



REPUBLIC OF KENYA



KENYA LAW
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**Ojwang v Barclays Bank (K) Ltd & 2 others (Civil Application
E020 of 2023) [2023] KECA 1111 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1111 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E020 OF 2023
M NGUGI, JA
SEPTEMBER 22, 2023**

BETWEEN

JOSEPH OBOTE OJWANG APPLICANT

AND

BARCLAYS BANK (K) LTD 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

*(Being an application for extension of time to file an appeal against
the judgment of the High Court of Kenya at Kisumu (R.E. Aburili
J.) dated 15th November 2022 in Civil Appeal No. 10 of 2020)*

RULING

1. In his application dated 8th February, 2023 brought under Rule 4 and 5(2)(b) of the [Court of Appeal Rules](#), the applicant seeks, substantively, an order that this Court be pleased to extend time within which to file the notice of appeal and the appeal against the judgment delivered by Aburili J on 15th November 2022. He also prays that the costs of the application abide the outcome of the appeal.
2. The application is based on the grounds set out on the face of the application and is supported by an affidavit sworn by the appellant's learned counsel, Ms. Silvia Nyambeki, on 8th February 2023. It is contended in these grounds and averred

by Ms. Nyambeki that the failure to prepare and file the notice of appeal on time was due to a lack of information on the actual outcome of the case. This was due to the counsel's 'non- arbitrary' (sic) absence during delivery of the impugned judgment and unavailability of the court file in the registry for perusal and extraction of the judgment. The applicant contends that his appeal is arguable with high chances of success.



3. Ms. Nyambeki avers that on 15th November 2022 when the judgment was due for delivery, she did not attend court as she was not admitted to the virtual platform. She inquired from the registry in Kisumu and was informed that the judgment had been delivered in Siaya High Court where Aburili J was then based. She also wrote to the Siaya High Court Registry on 5th December 2022 inquiring about the status of the file. She avers that her clerk was informed by the registry staff that the file was still in the Judge's chambers for minor corrections. The applicant was finally supplied with a soft copy of the judgment on 24th January 2023. Upon perusal, he found that it had a series of gaps, hence his intention to file an appeal out of time.
4. The applicant avers that the failure to file a notice of appeal on time is not deliberate; the instant application has been brought timeously; the delay is not inordinate, and the application is brought in good faith.
5. The applicant avers further that the intended appeal is arguable and raises substantial issues of law as can be discerned from the draft memorandum of appeal annexed to his application. He contends that he is apprehensive that should the orders sought not be granted, the respondent may commence execution which will render the appeal, even if it succeeds, nugatory.
6. In his submissions dated 7th July, 2023, the applicant reiterates the grounds and averments in support of his application. He submits that the failure by counsel to log into the virtual platform was due to the failure of the court to admit her on the platform despite counsel sending a request. The applicant seeks support for this submission on *Muthuuri & 4 Others vs Attorney General and 2 others petition(Application)* 15(E022) KESC 74 (KLR) 4 November 2022 (Ruling) in which the Supreme Court held that delays caused by a court's administrative processes to the detriment of a party could not be visited upon such a party because such a delay was beyond a party's reach.
7. It is the applicant's submission further that his appeal is arguable as it raises substantial legal issues relating to the superior court's decision on the concept of malicious prosecution and defamation to the extent that it amounted to reopening the criminal trial against the applicant despite his having been acquitted, thus subjecting him to double jeopardy. The applicant further faults the High Court for failing to find that he had proved malice against the 1st respondent, support for this submission being sought in the case of *Nicholas Kipsigei Ngetich & Others vs Republic* (2016) eKLR.
8. The applicant submits, finally, that he has been informed of the respondent's intention to get back the monies deposited in a joint account when the case was proceeding before the first appellate court. It is his case that unless the orders he seeks are granted, he will suffer substantial loss in the event that he succeeds on appeal.
9. The respondents did not file any documents in reply, nor have they filed submissions in opposition to the application.
10. I observe, first, that while the present application is expressed to be brought under Rule 4 and 5(2)(b) of the Court of Appeal Rules, it seeks only an order for extension of time to file a notice of appeal and an appeal against the decision of Aburili J rendered on 15th November 2022. In any event, it is not possible for this Court to consider an application for stay of execution under Rule 5(2)(b) simultaneously with an application for extension of time for filing a notice of appeal, bearing in mind that the jurisdiction of the Court under Rule 5(2)(b) can only be invoked where there is in place a valid notice of appeal.
11. The principles on which this Court will exercise its discretion to extend time for the taking of any action under the Court of Appeal Rules were well articulated in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2 EA 231. The Court is required to consider the length of the delay,



the reasons for the delay and (possibly) the chances of success of the intended appeal and finally, the prejudice that would be occasioned to the respondent if the application is granted. See also *Fakir Mohammed vs Joseph Mugambi & 2 Other* [2005] eKLR and *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* [2020] eKLR.

12. The judgment that the applicant intends to appeal against was delivered on 15th November 2022. His counsel avers, and this has not been controverted as the respondents did not file an affidavit in reply, that she attempted to join the court’s virtual platform when the judgment was being delivered but was not admitted to the session. She thereafter unsuccessfully attempted to obtain a copy of the judgment. She wrote to the registry in Siaya a letter dated 2nd December 2022, received at the registry on 5th December 2022, and was thereafter informed that the file was still in the Judge’s chambers. She finally received a copy of the judgment on 24th January 2023, and filed the present application which is dated 8th February 2023.
13. Under Rule 77(2) of this Court’s Rules, the application should have filed his notice of appeal fourteen (14) days after the 15th of November 2022. He did not do so, the reason for failing to comply with the Rule being that he had not seen the judgment. There is evidence, as averred by his counsel and demonstrated by the letter received at the registry on 5th December 2022, that he was trying to access the judgment. He received the judgment on 24th January 2023, and he filed the present application about two weeks thereafter.
14. The delay in filing the application is therefore, in my view, not inordinate. The reasons for the delay are also such as would warrant the exercise of discretion in favour of the applicant. As the Supreme Court held in *Muthuuri & 4 Others vs Attorney General* (supra), the applicant cannot be faulted for the failure by the court to admit his counsel to the virtual platform during the reading of the judgment, or for the delay in furnishing counsel with the judgment.
15. With regard to the possibility of success of his appeal, I note that he intends to raise the question, inter alia, whether the first appellate court erred in ‘re-opening the criminal trial’ against him. I cannot speak to the possibility or otherwise of the appeal succeeding, a matter which is to be addressed by the Court seized of the appeal.
16. Regarding possible prejudice to the respondents in the event that the orders sought are granted, in the absence of averments from the respondents in that regard, I see no basis for denying the extension of time on that basis.
17. Accordingly, I hereby grant the applicant leave to file and serve his notice of appeal within 14 days of today and his record of appeal within 14 days of filing his notice of appeal. In default, the leave granted herein shall lapse.
18. There shall be no order as to costs.

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

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

