



County Government of Meru. v Leopard Rock Mico Limited (Civil Application E011 of 2021) [2022] KECA 462 (KLR) (18 March 2022) (Ruling)

Neutral citation: [2022] KECA 462 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E011 OF 2021
KI LAIBUTA, JA
MARCH 18, 2022**

BETWEEN

COUNTY GOVERNMENT OF MERU APPLICANT

AND

LEOPARD ROCK MICO LIMITED RESPONDENT

(Being an application for leave to file and serve an appeal out of time against the Ruling of the High Court of Kenya at Meru (Patrick J.O. Otieno, J) dated 22nd January 2021 in Meru Misc. Application No. 1 of 2020 Consolidated with Meru Misc. Application No. E078 of 2020)

RULING

1. Before me is a Notice of Motion dated 26th February 2021 made under Rule 4 of the [Court of Appeal Rules](#) in which the Applicant (the County Government of Meru) seeks extension of time pursuant to Rule 4 to file an appeal from the Ruling of the High Court of Kenya at Meru (Patrick J. O. Otieno, J) delivered on 22nd January 2021 in Miscellaneous Application No. 1 of 2020 consolidated with Miscellaneous Application No. E078 of 2020, and prays that costs of the application be provided for.
2. The Applicant's Notice of Motion is made on the grounds inter alia that –
 - a. counsel on record for the applicant applied for certified copies of the proceedings and Ruling on 25th January 2021 for the purposes of filing the intended appeal;
 - b. the proceedings and Ruling were supplied to the applicant on 2nd February 2021, but the statutory period of filing the Notice of Appeal had lapsed by the time the applicant instructed their counsel;



- c. the delay in instructing learned counsel was occasioned by the administrative procedures of required to be observed by the applicant in making a resolution to appeal;
 - d. the delay is not inordinate, and no prejudice has been visited on the respondent; and
 - e. the intended appeal is meritorious with a high probability of success, and involves a substantial amount of money – KShs. 339,070,485 – which, if the Ruling of the High Court is upheld, would be borne by the taxpayer.
3. The Applicant’s Motion is supported by the annexed affidavit of Kiautha Arithi (the applicant’s County Attorney), sworn on 16th June 2020 in which he restates the reasons for the delay in filing the Notice of Appeal and the intended appeal. Annexed to his affidavit are the impugned Ruling, the Applicant’s Notice of Appeal dated 16th February 2021, a draft Memorandum of Appeal dated 26th February 2021 setting out 3 grounds for the intended appeal, namely that the learned Judge erred in law and fact –
- a. by failing to address the grounds raised by the applicant to the effect of violation of public policy;
 - b. in fettering his discretion by deliberately failing to address critical points of law of violation of public policy, and by failing to interrogate relevant conclusion of matters of fact, noting that it is not possible for a court of law to make a decision without interrogating the facts; and
 - c. by going outside the provisions of section 35 of the *Arbitration Act*, and by ignoring the points of law raised by the appellant and holding that the court cannot interrogate the facts as held by the arbitrator.
4. In reply, the Respondent’s Managing Director, Mr. Michel Jean Andre Dechauffour (Jean Andre), has filed an affidavit sworn on 11th January 2021.
5. The substantive grounds on which the respondent opposes the applicant’s Motion are: that the applicant has never served the respondent with a copy of their letter requesting for certified copies of proceedings and Ruling as mandated by Rule 82(2) of the Court’s Rules; that the applicant’s Notice of Appeal is defective in so far as it alludes to an intended appeal from a ruling dated 2nd May 2019, which does not exist; that the Notice of Appeal was served on counsel for the respondent 5 days later than the period prescribed under Rule 77(1); that the Notice of Appeal was belatedly lodged after the 14 days allowed under the Rules, and no leave has been sought to admit the said Notice; that the respondent has filed an application in Nyeri Civil Application No. E021 of 2021 seeking orders to strike out the Notice of Appeal, but that the application is yet to be determined; that the applicant’s Motion has failed to meet the minimum threshold required by law to enable this Court to exercise its discretionary powers to grant the orders sought; that the applicant has not offered any plausible explanation for the delayed service, and neither has it applied for leave to regularise the Notice of Appeal, but has instead applied to lodge the intended appeal out of time; that the mere fact that the applicant is a public institution whose acts of omission have affected it should not be a basis for denying the respondent from denying the fruits of its judgment; and that the respondent stands to suffer



great prejudice if the orders sought are granted in view of the fact that the orders sought will have the effect of prolonging the realisation of the judgment enforcing the Award published on 19th December 2019.

