



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Njowawbu Kenya Limited v Mjengo Limited (Civil Application
E072 of 2023) [2023] KECA 551 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 551 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E072 OF 2023**

KI LAIBUTA, JA

MAY 12, 2023

BETWEEN

NJOWAWBU KENYA LIMITED APPLICANT

AND

MJENGO LIMITED RESPONDENT

*(Being an application for extension of time to lodge an appeal out of time from
the Judgment and Decree of the Environment and Land Court of Kenya at
Nairobi (Mogeni, J.) delivered on 7th June 2022 in E.L.C Case No. 1055 of 2015)*

RULING

1. By a Notice of Motion dated 3rd March 2023 and made under Rule 4 of the Court of Appeal Rules, the Applicant (Njowambu Kenya Limited) seeks extension of time to lodge an appeal out of time; and orders that the costs of the application be provided for. The applicant's Motion is supported by the annexed affidavit of John N. Mugambi, learned counsel for the applicant, sworn on 3rd March 2023, and is anchored on the grounds, inter alia: that the judgment sought to be appealed from was delivered on 7th June 2022; that the requisite notice of appeal was lodged on 28th June 2022; that failure to lodge the appeal within the prescribed period was occasioned by an inadvertent mistake of counsel responsible for compiling the record of appeal coupled with technological failure on the part of counsel's email; that the delay was not intentional; that mistake of counsel should not be visited upon an innocent litigant; and that no prejudice will be occasioned to the respondent.
2. Learned counsel for the applicant filed written submissions in support of the Motion, but which I am unable to decipher in view of the fact that the manner in which they were scanned and uploaded on the virtual platform renders them incoherent.
3. In opposition to the applicant's Motion, the respondent filed a replying affidavit of Raj Malde, the respondent's Managing Director, sworn on 28th March 2023. According to Malde, the counsel tasked



with compiling the applicant's record of appeal has not sworn any affidavit deposing to the alleged inadvertent mistake. He avers that the applicant is guilty of material non-disclosure intended to mislead the Court; that, six months down the line, the applicant has not lodged its appeal; that the six months delay is inordinate; and that the respondent continues to suffer undue prejudice. They urge me to dismiss the Motion with costs.

4. In their written submissions dated 3rd April 2023, learned counsel for the respondent cited four judicial authorities, all relating to the principles that guide the Court in considering applications pursuant to rule 4 of the Court's rules. Significant among the four are the cases of *Antony Burugu & Company Advocates vs. Electrowatts Limited* [2022] KECA 415 (KLR) highlighting the principles on which this Court determines an application for extension of time under rule 4; and *Cecilia Wanja Waweru vs. Jackson Wainaina Muiruri & Another* [2014] eKLR for the proposition that there is no set rule as to what constitutes inordinate delay, but that whether or not a party is guilty of inordinate delay depends on the circumstances of the case.
5. 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.
6. 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."
7. The Applicant's prayer for extension of time to file the record 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 filing the record 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).
8. 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 1st July 2022, the applicant advances 12 grounds on which its intended appeal is anchored. In our ruling dated 2nd December 2022 on the applicant's Motion for stay of execution pending appeal, this Court found that the applicant had an arguable appeal with a probability of success, and I need not say more on this score.
9. 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 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 filing the intended appeal?

10. I take to mind that counsel for the applicant applied for certified copies of the proceedings in the trial court within the time prescribed under the proviso to rule 84(1) of this Court's Rules.
11. It is also noteworthy that the requisite certificate of delay was issued on 14th September 2022, the date from which the applicant ought to have lodged its appeal within sixty (60) days as required by rule 84(1). In effect, the applicant is five-and-a-half months late in lodging its record of appeal. Its case is that, even though notification to collect copies of proceedings was communicated sometime in August 2022, the notice was communicated through an email address that had technical challenges.
12. Considering the technical challenges alluded to in communication of the notification to collect copies of the proceedings, the time taken by the applicant to apply for and obtain orders staying execution of the impugned judgment, and the fact that execution has been stayed by order of the Court issued on 2nd December 2022, I do not consider the delay in lodging the record of appeal as inordinate. Neither would extension of time to lodge the record of appeal be prejudicial to the respondent in the circumstances of this case.
13. With regard to the period of delay, the Court of Appeal 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.
14. 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."
15. In my considered view, the applicant has given plausible and satisfactory explanation for the delay in filing its appeal. In view of the foregoing, I find that the Applicant's Notice of Motion dated 3rd September 2021 succeeds. The same is hereby allowed with orders that costs 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

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

