2022; that the applicant lodged its notice of appeal on 16th December 2022, but is yet to serve the same upon the respondent; that the superior court file was untraceable until sometime in January 2023 when they managed to collect the notice for service; that by then, the period allowed for service of the notice had lapsed; that its application has been brought without inordinate delay; and that the intended appeal has high chances of success.
3. In its memorandum of appeal dated 22nd February 2023, the applicant advances six (6) grounds on which its intended appeal is anchored, namely that the learned Judge erred: in failing to appreciate the



provisions of the Central Bank Guidelines on opening of accounts; in failing to take into account the chain of causation giving rise to the fraud; by upholding the agency principle of transactions and in disregarding the duty of care owed by the bank to third parties; and in failing to appreciate and analyse the evidence before him.

4. In support of the applicant's Motion, learned counsel M/s Dola, Magani & Company, filed written submissions dated 16th March 2023 citing the case of *ECNG vs. FNN* [2004] eKLR submitting that, in exercising its discretion under rule 4, the Court's primary concern should be to do justice to the parties.
5. Opposing the applicant's Motion, the respondent filed its replying affidavit of John Mwangi Thiga (counsel for the respondent) sworn on 10th March 2023. In addition, counsel filed their written submissions and list of authorities dated 24th March 2023 citing 3 judicial authorities, namely:

Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 Others [2013] eKLR for the proposition that this Court ought to put into perspective the applicant's attitude, efforts to make amends and demeanor on compliance with the Rules; *Bookpoint Limited vs. Guardian Bank Limited & Another* [2021] eKLR highlighting the jurisdictional importance of a notice of appeal; and *Mae Properties Ltd. Vs. Joseph Kibe & Another* [2017] eKLR submitting that this Court ought to be cautious of notices of appeal filed to hold as advocates await instructions on whether or not to proceed on appeal.

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 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."

8. The Applicant's prayer for extension of time to serve its notice of appeal is dependent on my findings on the following factors: whether the intended appeal is arguable with a possibility of success; the length of the delay, and whether such delay is inordinate; the reasons for the delay in serving the notice of appeal; and whether the Respondent would be unduly prejudiced by the extension of time (see also the Court of Appeal decision in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231).
9. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. In its Memorandum of Appeal dated 22nd February 2023, the applicant advances six (6) grounds on which its intended appeal is anchored. The intended appeal is a second appeal from the judgment and decree of the High Court (J. Wakianga, J.) delivered on 5th December 2022. It is noteworthy that, with the exception of the last, the grounds advanced in the intended appeal raise arguable points of law deserving of this Court's consideration.



10. It is noteworthy, though, that demonstration by an applicant that he or she has an arguable appeal is not the only requirement or qualification for extension of time under Rule 4 to lodge and serve their notice of appeal, or to file an intended appeal. It is merely the first step that must be followed by satisfaction of the other requirements relating to the period of delay; the reasons for the delay; whether such delay is inordinate; and whether the adverse party would be prejudiced by grant of the orders sought under the Rule. In other words, is it too late in the day to approach the Court under Rule 4? Has the applicant explained to the satisfaction of the Court the reason for the delay in serving its notice of appeal?
11. With regard to the period of delay in serving the notice of appeal, I do not consider a period of three months to be inordinate even though good reason dictates that such a notice be served at the earliest opportunity and, thereafter, orders be sought to have the notice deemed as duly served.
12. In this regard, this Court in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that “... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.” It is only then would consideration as to whether the intended appeal is arguable would be worthy of the Court’s attention in exercise of its discretion under Rule 4.
13. In *Abdul Aziz Ngoma v Mungai Mathayo* [1976] Kenya LR p.61-2, this Court had this to say on the matter:

“We would like to state once again that this Court’s discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”
14. In my considered view, the applicant has given plausible and satisfactory explanation for the delay in serving its notice of appeal. In view of the foregoing, I find that the Applicant’s Notice of Motion dated 25th February 2023 succeeds. The same is hereby allowed with orders that: The applicant do serve the notice of appeal upon the respondent within seven (7) days of this order; The costs of this application do abide the outcome of the intended appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 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