6. The applicant responds to the respondent's replying affidavit in terms of the further affidavit of Kiautha Arithi sworn on 31st January 2022 in which he states that reference in the applicant's Notice of Appeal to its intention to appeal the Ruling dated 2nd May 2019 instead of 22nd January 2021 was a "typographical error" of counsel in preparation of the Notice. Annexed to the further affidavit is a copy of the letter dated 25th January 2021 requesting for certified copies of the proceedings in issue. From the record before me, the same were supplied and collected on 3rd February 2021. Be that as it may, I hasten to observe that Mr. Kiautha Arithi's further affidavit was filed in contravention of Rule 43(2) of this Court's Rules, which requires that an applicant "with leave of a Judge or with the consent of the other party" before lodging one or more supplementary affidavits. My observation in this regard is made on account of the fact that I find nothing on record to suggest that leave of a Judge or consent of the other party to file the further affidavit in issue was first obtained. However, in view of the fact that nothing turns thereon, I shall say no more of it.
7. Learned counsel for the applicant, M/s. Munga Kibanga & Co. Advocates, filed their written submissions, list of authorities and case digest, all dated 31st January 2022, in support of the Applicant's application. They ask me to allow the Motion. On their part, counsel for the respondent, M/s. Manyonge Wanyama & Associates LLP, also filed their written submissions, list of authorities and case digest, both dated 11th January 2022. They ask me to dismiss the applicant's Motion with costs on the grounds set out in the replying affidavit aforesaid.
8. Rule 47 of the Rules of this Court 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. Though unfettered, the Court's discretion under Rule 4 must be exercised judiciously.
9. Having carefully considered the applicant's Motion, the grounds on which it is made, the facts deposed in the supporting and further affidavits of Kiautha Arithi, the issues raised in the replying affidavit of Michel Jean Andre Dechauffour, and the written submissions of counsel for the parties, I find that the applicant's Motion stands or falls on the following contentious issues:
 - a. whether the applicant's Notice of Appeal dated 26th February 2021 is properly on record so as to merit the orders sought;
 - b. if the answer to (a) is in the negative, whether the applicant has taken meaningful steps to regularise the Notice;
 - c. whether the grounds set out in the applicant's draft Memorandum of Appeal dated 26th February 2021 are indicative of an arguable appeal;
 - d. whether the written request by the applicant for certified copies of the proceedings in the High Court was duly served on the respondent as



- required under Rule 82(2) and, if not, whether belated service (if that be the case) is fatal to the applicant’s Motion;
- e. whether delay in filing the Notice of Appeal and the intended appeal is inordinate; and
 - f. whether the extension of time sought to file the intended appeal would unduly prejudice the respondent.
10. On the first issue, the respondent’s case is that the applicant’s Notice of Appeal is not properly on record to merit the orders sought, the same having been filed out of time and without leave. From the record, it is clear that the impugned Ruling was delivered on 22nd January 2021. Dissatisfied by that Ruling, the applicant lodged its Notice of Appeal dated 16th February 2021 on 17th February 2021, 26 days from the date of the Ruling.
 11. Rule 75(2) of this Court’s Rules mandates a party desirous of an appeal from a superior court to this Court to lodge a Notice of Appeal within 14 days of the date of the impugned decision. However, this mandatory period may be extended for good reason with leave of the Court on application under Rule 4. The only question falling to be determined on this score is whether there is an application before me to extend time to lodge a Notice of Appeal, or to admit the Notice of Appeal lodged out of time, and thereafter direct that the Notice lodged out of time be deemed as duly lodged.
 12. In paragraph 11 of his replying affidavit, Jean Andre states that –

