



REPUBLIC OF KENYA



**KENYA LAW**  
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**Premji v Patel & another (Civil Appeal (Application)  
E328 of 2022) [2023] KECA 923 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 923 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E328 OF 2022  
F SICHALE, JA  
JULY 28, 2023**

**BETWEEN**

**NEVIN KERAI PREMJI ..... APPLICANT**

**AND**

**KANJI KUNVERJI PATEL ..... 1<sup>ST</sup> RESPONDENT**

**DHANBHAI KANJI KUNVERJI PATEL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

*(An Application under Rule 4 of the Court of Appeal Rules)*

1. The applicant’s Notice of Motion dated 7<sup>th</sup> June, 2022 seeks the following two orders:
  - “i. This Honourable Court be pleased to extend time for filing of the Notice of Appeal in this matter.
  - ii. This Honourable Court be pleased to deem the Notice of Appeal dated 28<sup>th</sup> April, 2022 but filed on 6<sup>th</sup> May, 2022 as duly filed.”
2. The Motion is supported by the affidavit of Dr. Jotham Okome Arwa, counsel for the applicants sworn on the same day, 7<sup>th</sup> June, 2022 in which he deponed that Odero, J. delivered a judgment on 14<sup>th</sup> April, 2022; that as the applicants were dissatisfied with the said judgment, a Notice of Appeal was prepared, although unfortunately filed 2 days outside the 14<sup>th</sup> days period. The delay was attributed to a miscalculation of the working days given the fact that there were many public holidays in the month of April and May 2022.
3. The respondent resisted the motion vide a replying affidavit dated 12<sup>th</sup> July, 2022 in which he deponed that the applicants did not exercise due diligence in observing the timelines; that the delay is inordinate;



that the parties have been in court for a period of 5 years and that the filing of the Notice of Appeal was an afterthought.

4. In the applicants' submissions dated 10<sup>th</sup> July, 2022, it was submitted that the filing of the Notice of Appeal two days after the expiry of 14 days was on account of miscalculation due to the many public holidays in the month of April and May 2022. The holidays included the 4-day Easter holiday, State funeral for the late Hon. Mwai Kibaki and Labour day.
5. Reliance was placed on this Court's decision of County Government of Mombasa vs. Kooba Kenya Ltd [2019] eKLR in support of the proposition that a delay of two days cannot be said to be inordinate. Further, that the Notice of Appeal was served upon the respondent upon its filing and the instant motion was filed immediately after the mistake was noted.
6. In the respondent's submissions dated 12<sup>th</sup> July, 2022, it was contended that the applicants' application seeking enlargement of time was filed on 7<sup>th</sup> June, 2022 and was in response to the respondent's application dated 2<sup>nd</sup> June, 2022 seeking to strike out the Notice of Appeal; that the applicant failed to exercise due diligence in computing timelines for the filing of the Notice of appeal; that the applicants' conduct is inexcusable; that the respondent is likely to suffer great prejudice given that the proceedings herein have taken over 5 years and finally, that the applicants have no arguable appeal.
7. The application before me is made pursuant to Rule 4 of this Court's Rules which provide as follows:

“ 4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

8. The respondent submits that the prerequisites for granting relief under Rule 4 of this Court's Rules have not been met. He submitted that:

“The court in the case of *Ngunjiri v Mbugua & another* (Civil Application 25 of 2020 (UR 17 of 2020) of 2020)[2021] KECA 22 (KLR) (23 September 2021) (Ruling), while making reference to the Supreme Court Case of Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission and 7 others, set out the principles governing the court's exercise of discretion for Applications made under the premise of Rule 4. The principles set outlined by the Supreme Court are set out as follows:

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks for the extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; Whether there will be any prejudice suffered by the respondent if the extension is granted; Whether the Application has been made without undue delay ””

9. On the other hand, the appellants cited the decision of *Karny Zabarya & Another vs. Shalom Levi*. Civil Appl. No. 80 of 2018, where Koome, JA (as she then was) stated as follows:

“Some of the considerations to be borne in mind while dealing with an application for extension of time



include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal.”

10. Admittedly, the impugned judgment was delivered on 14<sup>th</sup> April, 2022. The applicants filed a Notice of Appeal dated 28<sup>th</sup> April, 2022 on 6<sup>th</sup> May, 2022. At the time, the respondent had filed an application dated 2<sup>nd</sup> June, 2022 seeking to strike out the Notice of Appeal.
11. In my view, the applicants have explained that the delay of 2 days was on account of miscalculation of days given that the months of April and May, 2022 had so many public holidays. In my view, this is an excusable mistake. True, the applicants may have been “woken up” by the respondent’s application to strike out their Notice of Appeal and this demonstrates the fact that the applicants had all along been under the impression that their Notice of Appeal had been lodged within the 14 days period.
12. I find the mistake to be excusable and since the delay of 2 days cannot be said to be inordinate, I allow the motion of 7<sup>th</sup> June, 2022. I make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*signed*

**DEPUTY REGISTRAR**

