



**Standard Chartered Bank Limited v Mwailemi (Civil Application
E086 of 2022) [2023] KECA 1384 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1384 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E086 OF 2022
GV ODUNGA, JA
NOVEMBER 24, 2023**

BETWEEN

STANDARD CHARTERED BANK LIMITED APPLICANT

AND

BIGVAI MWAILEMI RESPONDENT

(Being an Application for enlargement of time to file and serve the Notice of Appeal against the Judgment and Decree delivered by Byram Ongaya J. on 17th June, 2022 at the Mombasa in Employment and Labour Relations Court No. 664 of 2020)

RULING

1. The genesis of this dispute was the claim lodged by the respondent herein against the applicant at the Mombasa Employment & Labour Relations Court in Cause No 664 of 2020 where that court in its judgment delivered on June 17, 2022 awarded the respondent a sum of Kshs 1,000,000/- plus costs and interest. Aggrieved, the applicant intends to appeal to this court against that judgment. However, the applicant was out of time for lodging the Notice of Appeal and the Record of Appeal. It was however clarified that the time limited for lodging the Notice of Appeal was extended by the trial court in the exercise of its jurisdiction under section 7 of the *Appellate Jurisdiction Act* and that an attempt by the respondent to have that Notice of Appeal struck out was dismissed by this Court in Civil Application No Mombasa E051 of 2022 in a ruling delivered on July 28, 2023. Accordingly, the only prayer pending for determination is for extension of time to file and serve the Record of Appeal upon obtaining typed proceedings from the trial Court.
2. The application is dated November 7, 2022 and it is supported by the Affidavit of Lorraine Adoli Oyombe sworn on even date. She avers that a copy of the court's judgment was not available to applicant's advocate until July 7, 2022 when its advocates obtained a copy from the court; that by that date the 14 days prescribed for lodging a Notice of Appeal had already lapsed since the Notice of



- Appeal ought to have been filed by June 30, 2022 from the date of the impugned judgment. On the other hand, the letter requesting typed proceedings ought to have been filed by July 16, 2022.
3. According to the deponent, the failure to file the Notice of Appeal and to request for the proceedings in time was occasioned by mistake, error and an oversight on the part of the applicant's advocates who was handling the application dated July 28, 2022 at the superior court. In her view, the delay is innocent and inadvertent. She avers that the applicant has an arguable appeal with high chances of success and the respondent does not stand to suffer any prejudice that cannot be compensated by way costs.
 4. In response, the respondent swore a Relying Affidavit on December 1, 2022 wherein he averred that the application is defective for it lacks an address for service for parties and that the application has not been lodged in this Court; that the application has no official seal of the court and the Signature of the Registrar; that the impugned was delivered in the presence of Solomon Weloba, an advocate who has not sworn the Affidavit in support of the application; that on June 23, 2022 at 14.46 p.m., a copy of the judgment was forwarded to the said advocate *vide* a Whats App Messenger and a message of the same date hence it is not true that the advocate received the judgment on July 7, 2022; that no explanation has been offered for the delay of over 14 days between the date of receipt of the instructions to lodge an appeal and the date of filing the application in the trial court for extension of time to lodge appeal; that the whole process was an afterthought; and that the delay of over 5 months to file this application from June 17, 2022 up to November, 2022 cannot be excused.
 5. I heard the application on the court's virtual platform on November 1, 2023 during which learned counsel Ms Osewe appeared for the applicant while Mr Wachenje appeared for the respondent. Both counsel relied on their Written Submissions which they briefly highlighted.
 6. It was submitted on behalf of the applicant that this Court has unfettered discretion to extend time as observed in *Habo Agencies Limited v Wilfred Odhiambo Musingu* [2015] eKLR; that though the Notice of Appeal was lodged on July 29, 2022 upon being granted leave by the court, the letter requesting for typed proceedings was lodged on August 4, 2022 instead of July 16, 2022 which resulted to a delay of 19 days; and that the delay was occasioned by mistake on the part of its advocate who was pre-occupied with the application before the superior court seeking leave to lodge the Notice of Appeal. Reliance is placed on *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR on when to excuse a mistake of counsel and on *KNHR v Nubian Rights Forum & 17 others* [2020] eKLR where court held that the failure to serve the letter in question on time could be excused.
 7. It was submitted that the appeal has merit based on the grounds listed in the Draft Memorandum of Appeal. According to the applicant no prejudice will be suffered by the respondent if court extends the time to file an appeal. The applicant urged this Court to allow its application.
 8. On behalf of the respondent it was submitted that the application is defective for non-compliance with the mandatory terms under rule 10 of the *Court of Appeal Rules, 2010* which require the application to be endorsed by the Registrar/Deputy Registrar of the Superior Court showing the date and time when the application was lodged. According to the respondent the delay has not been sufficiently explained and the Notice of Appeal filed on July 29, 2022 was not filed within 14 days pursuant to rule 75(2) of the *Court of Appeal Rules*. It was submitted that the letter requesting typed proceedings was served on August 4, 2022 outside the stipulated 30 days. According to the respondent, there has been a delay of 4 months to file this application. In the respondent's view, his Notice of Motion dated August 8, 2022 in Civil Application No E051 of 2022 seeking to strike out the Notice of Appeal was what prompted the filing of the instant application. The respondent urged the court to dismiss the application dated November 7, 2022 with costs.



