



**The Registered Trustees of Micro Enterprise Support Programme Trust  
(MESPT) v Kyome Fresh Co. Limited & 3 others (Civil Application  
407 of 2020) [2023] KECA 832 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 832 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 407 OF 2020  
HM OKWENGU, JA  
JULY 7, 2023**

**BETWEEN**

**THE REGISTERED TRUSTEES OF MICRO ENTERPRISE SUPPORT  
PROGRAMME TRUST (MESPT) ..... APPLICANT**

**AND**

**KYOME FRESH CO. LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PETER GATHIRWA GITHIRWA WAWERU ..... 2<sup>ND</sup> RESPONDENT**

**PATRICK NGUGI MWAI ..... 3<sup>RD</sup> RESPONDENT**

**GRACE MUENI NYAA ..... 4<sup>TH</sup> RESPONDENT**

*(An application for extension of time to file and serve the notice of appeal out  
of time in an intended appeal from a Ruling of the High Court (Kasango  
J) delivered on 29th April 2020 in Commercial Suit No. 80 of 2013)*

**RULING**

1. The applicant has moved this Court by way of a notice of motion dated December 22, 2020, in which it prays that time be enlarged to enable it file and serve a notice of appeal against the ruling of the High Court (Kasango J), delivered on April 29, 2020. The motion is supported by grounds stated therein and an affidavit sworn by the applicant's advocate, Lilian Kirui.
2. In brief the applicant explains that at the time the High Court ruling was delivered, its advocates offices were closed on multiple occasions due to Covid-19 and that it only resumed fully in September 2020, but that the advocate inadvertently failed to file the notice of appeal as there was communication breakdown between the advocate and the applicant and they were unable to obtain proper instructions. The applicant contends that it has an arguable appeal which raises critical issues



- including the High Court having dismissed the applicant's application despite acknowledging that the notice to show cause was never served upon it; that the High Court also failed to take into account the fact that the 1<sup>st</sup> respondent, Kyome Fresh Co. Limited, had been placed under receivership and the receiver manager was yet to issue notices to take up the defence; the fact that the parties were engaged in an out of court settlement and the fact that the plaintiff has a claim for a colossal sum of Kshs.9,346,334/35 which amounts the defendants borrowed and utilized and it would be unjust to release them from their contractual obligation to repay.
3. The applicant filed written submissions in which it reiterated that the Court has discretion under rule 4 of the [Court of Appeal Rules](#) to extend time for the doing of any action. The applicant also cited [Cargill Nawal vs National Agricultural Export Development Board](#) [2015] eKLR; [Edith Gichugu Koine vs Stephen Njagi Thoiti](#) [2014] eKLR. The applicant maintains that considering the circumstances, in particular, the Covid-19 and the breakdown in communication with its counsel, the period of delay was not inordinate and the reasons for delay are justified.
  4. Urging that its intended appeal is arguable, the applicant cited [Moroo Polymers Limited vs Wilfred Kasyoki Willis](#) [2019] eKLR, submitting that it would be just to allow the application to enable the applicant pursue its constitutional right.
  5. The applicant's motion was listed for hearing before me on 6<sup>th</sup> December 2022, through written submissions without the appearance of counsel. The hearing notice was served through email on the applicant's advocate Kimani Michuki, and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' advocate, Kabiro Ndaiga & Co. advocates on 29<sup>th</sup> November 2022, and the applicant's advocate was requested to serve Mwangi Kigotho "for the respondent" and file an appropriate affidavit of service. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents who were represented by Kabiro Ndaiga & Co. advocate, have filed written submissions opposing the motion. They have also filed a replying affidavit sworn by the 3<sup>rd</sup> respondent. The 1<sup>st</sup> and 4<sup>th</sup> respondents have not filed any document in response to the motion, nor has there been an affidavit of service availed to us confirming that Mwangi Kigotho & Co advocates was served with a hearing notice.
  6. Be that as it may, as already indicated the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have opposed the applicant's motion. They contend that the notice of appeal purported to be filed, was filed more than 8 months after the statutory time had expired. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents also dismiss the applicant's explanation that the advocate's law firm was closed due to the Covid pandemic as unsatisfactory, maintaining that most advocates continued to execute their judicial and professional duties even during the Covid pandemic. They cite [Grindlays Bank International \(K\) Limited & Anor vs George Barbour](#) [1996] eKLR and [Baber Alibhai Mawji vs Sultan Hasham Lalji & Anor](#) [1995] eKLR, for the proposition that inaction on the part of counsel is inexcusable and cannot amount to inadvertence.
  7. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents urged that the applicant had not disclosed any substantive grounds that may be argued with any success. They urged that the applicant not having sought to extend time for filing of the memorandum of appeal and record of appeal, the Court would be acting in vain if it were to extend time for the filing of the notice of appeal. The Court was therefore urged to dismiss the applicant's motion.
  8. I have considered the application, the affidavit in support and in reply as well as the written submissions. Under Rule 4 of the Court of Appeal Rules, this Court has discretion to extend time for the doing of any act described under the Rules. Under rule 75(2) of the [Court of Appeal Rules](#), a notice of appeal is required to be lodged within 14 days from the date of the decision against which it is desired to appeal. The ruling subject of the intended appeal having been delivered on April 29, 2020, the applicant was expected to file its notice of appeal on or before May 13, 2020. The applicant has exhibited a notice of



appeal dated December 10, 2020. That means that the attempt to file the notice of appeal was made almost 7 months after the statutory time for filing the notice of appeal had expired.

9. The applicant has blamed the Covid pandemic but has not demonstrated any effort that it took to ensure that it communicated with its advocate to give the appropriate instructions. This could easily have been done through email, Covid-19 notwithstanding. The advocate for the applicant has not given any indication of its attempt to communicate with the Court or the applicant.
10. I am persuaded that this was a mere case of inaction on the part of the applicant and its advocate as they could easily have taken advantage of the Covid Court Practice guidelines that were in place. The exercise of the Court's discretion must have a basis. In *Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR the Supreme Court has laid the principles for laying the basis for exercising the Court's discretion in an application for extension of time. These are:

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
2. Whether the Court ought to exercise the discretion to extend time is a consideration to be made on a case to case basis;
2. Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the Court;
3. Whether there will be any prejudice suffered by the respondents if the extension is granted;
2. Whether the application has been brought without undue delay;
2. Whether in certain cases like election petition, public interest ought to be a consideration for extending time.”

11. The delay of 7 months in the circumstances of this case is unreasonable. Secondly, the applicant has not provided a plausible explanation for the delay. For these reasons, the applicant's motion fails and is accordingly rejected.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

