



REPUBLIC OF KENYA



**Structural International Kenya Limited v Commissioner of Domestic Taxes (Civil Application E720 of 2021) [2023] KECA 1476 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1476 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E720 OF 2021  
KI LAIBUTA, JA  
DECEMBER 8, 2023**

**BETWEEN**

**STRUCTURAL INTERNATIONAL KENYA LIMITED ..... APPLICANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(Being an application for leave to file a notice of appeal and memorandum of appeal out of time from the Judgment of the High Court of Kenya at Nairobi (Mabeya, J.) delivered on 22nd October 2021 in Income Tax Appeal No. E089 of 2020)*

**RULING**

1. Before me is a Notice of Motion dated 3<sup>rd</sup> December 2021 made under Rules 4, 5(2), 47 and 86 of the *Court of Appeal Rules* in which the Applicant (Structural International Kenya Limited) prays inter alia: that leave to file the Notice of Appeal dated 5<sup>th</sup> November 2021 and the Memorandum of Appeal dated 29<sup>th</sup> November 2021 out of time; that upon grant of leave to appeal out of time, the Notice of Appeal and the Memorandum of Appeal lodged herein be deemed as duly filed and properly on record upon payment of the requisite fees; and the costs of this application be provided for.
2. The Motion is supported by the annexed affidavit of Karsan Harji Raghwan (the Managing Director of the applicant) sworn on 3<sup>rd</sup> December 2021 and is made on 13 grounds set out on the face of the Motion, and which I take the liberty to summarise and reframe as follows: that the matter subject to this application came up on 15<sup>th</sup> October 2021 for judgment in the presence of both parties; that the court directed that all judgments scheduled for delivery on that day be delivered on notice to the parties; that unknown to the parties, the court delivered judgment on 22<sup>nd</sup> October 2021 in the absence of both parties and without notice; that the applicant came to learn of these developments on 4<sup>th</sup> November 2021 whereupon the applicant instructed their counsel on 26<sup>th</sup> November 2021 to lodge an appeal;



that the delay was not deliberate or unreasonable as judgment was entered without notice; that the intended appeal is competent and has appreciable chances of success.

3. The applicant's supporting affidavit restates the grounds aforesaid and adds that the respondent will suffer no real prejudice if this application is allowed in view of the fact that the applicant has to date paid to the respondent a sum of KShs. 7,200,000 as security pending the hearing and determination of the intended appeal. In addition to the supporting affidavit, learned counsel for the applicant (M/s. Humphrey and Co. LLP) filed written submissions, a list and bundle of authorities dated 9<sup>th</sup> March 2022 in support of the applicant's Motion.

4. The respondent did not file any affidavit in reply to the applicant's Motion. However, learned counsel for the respondent (Mr. Nick Otieno Osoro, Advocate) filed written submissions dated 11<sup>th</sup> March 2022 in opposition to the applicant's Motion for extension of time.

5. 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.

6. The Court of Appeal 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.”

7. The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. In principle, the discretion is unfettered. In its celebrated decision, the Court observed:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it 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, 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.”

8. The Applicant's prayer for extension of time to file an appeal is dependent on my findings on the following factors:

- a. whether the intended appeal is arguable with a possibility of success;
- b. the length of the delay, and whether such delay is inordinate;
- c. the reasons for the delay in filing the intended appeal; and



- d. whether the Respondent would be unduly prejudiced by extension of time as sought.
9. Even though this is not the only basis for consideration, the 6 grounds set out in the Applicant’s draft Memorandum of Appeal dated 29<sup>th</sup> November 2021 point to a reasonable conclusion that the intended appeal is arguable with the possibility of success. In *Joseph Wanjohi Njau v Benson Maina Kabau*, Civil Application No. 97 of 2012 (Unreported), Hon. Mr. Justice Kathurima M’Inoti held that
- “the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court.”
10. In *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, the Court held that:
- “This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore 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.”
11. It is noteworthy, though, that demonstration by an applicant that he or she has an arguable appeal is not the only requirement or qualification for extension of time under Rule 4 to file an intended appeal. It is merely the first step that must be followed by satisfaction of the other requirements relating to the period of delay; the reasons for the delay; whether such delay is inordinate; and whether the adverse party would be prejudiced by grant of the orders sought under the Rule. In other words, is it too late in the day to approach the Court under Rule 4? Has the applicant explained to the satisfaction of the Court the reason for the delay in filing the intended appeal?
12. I take note of the fact that the impugned judgment was delivered on 22<sup>nd</sup> October 2021. The applicant filed its Motion seeking extension of time to file the intended appeal on 3<sup>rd</sup> December 2021, about 42 days thereafter. According to the applicant’s Managing Director, the impugned judgment had been delivered in the absence of both parties without notice 7 days after adjournment on 15<sup>th</sup> October 2021. It was not until 4<sup>th</sup> November 2021 when the applicant learnt from its advocates that judgment had been delivered, obtained a copy thereof and instructed their advocates to lodge an appeal on 26<sup>th</sup> November 2021. Hence the application before me. I am satisfied with the applicant’s explanation for the delay which, in my considered view, is not inordinate, having lodged its Notice of Appeal together with its application on 3<sup>rd</sup> December 2021.
13. With regard to the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that
- “... 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.” It is only then would consideration as to whether the intended appeal is arguable would be worthy of the Court’s attention in exercise of its discretion under Rule 4.
- See also *Abdul Aziz Ngoma v Mungai Mathayo* [1976] Kenya LR p.61-2.
14. The applicant has given a plausible and satisfactory explanation for the delay in filing its Notice of Appeal. In my considered view, the Respondent does not stand to suffer any prejudice by extension of time to lodge the intended appeal, particularly in light of the security already furnished by the applicant



in the sum of KShs. 7,200,000. In view of the foregoing, I find that the Applicant's Notice of Motion dated 3<sup>rd</sup> December 2021 merits the orders sought. Accordingly, I hereby order and direct that:

- a. leave be and is hereby granted to the applicant to file its Notice of Appeal dated 4<sup>th</sup> November 2021 out of time;
- b. the Notice of Appeal lodged herein be deemed as duly filed;
- c. the costs of this application be costs in the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER 2023.**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