9. I have considered the application, Affidavit in support of and in opposition to the application, the submissions and authorities relied upon.
10. The first objection taken by the respondent is that the application is defective for non-compliance with the mandatory terms under Rule 10 of the *Court of Appeal Rules, 2010* which require the application to be endorsed by the Registrar/Deputy Registrar of the Superior Court showing the date and time when the application was lodged. That rule provides that:
- Whenever a document is lodged in the registry, a sub registry or the registry of a superior court under or in accordance with these Rules, the registrar, deputy registrar or registrar of the superior court, as the case may be, shall cause the document to be endorsed showing the date and time when it was lodged.
11. In my view an application is not rendered defective simply because the registry has not endorsed it. An applicant has no control over the registry and cannot be blamed for the omission by the registry to endorse a document that has been duly filed. Accordingly, there is no merit in the argument that the application was defective for the failure by the registry to endorse it. Similarly, I find no merit in the grounds that the application is defective for it lacks an address for service for parties since that omission is a mere technicality which has not prejudiced the respondent in any material way since the respondent was served and duly appeared through its counsel
12. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the *Court of Appeal Rules* are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the court has to exercise the same discretion upon reasons and not upon the whims of the court. To guide the court on what to consider when exercising the same discretion, the case law has established certain matters that the court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations. The court would of course also consider the overriding objective spelt out in sections 3A and 3B of the *Appellate Jurisdiction Act*.
13. Those principles were restated by Waki, JA in *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR as follows:
- “The exercise of this Court’s discretion under rule 4... 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, (possibly) 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: See *Mutiso vs Mwangi* Civil Appl Nai 255 of 1997 (UR), *Mwangi vs Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General* Civil Appl Nai 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
14. On its part, the supreme court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others*, Supreme Court Application No 16 of 2014 [2014] eKLR while expressing itself on the matter opined



that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

15. In *Leo Sila Mutiso vs Helen Wangari Mwangi* Civil Application No Nai 255 of 1997 [1999] 2 EA 231 this court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
16. In this case, the applicant's ground for seeking extension is that the failure to lodge the Notice of Appeal was due to inadvertence on the part of its counsel. However, the filing of the same has since been regularised and an attempt to have the same struck out has been dismissed. The only step remaining is the filing of the record of appeal which it is willing to file once the time is extended.
17. Although at the hearing Mr Wachenje submitted that the applicant ought to have regularised the position before seeking to have the same deemed to have been properly done, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others*, Supreme Court Application No 16 of 2014 [2014] eKLR held that:

“where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the court to remedy an illegality. This, the court cannot do. To file an appeal out of time and seek the court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the court’s record.”
18. Based on that decision, the applicant cannot be faulted for not filing the record before seeking extension of time. In any case even where a document has been irregularly filed nothing bars the court from expunging the document and instead extending time for the filing of a proper document if the application is otherwise merited.



19. It is true that an applicant for extension of time is required to explain the reasons for the delay in taking a step in the proceedings. Regarding delay, it was appreciated in the case of *Utalii Transport Company Limited & 3 others vs. NIC Bank Limited & anor* [2014] eKLR that:

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

20. It is however appreciated that the broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See *Philip Chemwolo & another vs Augustine Kubende* [1986] KLR 492; (1982-88) KAR 103.
21. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the respondents contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See *Waljee’s (Uganda) Ltd vs Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.
22. In this case counsel has owned up to the failure to take the necessary steps within the prescribed time. Part of the delay has already been excused by the Applicant being allowed to file the Notice of Appeal out of time. As was held in *Shital Bimal Shah & 2 others vs Akiba Bank Limited* Civil Appeal (Application) No 159 of 2005 [2006] 2 EA 323:

“An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the rules of the court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate.”

23. In the circumstances of this case and in the absence of any prejudice alluded to by the respondent, I find that this is a just and proper case to exercise discretion in favour of the applicant. I accordingly allow the Notice of Motion dated November 7, 2022 and extend time for filing and serving the Record of Appeal against the judgment and decree delivered by Byram Ongaya J. on June 17, 2022 at Mombasa



in Employment and Labour Relations Court Case No 664 of 2020. The Record of Appeal to be filed and served within 30 days. The costs of this application are awarded to the respondent.

24. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

