



**Fintel Limited v Kenya Revenue Authority (Civil Application  
8 of 2019) [2023] KECA 1654 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1654 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 8 OF 2019  
PM GACHOKA, JA  
DECEMBER 15, 2023**

**BETWEEN**

**FINTEL LIMITED ..... APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**RULING**

1. On 8<sup>th</sup> February 2019, this Court (Ouko(P), (as then was) Asike- Makhandia and Gatembu, JJ. A) delivered a judgment setting aside the judgment of the High Court (Majanja, J.) which in effect meant that the applicant was liable to pay the withholding tax under the [Income Tax Act](#), as per the notice that had been issued before the impugned judgment.
2. After the judgment, the applicant filed an omnibus application expressed to be made under Articles 10, 20 (3), 25 (c), 159(2) (a) (d) and (e), 163 (4) (b) and 259(1) of [the Constitution](#), section 15 (1) of the [Supreme Court Act](#), sections 3A and 3B of the [Appellate Jurisdiction Act](#), Rules 1 (2) of the Court of Appeal Rules, Rules 42, 43 and 47 of the Court of Appeal Rules, sections 53 (1) and of the [Income Tax Act](#). The applicant seeks the following prayers:
  1. Spent.
  2. Spent.
  3. Pending the hearing and determination of this application there be a stay of this honourable Court's order dated 8<sup>th</sup> day of February 2019 in Nairobi Civil Appeal No. 311 of 2015.
  4. Leave be granted to the applicant to lodge an appeal to the Supreme Court against the Court's said judgment delivered on 8<sup>th</sup> day of February 2019 in Nairobi Civil Appeal No. 311 of 2015.
  5. The Court be pleased to extend time for filing a notice of appeal, and for leave to appeal out of time the proposed appeal from this Court, pursuant to Rule 33 of the Supreme Court Rules,



against the judgment delivered on 8<sup>th</sup> day of February 2019 in Nairobi Civil Appeal No. 311 of 2015.

6. The Court be at liberty to make any other order in the interest of justice.
7. Cost be awarded in favour of the applicant.
3. This application has been placed before me to deal with prayer No. 5 on the extension of time; an issue that is to be heard by a single Judge under rule 55 (1) of the Court of Appeal Rules. Extension of time is governed by rule 4 of the Court of Appeal Rules and though not specifically cited by the applicant, I will proceed to determine the application on the principles that this Court has set over the years.
4. The principles that govern the extension of time have been laid down in many decisions of this Court. In the oft quoted case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997*(unreported), the court expressed itself as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first; the length of the delay; secondly, 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”.

In *Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustees* [2020] eKLR, this Court stated as follows:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

In *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet*

[2018] eKLR this Court expressed stated as follows:

“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.”

The Supreme Court has also addressed this issue in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, in which the Court laid down the applicable principles as follows:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
5. Having set out the applicable principles, the issue to determine now is whether the applicant has met the conditions for exercise of discretion in its favour. No case is on all fours with another and it is upon an applicant to explain the delay and give reasons why it failed to file the notice of appeal or the intended appeal on time.
  6. In support of the motion, Hillary M. Thegeya a director of the applicant has filed an affidavit sworn on 18<sup>th</sup> April 2019. I have carefully read the affidavit and in the 15 paragraphs, none addresses the issue of the delay as to convince this Court to exercise its discretion to extend time. However, I note that in the grounds in support of the application, the reason given is that where an appeal lies only with leave or on a certificate on a point of general importance, such leave is required before filing the notice of appeal. I will interrogate this assertion later in the ruling.
  7. The applicant has also filed written submissions dated 4<sup>th</sup> July 2019. The applicant reiterates the grounds in support of the application and cites the following cases in support of its position; Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997(unreported) and Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014] eKLR.
  8. The application is opposed. In a replying affidavit sworn on 25<sup>th</sup> June 2019, Beatrice Akinyi Odundo, the learned counsel for the respondent, on the question of extension of time, states that the intended appeal is an afterthought as no notice of appeal was filed and the applicant only awoke from its slumber when enforcement of the judgment commenced.
  9. The respondent has also filed written submissions. It relies on the case of Nicholas Kiptoo Arap Korir Salat (supra) and Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 others [2015] eKLR in support of its argument that the applicant has not met the principles for extension of time.
  10. I have considered the application, the respective affidavits, the written submissions and the law. It is common ground that the applicant has to obtain leave of this Court and certification on a point of general importance for it to file an appeal to the Supreme Court. The question is, has the applicant explained the delay in moving this Court. To answer that question, it is important that I restate the facts once again as follows:
    - i. The judgment of this Court was delivered on 8<sup>th</sup> February 2019.
    - ii. The application for extension of time (among other prayers) was filed on 23<sup>rd</sup> April 2019. The delay therefore is 74 days.
    - iii. No notice of appeal was lodged against the judgment of this Court.



11. As already stated, extension of time is a discretionary power that is exercised judiciously and it is imperative that an applicant gives a plausible explanation or reasons for the delay. Before me is an applicant who has not even made an attempt to explain the delay of 74 days before filing the application. It is submitted that filing of the notice of appeal required the leave of the Court. Even if for a moment I agreed with the applicant, why was the application not filed immediately or within a reasonable period? No such reason or explanation has been given.
12. The applicant has cited rule 30 of the Supreme Court Rules as the reason why it did not file the notice of appeal. Rule 30 reads as follows:

“Execution

1. The Registrar shall certify every decision of the Court for transmission to the High Court for execution.
2. An order or a decree of the Court may be enforced as if it were an order of the High Court.”

Certainly, this rule is not relevant for the purpose of this application and it appears that the applicant relies on rule 33 of the Supreme Court Rules 2020 which reads as follows:

“Application for certification

1. An application for certification shall, in the first instance, be made in the court from which the appeal originates.
2. Where the Court of Appeal has certified or has declined to certify a matter as one of general public importance, an aggrieved party may apply to the Court for review, within fourteen days.
3. An application under this rule shall be by way of originating motion as set out in Form E of the First Schedule.
4. Upon filing an application under this rule—
  - a. the applicant shall serve the application within seven days;
  - b. all responses shall be filed and served within fourteen days of service; and
  - c. upon service of a response, the applicant shall file and serve any rejoinder within seven days.
5. An application for certification shall—
  - a. only be limited to the parties in the original cause; and
  - b. be determined on the basis of written submissions.”

Rule 36 (4) provides as follows:

“In lodging an appeal on a matter of general public importance, it shall not be mandatory to obtain such certification before filing the notice of appeal.”



13. It is therefore not correct as submitted by the applicant that it required leave of the Court before filing the notice of appeal. This means that whichever way one looks at this application, no plausible explanation has been given for the delay. I am alive to the fact that the door of justice should not be shut on the applicant. However, it is also true that a Court of law should not condone indolence or inaction as the sword of justice cuts both ways. A successful litigant is entitled to finality and a chance to enjoy the fruits of justice, just as an unsuccessful party is entitled to a right of appeal. Undeniably, a court of justice should in appropriate circumstances excuse delay in invoking the right of appeal but this should be based on good reasons or plausible explanations. The duty to advance the reasons for the delay rests squarely on the applicant.
14. Given the foregoing, it is my finding that the applicant has not given any reasonable explanation for the delay and I am unable to exercise the discretion to extend time in his favour.
15. Accordingly, the application on the question that is before me, that is extension of time has no merit and I dismiss it with costs. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER 2023.**

**M. GACHOKA CIARB, FCIARB**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

