



**Quadrant Service Limited v Makutu & another (Civil Appeal (Application)
E267 of 2021) [2023] KECA 893 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 893 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E267 OF 2021
HM OKWENGU, JA
JULY 24, 2023**

BETWEEN

QUADRANT SERVICE LIMITED APPELLANT

AND

PAUL MAKUTU 1ST RESPONDENT

VEKARIA CONSTRUCTION LTD 2ND RESPONDENT

*(Application under Rule 4 & 82 of the Court of Appeal Rules for extension of
time to file and serve the memorandum of appeal and record of appeal out of time)*

RULING

1. The applicant, Quadrant Service Limited, has filed a Notice of Motion dated January 25, 2023, with two prayers. First, is a prayer for extension of time to file and serve the applicant's memorandum of appeal from the judgment of the High Court (Ndung'u, J) delivered at Nairobi on January 20, 2020 in Nairobi Civil Appeal No 278 of 2015. The second prayer is for enlargement of time to file the record of appeal dated March 17, 2021 and filed on August 13, 2021 out of time, so that the same is deemed to have been filed within time.
2. The applicant's intended appeal is a second appeal, originating from the judgment of the magistrate's court delivered on May 15, 2015, and the subsequent judgment of the High Court on appeal delivered on January 20, 2020, which date has been referred to as January 20, 2023 in the applicant's motion, but that is obviously an inadvertent error.
3. The applicant states that following the delivery of the impugned judgment, it filed a notice of appeal on January 29, 2020, and thereafter applied for typed copies of the proceedings and judgment. It received the typed copies of the proceedings and judgment on July 10, 2020. On March 17, 2021, it compiled the record of appeal against the judgment of the High Court, and filed it on July 13, 2021 and thereafter served the respondents on August 13, 2021.



4. The applicant explains that the memorandum of appeal was not filed as the clerks who were instructed to file the same inadvertently omitted to do so, a fact that the applicant only learnt of after receiving the respondents' submissions dated March 29, 2022. Apparently the memorandum of appeal that was filed by the respondents against the judgment of the trial court in the first appeal, was mistaken for the memorandum of appeal against the judgment of the High Court in the intended second appeal. Consequently, parties exchanged written submissions and the appeal which was to be determined by way of written submissions is awaiting judgment.
5. The applicant explains through an affidavit sworn by its advocate, Laban Kipchirchir Kirui, that the delay in filing the memorandum of appeal was occasioned by an inadvertent error in that the file slipped through the cracks and remained unattended for some time. The applicant contends that the respondent will not be prejudiced if the orders sought are granted.
6. The applicant has also filed written submissions urging the Court to grant the orders sought. In the submissions, the applicant cites *Leo Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2EA 231, and *Nicholas Kiptoo Arap Salat vs IEBC & 7 Others* [2019] eKLR. It submitted that the delay in filing the record of appeal was occasioned by an inadvertent error on the part of the applicant's advocate, and that the Court should not therefore, hold the applicant liable for the inadvertent mistake on the part of the its counsel.
7. Relying on *Vishfa Stone Suppliers Limited vs R.S.R. Stone* (2006) [2020] eKLR, the applicant submitted that the explanation offered was sufficient. It urged the Court to note from the memorandum of appeal that it has an arguable appeal which raises weighty and triable issues, and that the respondents will not suffer any prejudice if the application is allowed.
8. The respondents were served with a hearing notice on June 1, 2023 by way of email through their advocates. The notice informed them that hearing of the application would proceed by way of written submissions and invited them to file the same. The respondents did not file any written submissions or any replying affidavit to the motion. The matter, therefore, proceeded with the applicant's submission only.
9. Rule 4 of the *Court of Appeal Rules, 2022*, which gives this Court power to deal with an application for extension of time, states as follows:

“Rule 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 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended”.
10. The issue that arises is whether or not the applicant has given a plausible reason for the delay in filing the memorandum of appeal to warrant this Court's exercise of its discretion in its favour.
11. Under Rule 4 of the *Court of Appeal Rules*, this Court has an unfettered discretion in considering an application for extension of time. However, there must be a basis for the exercise of that discretion. The court through case law, has established the basis for the exercise of such discretion. For instance, in *Nicholas Kiptoo Arap Salat vs Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court emphasized that a party seeking extension of time had the burden of laying a basis to the satisfaction of the Court. Such basis includes a reasonable justification for the delay, the application being brought without undue delay, and there being no prejudice likely to be suffered by the respondent.



12. The circumstances before us indicate that the applicant did file a notice of appeal and a record of appeal but due to an inadvertent error, the memorandum of appeal was not filed. The explanation given by the applicant reveals that the error in confusing the memorandum of appeal that had been filed in the first appeal as the memorandum of appeal for this second appeal is a mistake that was made by counsel, and is a mistake that is easily understandable. The explanation is therefore satisfactory to the Court.
13. Moreover, the respondents have not opposed the motion as they have not filed any response to the application nor have they filed any submissions. It is therefore evident that the respondents are not likely to be prejudiced if the applicant's motion is granted.
14. For these reasons, I allow the application and issue orders as prayed. I make no orders as to costs.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

