



**Taib v Said (Civil Application E064 of 2023)  
[2023] KECA 1347 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1347 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E064 OF 2023  
KI LAIBUTA, JA  
NOVEMBER 10, 2023**

**BETWEEN**

**MOHAMED ALI TAIB ..... APPLICANT**

**AND**

**SALIM AGIL SAID ..... RESPONDENT**

*(Being an application for extension of time to apply for leave to file an appeal out of time against the Ruling and Orders of the High Court of Kenya at Mombasa (D. O. Chepkwony, J.) dated 23rd August 2022 in HCCC No.88 of 1996)*

**RULING**

1. Before me is a Notice of Motion dated July 22, 2023 made under Rule 4 of the [Court of Appeal Rules](#), and by which the Applicant, Mohamed Ali Taib, prays, inter alia, for extension of time to apply for leave to file an appeal; orders that the notice of appeal dated August 25, 2022 be deemed as properly filed, and that directions for filing of the record of appeal be issued; and for costs of the application.
2. The applicant's Motion is supported by his annexed affidavit sworn on July 22, 2023. The application is also made on a whopping 14 grounds set out on the face of the Motion, which I need not replicate here. Relevant among them are: that the impugned ruling was delivered on August 3, 2022; that the application is brought without undue delay; that the intended appeal is arguable; that, unless this application is allowed, the applicant stands to suffer irreparable loss; and that the respondent will not suffer any prejudice if the orders sought are granted.
3. The affidavit in support of the applicant's Motion merely deposes to the grounds aforesaid.
4. Counsel for the applicant, M/s. Taib A. Taib Advocates filed written submissions and case digest dated September 7, 2023 citing 4 judicial authorities relating to the intended appeal, but none of which address the principles required to be satisfied for grant of orders under rule 4. He asked me to allow the Motion as prayed.



5. In response to the application, the respondent filed a replying affidavit sworn on August 1, 2023 in which he deposes that this Court has no jurisdiction to entertain the applicant’s Motion; that the said application is res judicata in view of the fact that a similar application had been made in the High Court and dismissed vide a ruling delivered on July 10, 2023; that the applicant’s Motion does not meet the requirements for grant of orders under rule 4; and that the parties cannot be allowed to litigate without end.
6. In addition to his replying affidavit, the respondent filed a notice of preliminary objection dated July 26, 2023 on the grounds that the Court lacks jurisdiction to entertain the applicant’s Motion; and that the application is res judicata.
7. The respondent’s preliminary objection prompted the applicant to file a supplementary affidavit sworn on September 1, 2023 by his advocate, Taib Ali Taib Bajaber SC., arguing that the doctrine of res judicata bars re-litigation over a matter within a court of concurrent jurisdiction, and that the High Court and this Court are not of concurrent jurisdiction. Counsel urged me to allow the Motion.
8. The respondent filed written submissions and a list of authorities dated 2<sup>nd</sup> October 2023 citing a whopping 12 judicial authorities, including the cases of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2013] eKLR, highlighting the principle that extension of time is discretionary and not granted as of right; and *George Mwenda Muthuri v Mama Day Nursary and Primary School* [2014] eKLR on the factors that the Court takes into account in determining whether to grant extension of time under rule 4. He urged me to dismiss the Motion with costs.
9. 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 (see *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR).
10. This Court 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.”
11. With regard to the merit of the appeal, I take to mind that what is sought in the applicant’s Motion is extension of time to apply for leave to appeal. Accordingly, the arguability of the intended appeal is a matter to be determined by a full Bench of this Court in determination of the issue as to whether leave to appeal is merited. That leaves me with three issues as to the length of the delay; the reason(s) for the delay; and whether the respondent stands to be prejudiced by extension of time to apply for leave to appeal. In the circumstances, I need not pronounce myself on the grounds on which the intended appeal is anchored. Suffice it to observe that it would be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it (see *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR).



12. With regard to the length of time taken to apply for leave to appeal to this Court against the ruling of the High Court (G. O. Chepkwony, J.) dated 2 August 3, 2022 dismissing the notice to show cause issued against the respondent on December 7, 2020, I take note of the fact that the impugned ruling was delivered on 23<sup>rd</sup> August 2022; that the applicant filed his Notice of Appeal to this Court on time on August 31, 2022; that he ought to have applied to the High Court for leave to appeal to this Court within 14 days of the impugned ruling, but only took steps to do so vide his notice of Motion dated April 30, 2023; and that it took the applicant 8 months to file his application for leave in the High Court, way after the 14 days allowed by Order 43 rule 1(3) of the Civil Procedure Rules; that this delay prompted the High Court to dismiss his Motion on July 10, 2023; that, after his Motion for leave to appeal was declined by the High Court, the applicant was required to apply for leave to appeal within 14 days pursuant to rule 41(b) (ii) of the Court of Appeal Rules, 2022 which he did on time vide his Motion dated July 22, 2023.
13. It is noteworthy that the applicant's notice of appeal dated August 29, 2022 was lodged on time on August 31, 2022. Likewise, his Motion for leave to appeal dated July 22, 2023 was filed on time in compliance with rule 41(b) (ii) of this Court's Rules. The only issue deserving of this Court's attention is whether the applicant merits leave to appeal as sought in his Motion. Such leave is the prerogative of the full Bench of this Court. To my mind, it is only after obtaining such leave that the applicant would be entitled to seek extension of time to file his record of appeal. Otherwise, his application for leave to appeal is properly on record and pending determination, whereupon the Court may make such findings and orders, and give such directions, as it thinks fit. In the circumstances, I find that the applicant's Notice of Motion dated July 22, 2023 is superfluous and is hereby struck out with costs to the respondent. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original.*

**DEPUTY REGISTRAR**

