



REPUBLIC OF KENYA



**Barasa v Tasha Enterprises (K) Ltd (Civil Application E043 of 2023)
[2023] KECA 1306 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1306 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E043 OF 2023
M NGUGI, JA
OCTOBER 27, 2023**

BETWEEN

BEN KHAEMBA BARASA APPLICANT

AND

TASHA ENTERPRISES (K) LTD RESPONDENT

(An application for leave to file and serve the notice and record of appeal out of time from the judgment and decree of the High Court of Kenya at Bungoma (S. N. Riechi J) delivered on 7th October, 2022 in Bungoma HCA No. 84 of 2018)

RULING

1. In his application dated March 27, 2023 brought under Rule 4 of the [Court of Appeal Rules 2010](#) and Article 159(a) of the [Constitution](#), the applicant prays for orders:
 - i. That the Applicant be granted leave to file and serve the notice of appeal and Record of appeal out of time against the judgment of Hon Justice SN Riech in Bungoma HCA No 84 of 2018 delivered on October 7, 2022.
 - ii. That Pending the hearing and the determination of the appeal, a sum of Kshs 773,900/= that was deposited in Bungoma Court pending the determination of Bungoma HCA 84/2018 be held in the said account until the intended appeal is determined.
 - iii. That costs of this application do abide by the outcome of the intended appeal.
2. The applicant states in the grounds in support of the application that he was aggrieved with the judgment delivered on October 7, 2022 and desires to appeal against it. He blames the failure to file the notice of appeal and the record of appeal on time on factors beyond his control. He contends that the judgment complained of was delivered without notice to the parties and he learnt of its delivery



- long after it was delivered. He states further that the intended appeal has high chances of success and unless the orders sought are granted, he will suffer irreparably as he will have been denied a chance to argue his case before this Court.
3. The application is supported by two affidavits. The first is sworn by the applicant on March 27, 2023. He states in this affidavit that judgment in Bungoma High Court Civil Appeal No 84 of 2018 was scheduled for delivery on April 28, 2022 but it was not and the parties were advised that it would be delivered on notice. He avers that his advocates only came to learn of the delivery of the judgment in January 2023 as no notice was issued to them. A copy of the judgment indicated that it had been delivered on October 7, 2022.
 4. The applicant avers that upon delivery of the impugned judgment, he was required to file a notice of appeal within 14 days and a record of appeal within 60 days from the date of service of the notice of appeal. He was unable to comply with the requirements as the judgment was delivered without notice, but he has prepared a notice of appeal and grounds of appeal.
 5. The application is also supported by an affidavit sworn by the applicant's counsel, one Anono Winnie Okwaro, on July 30, 2023. Ms. Okwaro avers that she learnt of the decision of the High Court when she called the respondent's advocates, one Mukhwana Maobe, who forwarded to her the judgment of the High Court sometime in January 2023. The court file was, however, not in Bungoma as the judge who delivered the judgment was operating from Nairobi. She further avers that though the certificate of delivery of judgment via email was issued by the Registrar of the Court, the email never reached her office.
 6. The applicant reiterates the contentions in his affidavit in the submissions dated July 20, 2023.
 7. Though the appellant refers, in his submissions, to an affidavit filed on behalf of the respondent, none was placed before the Court.
 8. Rule 4 of the *Court of Appeal Rules* gives the Court discretion to extend time for the doing of any act required under the Rules. In exercising this discretion, 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 *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2 EA 231; *Fakir Mohammed v Joseph Mugambi & 2 Other* [2005] eKLR and *Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* [2020] eKLR.
 9. The judgment that the applicant seeks to appeal against was delivered on October 7, 2022. Under Rule 77(2) of the *Rules* of this Court, the appellant was required to file the notice of appeal within 14 days of that date, which he did not do. His explanation is that he did not get to know that the judgment had been delivered until some time in January of this year. He filed the present application in March 2023. The appellant should have filed the notice of appeal by the 21st of October 2022. There was thus a delay of over five months between the date of delivery of the judgment and the filing of this application for extension of time.
 10. Has the applicant explained the delay sufficiently? Regrettably, he has not. His advocate states that she learnt from the respondent's advocates, on a date in January 2023, which is not stated, that the judgment had been delivered. The applicant, however, waited a further two months or so before filing his application for extension of time. In my view, the delay, which is inordinate, is not satisfactorily explained. The applicant has argued that the court file was not available in Bungoma during this two month period, but no correspondence has been placed before the court to show that inquiries were made with respect to the file and the judgment.



11. The court is also required to consider, possibly, the possibility of the appeal succeeding. Other than stating that he has an arguable appeal and will suffer irreparable loss, the appellant does not state what the issues he intends to raise on appeal are. It is not possible, therefore, for the Court to consider this limb of the factors for consideration under Rule 4, while bearing in mind, of course, that ultimately, that is not a matter that the Court can enter into in depth at this stage.
12. In the result, I find that the application dated March 27, 2023 is without merit. It is hereby dismissed but with no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER, 2023

MUMBI NGUGI

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JUDGE OF APPEAL

certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

