



**China Bente Industries (K) Limited v Komen & another (Civil Application
E315 of 2023) [2023] KECA 912 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 912 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E315 OF 2023
GWN MACHARIA, JA
JULY 24, 2023**

BETWEEN

CHINA BENTE INDUSTRIES (K) LIMITED APPLICANT

AND

SELINE J KOMENT 1ST RESPONDENT

LANDEX GROUP LIMITED 2ND RESPONDENT

(Being an application for extension of time to file an appeal out of time against the Ruling and Order of (O. Mboya, J.) delivered on 21st November, 2022 in ELC Suit No. 358 of 2019)

RULING

1. The Applicant filed a Notice of Motion dated December 7, 2022, brought under rules 4, 41, 43, 44 and 45 of the [Court of Appeal Rules, 2022](#), seeking leave to appeal out of time and that time be extended within which to file and serve the Memorandum and Record of Appeal.
2. The application is supported by the grounds stated on the faced of it and the affidavit sworn by Mr. Tao Lang, the applicant's director. He deposes that the trial court suit came up for hearing on September 21, 2022, but was dismissed on account that he was absent; he was the only applicant's witness; that his absence was due to a medical emergency as his child was unwell, which he did not communicate to his advocate in good time; that he did not intentionally abscond court and is willing to attend court and prosecute the suit; that it was the first time that the suit was coming up for hearing and the dismissal for non-attendance in the circumstances was unfair; that he subsequently filed an application for review of the order dismissing the suit dated October 7, 2022 which was dismissed; that his former advocate, one Mr. Makori filed a notice of appeal dated December 9, 2022 against this ruling, but failed to file proper documents for appeal on time; that this mistake was only realized when Mr. Makori left the law firm of his advocates; that the mistake of his counsel should not be visited upon him; that he should



not be condemned unheard; that he stands to suffer irreparable loss if the application is not allowed; and that the interest of justice tilts towards granting the orders sought.

3. The applicant filed submissions dated May 25, 2023.
4. The application was unopposed.
5. Rule 4 of the [Court of Appeal Rules, 2022](#) gives this 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 Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p.231 set out the principles to be applied in exercise of its discretion in determination of any application under rule 4. The Court held that:

“The decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

7. In the present application, the ruling the applicant seeks to appeal was rendered on November 21, 2022 and the applicant subsequently filed a notice of appeal dated December 9, 2022; the applicant is not categorical if it filed the notice of appeal on the same date or not, but it is clear that it was filed outside the stipulated statutory timelines as it ought to have been filed by December 5, 2022.
8. The application seeks leave to appeal out of time and in my considered view, this prayer encompasses time to file the Notice of Appeal out of time as well. The applicant has explained the delay, though exercise of prudence and diligence would have demanded that learned counsel, Mr. Makori swore an affidavit to buttress the justification for the delay. Nevertheless, I am satisfied by the reasons advanced by the applicant for the delay in lodging the appeal in time. Furthermore, the period of delay was not inordinate as it is of only about 3 months. Notable also, is the fact that the respondents did not file a response to the application, and there is nothing that suggests that they will suffer any prejudice if I exercised this Court’s discretion in favor of the applicant.
9. In the upshot, I allow the application with orders that the time for the applicant to file and serve the Notice of Appeal, Memorandum and Record of Appeal is hereby extended. The draft Notice of Appeal dated December 9, 2022 is hereby deemed to be properly filed. The applicant is granted seven (7) days to serve the Notice of Appeal dated December 9, 2022. Thereafter, the applicant has a further thirty (30) days to file and serve the Record of Appeal. There shall be no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

G.W NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

