



REPUBLIC OF KENYA



**KENYA LAW**  
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**Cinetine Enterprises Limited v Electrical Marketing (Wholesale) Limited (Civil Application E324 of 2021) [2022] KECA 375 (KLR) (25 February 2022) (Ruling)**

Neutral citation: [2022] KECA 375 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E324 OF 2021  
S OLE KANTAI, JA  
FEBRUARY 25, 2022**

**BETWEEN**

**CINETINE ENTERPRISES LIMITED ..... APPLICANT**

**AND**

**ELECTRICAL MARKETING (WHOLESALE) LIMITED ..... RESPONDENT**

*(Being an application for extension of time from the Ruling of the Environment and Land Court of Kenya at Nairobi (Bor, J.) delivered on 7th October, 2020 in E.L.C. Appeal No. 22 of 2017)*

**RULING**

1. In a Judgment delivered on 15th July, 2019 Bor, J., set aside the Judgment of a subordinate court which had upheld a public auction involving a property known as L.R. No. 209/8323 (“the suit property”). The Judge found the process used in the said auction irregular and against the law. Various applications followed two of which led to a ruling delivered on 7th October, 2020. One of the applications was by the applicant (it was the interested party in the appeal before the Judge) and it sought review and setting aside of the Judgment delivered on 15th July, 2019. The other application prayed for stay of execution pending appeal. The application for review and setting aside of the Judgment was refused.
2. In the Motion brought under Rule 4 of the *Court of Appeal Rules* I am asked to grant leave to the applicant (Cinetine Enterprises Limited) to appeal from the ruling of the said Judge delivered on 7th October, 2020 and that I set a time for lodging a notice of appeal and record of appeal out of time. It is said in grounds in support of the Motion and in a supporting affidavit of Hellen Adhiambo Oburu, a director and shareholder of the applicant, that the applicant’s failure to file a notice of appeal and appeal was due to the acts and omissions of its advocates on record and not due to an inexcusable act or omission on the part of the applicant; that such leave is necessary to enable the applicant file an application for stay of execution of the Judgment of the Environment and Land Court (“ELC”); that the applicant was always ready to prosecute an appeal and that the application has been brought without delay. It is also said that the applicant is the registered proprietor of the suit property which it



was in occupation of and had rented out to various tenants; that it was not a party to the proceedings in the subordinate Court or at the ELC; at paragraphs 12-14 (inclusive) of the affidavit:

12. That the applicant came to learn that its advocates indeed prepared but failed to file and serve a Notice of Appeal. Hereto annexed and marked HAO 9 is a copy of an unsigned and undated Notice of Appeal found in the file of the applicant's advocates.
13. That the applicant's advocate indeed bespoke the proceedings, judgment and ruling for purposes of appeal. Hereto annexed and marked HAO 10 is a copy of the letter bespeaking the proceedings and attached receipt evidencing payment of the required deposit.
14. That the applicant only got to learn about the failure to file prosecute the intended appeal in the second week of the month of August 2021 when it instructed the firm of Eliakim Mbata Owala & Co. Advocates to come on record as additional counsel. On a perusal of the former advocate's file and the record of the superior court, it became apparent that though a notice of appeal was prepared and a letter bespeaking proceedings for purposes of appeal written, neither the notice of appeal nor the letter bespeaking proceedings was filed and served as required by the rules of this court."

In a replying affidavit Angela M. Nthenge, an Advocate of the High Court of Kenya and the Liaison Officer of the respondent (Electrical Marketing (Wholesale) Limited) it is deponed that the application is brought with inordinate unexplained delay; that the applicant is guilty of laches that the applicant has not complied with orders of ELC; that there is no arguable appeal; that there is a pending appeal in this Court where the applicant can join and participate in the proceedings.

3. I have perused the submissions filed by the parties and the list of authorities filed for the applicant.
4. The principles applicable in considering an application of this nature are old hat and were well summarized in the case of *Fakir Mohamed v Joseph Mugambi & 2 Others Civil Application No. 332 of 2004*, a decision of a Single Judge of this Court affirmed by the full court as:

"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 (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 the 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 v Mwangi*, Civil Application No. NAI. 255 of 1997 (ur), *Mwangi v Kenya Airways Limited* [2003] KLR 496, *Major Joseph Mwereri Igweta v Murika Methare & Attorney General* Civil Application No. NAI 8 of 2000 (ur) and *Murai v Wainaina (No. 4) 1982 KLR 38*."

Section 3A and 3B of the *Appellate Jurisdiction Act* which were enacted after that decision provide the overriding objectives of civil litigation which is to ensure the just, expeditious, proportionate and affordable resolution of disputes before the Court as explained by this Court in the case of *City Chemist (Nbi) & Another v Oriental Commercial Bank Limited Civil Application No. NAI. 302 of 2008*.



- 5. The record shows, as I have said, that Judgment of ELC was delivered on 15th July, 2019. The applicant moved the ELC in an application for review and setting aside of the Judgment and a ruling was delivered on 7th October, 2020. The Motion before me is dated 30th August, 2021, about 10 months after the ruling sought to be appealed. The only explanation given for delay in appealing the said ruling is that advocates on record prepared a notice of appeal and a letter bespeaking proceedings but did not lodge or file the same; that it is only after advocates appointed to assist advocates on record were appointed that it was found that the lawyers on record had not taken the necessary steps to appeal the ruling.
- 6. Rule 75 of the Court of Appeal Rules requires a person who desires to appeal to this Court to lodge a notice of appeal within 14 days and to serve the same on the opposite side as required by Rule 77 of the said rules. I am not satisfied by the reason given why the applicant did not comply with these requirements. I am also not satisfied that the applicant has satisfied the principles set out in the *Fakir Mohamed (supra)* case or any other relevant considerations I would take to exercise a discretion in favour of the applicant. Being of that view the Motion fails and I dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2022.**

**S. Ole Kanta**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

