



REPUBLIC OF KENYA



Munyao t/a Munyao - Kayugira & Co. Advocates v Otieno & another (Civil Application E462 of 2022) [2023] KECA 1141 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KECA 1141 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E462 OF 2022
KI LAIBUTA, JA
SEPTEMBER 22, 2023**

BETWEEN

**SCOLA MUNYAO T/A MUNYAO - KAYUGIRA & CO.
ADVOCATES APPLICANT**

AND

LINDON NICHOLAS OTIENO 1ST RESPONDENT

DALE BOLTON 2ND RESPONDENT

(Being an application for extension of time to file a Record of Appeal out of time against the Ruling and Orders of the High Court of Kenya at Nairobi (J. Kamau, J.) dated 26th May 2020 in H.C.C.C No. 92 of 2019)

RULING

1. Before me is a notice of motion dated December 7, 2022 in which the applicant, Scola Munyao T/A Munyao-Kayugira and Company Advocates, seeks extension of time pursuant to rule 4 of the [Court of Appeal Rules](#) to file a record of appeal against the ruling of the High Court of Kenya at Nairobi (j. Kamau, J.) dated May 26, 2020 in HCCC No 92 of 2019.
2. The applicant's motion is supported by her annexed affidavit sworn on December 7, 2022 and is made on a whopping 21 grounds set out on the face of the motion, but to which I need not address myself in extenso, save to take note of the salient grounds on which the application is made, namely: that the impugned ruling was delivered on May 26, 2020 dismissing her application to be struck out of the suit on the ground that the suit did not disclose a reasonable cause of action in law against her; that she filed a notice of appeal within the period stipulated by rule 77(2) of the [Court of Appeal Rules](#); that she applied and paid for certified copies of the proceedings, which were ready for collection on June 1, 2020; that her counsel on record were duly notified; that communication between herself and her (undisclosed) legal counsel then on record broke down prompting her to appoint other counsel, M/



- s. Ongoya and Wambola, who filed their notice of change dated January 13, 2022; that the impugned ruling and proceedings were collected on November 28, 2022; that the intended appeal is not frivolous and has a high chance of success; that the delay was not occasioned by the applicant; and that the delay was not unreasonable under the circumstances.
3. In support of the motion, learned counsel for the applicant filed written submissions and case digest and bundle of authorities both dated February 7, 2023 citing the cases of *Stanley Kaiyongi Mwenda v Cyprian Kubai* [2002] eKLR drawing my attention to the discretionary powers of the Court in applications under rule 4 of this *Court's Rules*; *CFC Stanbik Ltd v John Maina Githaiga and Another* [2013] eKLR contending that mistake of counsel should not be visited on their client; and *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, submitting that the law does not set out any minimum period of delay. They urged me to allow the motion as prayed.
 4. Though served with the hearing notice on February 3, 2023, the respondents have not filed any affidavit in reply to the applicant's motion. However, learned counsel for the respondents have filed grounds of opposition dated February 10, 2023 and written submissions dated February 10, 2023 on behalf of the 1st respondent. According to learned counsel, the reasons advanced for the delay in filing the record of appeal are not convincing. They contend that the delay is inordinate; that the same has not been satisfactorily explained; that the respondents will be prejudiced by grant of the orders sought; and that the applicant's motion should be dismissed with costs.
 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 Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 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. 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.”
 8. The applicant's prayer for extension of time to file an appeal is dependent on my findings on: 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 intended appeal; and whether the respondent would be unduly prejudiced by extension of time as sought.

9. 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. It is noteworthy that the applicant has not presented a memorandum of appeal to demonstrate that the intended appeal is arguable. I can only gather from the grounds on which the motion is made the submission that “the intended appeal is not frivolous and has high chances of success for the following reasons: (i) the applicant’s application was premised on the common law principle that an agent cannot be sued when there is a disclosed principal” From the record as put to me, there is nothing to demonstrate that the applicant has an arguable appeal.
10. 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.” I hasten to observe, though, that in the absence of any material to demonstrate that the applicant has an arguable appeal, the Court need not pronounce itself on other factors for grant of orders pursuant to rule 4.
11. It is also noteworthy that, although the applicant states that certified copies of the proceedings were ready for collection as far back as June 1, 2020; that the proceedings were collected on November 28, 2022; and that she appointed a new firm of advocates on January 13, 2022, the sequence of events demonstrate inaction and inordinate delay in light of the fact that the record of appeal has never been filed about 2 years and 8 months after they were ready for collection; and more than 2 months after collection. Even so, her new counsel took 10 months to collect the proceedings, and have to-date not filed the intended record of appeal in compliance with the mandatory provisions of rules 84(1) of this *Court’s Rules*. Furthermore, the delay has not been satisfactorily explained.
12. In view of the foregoing, I form the view that the orders sought to extend time to file the record of what is essentially an interlocutory appeal are unmerited and would, in any event, prejudice the respondents by standing in the way of their substantive suit. Accordingly, I find that the applicant’s motion does not satisfy the requirements for grant of orders under rule 4 of this *Court’s Rules*. The same fails and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR

