



Columbia Developers (K) Limited v Armstrong Engineering Limited (Civil Application E305 of 2020) [2022] KECA 161 (KLR) (18 February 2022) (Ruling)

Neutral citation: [2022] KECA 161 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E305 OF 2020
KI LAIBUTA, JA
FEBRUARY 18, 2022**

BETWEEN

COLUMBIA DEVELOPERS (K) LIMITED APPLICANT

AND

ARMSTRONG ENGINEERING LIMITED RESPONDENT

(Being an application for leave to file an appeal out of time from the Judgment of the High Court of Kenya at Nairobi (Mary Kasango, J.) delivered on 2nd July 2020 in HCCC No. 517 of 2009)

RULING

1. Before me is a Notice of Motion dated 28th September 2020 made under Rules 4,5(2) (b) and 41 of the [Court of Appeal Rules](#) in which the Applicant, Columbia Developers (K) Limited, prays:
 1. Spent
 2. That the Honourable Court be pleased to grant leave to the applicant to file an appeal out of time.
 3. That on grant of prayer No. 2 herein, the annexed Memorandum of Appeal be deemed as duly filed in the Court of Appeal.
 4. That costs of the application be in the cause.”
2. The second and 3rd prayers sought pursuant to Rule 4 of the Rules of this Court seek extension of time to file an appeal from the judgment of the High Court of Kenya at Nairobi (Commercial and Admiralty Division) (Mary Kasango, J.) in Civil Suit No. 517 of 2009.
3. The Applicant’s Notice of Motion is made on 13 grounds set out on the face of the Motion, which I need not replicate here. Suffice it to observe that the applicant has given satisfactory reasons for the delay in instituting the intended appeal. In brief, the applicant states that the impugned judgment



was scheduled for delivery on 2nd July 2020; that the judgment in issue was delivered in disregard of the applicant's written submissions, which were to be filed subject to availability of the trial court's proceedings; that the said proceedings were not availed as directed; that, due to the restrictions imposed during the COVID-19 pandemic, the applicant was unable to freely access his counsel for legal advice; that to date, the applicant has not been able to secure the requisite copies of the judgment, proceedings and Certificate of Delay despite written request therefor on 4th August 2020; that the applicant has an arguable appeal; and that the respondent will not suffer any prejudice in the prayers sought herein are granted.

4. The Motion is supported by the annexed affidavit of John K. Gatobu (the applicant's Managing Director) sworn on 28th September 2020 in which she restates the reasons for the delay in filing the intended appeal. Annexed to his affidavit is the Applicant's Notice of Appeal dated 10th September 2020 and the draft Memorandum of Appeal dated 28th September 2020 setting out 4 grounds for the intended appeal, which may be summed up as follows:
 - a. the learned Judge erred in law and in fact in failing to consider the applicant's defence founded on evidential documents as pleaded and adduced at the hearing;
 - b. the learned Judge erred in law and in fact in awarding the respondent the sum of KShs. 5,602,139.86 without sufficient evidence to justify the award;
 - c. the learned Judge erred in law and in fact in disregarding the applicant's evidence in awarding the decretal amount aforesaid; and
 - d. the learned Judge erred in law in finding that the respondent had met the standard required in civil cases as regards the burden of proof.
5. In reply, Gerald Wafula Kangale (a director of the Respondent) filed an affidavit sworn on 14th October 2020. According to him –
 - a. the applicant was duly served with the notice of judgement, which was delivered online on 2nd July 2020 during which virtual proceedings the applicant was duly represented;
 - b. the applicant had ample time to file written submissions before judgment, but failed or neglected to do so;
 - c. the applicant failed to file its notice of appeal within 14 days of the delivery of the impugned judgment as required under the Rules;
 - d. it was not until 10th September 2020 when the applicant moved to file its Notice of Appeal after the respondent took steps to tax its Bill of Costs;
 - e. by a letter dated 17th September 2020, the applicant sought stay of taxation to enable them file submissions thereon; and
 - d. the Memorandum of Appeal is speculative and does not raise any arguable grounds capable of being litigated in the Court of Appeal.
6. In its written submissions dated 14th October 2020 and made in support of the Applicant's application, learned counsel for the Applicant has invited me to find for the Applicant on its application as prayed. They relied on the authority of *Nicholas Kiptoo Arap Salat v IEBC and 7 Others [2014] eKLR*; and



Nairobi Womens Hospital v Purity Kemunto [2018] eKLR. On their part, learned counsel for the respondent filed their written submissions dated 15th October 2020 asking that the applicant’s Motion be dismissed with costs to the respondent.

7. The pertinent issue before me is whether the applicant’s Motion merits the orders sought. 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.
8. 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.”
9. 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. The discretion is unfettered. In its 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.”

10. In addition to the foregoing, I am mindful of the factors considered in exercise of the Court’s discretion under Rule 4 to extend time to lodge an appeal from a superior court as enunciated in the case of *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited 2020 eKLR*. To my mind, 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 reasons for the delay in filing the intended appeal;
 - c. the reasons for the delay; and
 - d. whether the delay was inordinate;
 - e. whether the Respondent would be unduly prejudiced by extension of time for the Applicant to file the appeal.

11. In considering these factors, I am guided by the decision in *Pothiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others [2005] eKLR* where the Court, at p.733, called to mind the criteria



applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* [1984] KLR p591 where this Court stated:

“ As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

- a. that there is merit in his appeal;
- b. that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and
- c. that the delay has not been inordinate.”

12. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. I am satisfied that the grounds set out in the Applicant’s draft Memorandum of Appeal point to a reasonable conclusion that the intended appeal is arguable with the possibility of success. Indeed, the application before me turns on the authority of *Joseph Wanjohi Njau v Benson Maina Kabau, Civil Application No. 97 of 2012* (Unreported), where the 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.”

13. 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.”

14. I have carefully considered the contents of the Applicant’s Notice of Motion and the supporting affidavit together with the grounds contained in its draft Memorandum of Appeal. The grounds point to the fact that the intended appeal is arguable with the possibility of success. Whether or not the intended appeal will succeed in whole or in part is not for me to judge, but remains to be seen on scrutiny by the Court of the entire record of appeal once filed, and on consideration of the relevant law relating to the matters in contention. Furthermore, it is not within my jurisdiction to consider the merits of the intended appeal with finality at this stage in the proceedings.

15. By so determining, I am guided by this Court’s decision in *Aibuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015* (Unreported), where the Court had this to say:

“ This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

16. As regards the issue as to whether the extension of time to file the intended appeal will cause undue prejudice to the respondent, I find that no such prejudice would be suffered. The Respondent has not alluded to any undue prejudice.

17. 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.”

18. The applicant has given a plausible and satisfactory explanation for the delay in filing its appeal. Accordingly, I find that the Respondent would not suffer undue prejudice by extension of time for the Applicant to lodge its intended appeal. In view of the foregoing, I find that the Applicant’s Notice of Motion dated 28th September 2020 merits the orders sought for extension of time to lodge its intended appeal.
19. Accordingly, I hereby order and direct that –
 - a. time be and is hereby extended for the Applicant to file its Notice of Appeal within fourteen (14) days from the date hereof;
 - b. the Applicant’s Notice of Appeal dated 10th September 2020 be deemed as duly filed and served;
 - c. the applicant do file and serve its Record of Appeal within 60 days next following the period specified in (a) above; and
 - d. the costs of this application be costs in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