“The applicant has not offered any plausible explanation for the delayed service, neither has it applied for leave of this Honourable Court to regularise the Notice of Appeal. Instead, it has applied to lodge an appeal out of time which appeal has no foundation as it is based on a defective Notice of Appeal.”
 13. Prayer No. 2 on the face of the applicant’s Motion reads:

“leave be granted to the applicant to file an appeal out of time against the Ruling of the High Court of Kenya at Meru (Hon. Justice Patrick J. O. Otieno) dated 22nd January 2022 in Meru Misc. App. No. 1 of 2020 consolidated with Meru Misc. App. No. E078 of 2020.”
 14. Having carefully considered the contents of the applicant’s Motion, the affidavit in support thereof sworn by its County Attorney (Mr. Kiautha Arithi) on 26th February 2021, and those of his further affidavit sworn on 31st January 2022 (filed without leave or consent of the respondent) in response to Jean Andre’s replying affidavit sworn on 11th January 2022, I find nothing to suggest that the applicant seeks leave to lodge a Notice of Appeal out of time as contemplated by Rule 4 of the Rules of this Court. Neither does the applicant seek extension of time to file such Notice, or to have the Notice belatedly filed, as is the case here, to be deemed as duly filed. Indeed, its application is confined to prayers for leave to file the intended appeal out of time.
 15. Even though the decision to extend time pursuant to Rule 4 is discretionary, as was observed by this Court in *Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231, the settled principles to be applied in exercise of that discretion can only avail to an applicant in proper cases where



an application has been expressly made under Rule 4. In the absence of an application in that regard, that discretion cannot be exercised so as to grant orders not sought.

Neither is the applicant's omission cured by its prayer for leave to file its intended appeal out of time. To my mind, a notice of appeal, which is a pre-requisite to filing an appeal or intended appeal cannot by any stretch of imagination, be conflated with an intended appeal, which ordinarily refers to the record of appeal that falls due for filing within 60 days of lodging the Notice as required under Rule 82(1). The applicant seeks leave to file nothing more than the record of its intended appeal, which can only be admitted with leave of the Court only where there is in existence a Notice of Appeal properly lodged and served in compliance with the mandatory provisions of Rule 75.

16. The peculiar circumstances of this case are such as constrain me to decline the orders sought. It is curious that no attempt is made on the part of the applicant to cure the defects in issue. Indeed, this Court does not hesitate to decline an application for leave to extend time to lodge an intended appeal in the absence of a Notice of Appeal properly on record. Moreover, the Court has power, so far only as its jurisdiction permits.

17. Addressing itself to the mandatory requirement to file and serve a notice of appeal, the Supreme Court in *University of Eldoret and another v Hosea Sitienei and three others* [2020] eKLR observed at para 36:

“The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.”

18. On the authority of the University of Eldoret and Sitienei case, it is true to say that, in the absence of a notice of appeal properly on record, the applicant herein is yet to express its intention to appeal. Citing the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR, this Court had this to say in *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission and 2 others* [2018] eKLR:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

19. In so far as a proper Notice is a jurisdictional pre-requisite, nothing flows from a defective notice to invoke this Court's jurisdiction to grant orders sought pursuant to Rule 4 or any other Rule. In effect, its hands are tied, so to speak. I so hold cognisant of the general principle that it is only in exceptional circumstances that this Court would raise its hand to slam shut the door to justice on the face of a litigant despite the constitutional guarantee of access to justice as enshrined in Article 48.

20. In addition to the foregoing, I must also add that the jurisdictional pre-requisite for a notice of appeal is not merely a technicality of procedure curable by invoking the provisions of Article 159(2) (d) of *the Constitution*, which mandates courts to administer justice without undue regard to technicalities of procedure. In this regard, the cases of *Jaldesa Tuke Dabelo vs. IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others vs. IEBC & 3 Others* [2013] eKLR; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others* [2014] eKLR; *Patricia Cherotich Sawe vs. IEBC & 4 Others* [2015] eKLR, among others, are a constant reminder



that Article 159(2) (d) is not a panacea for all procedural ills even though “the exercise of the jurisdiction under Article 159 of *the Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice, save that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural ills” It matters not that the overriding objectives set out in sections 3A and 3B of the *Appellate Jurisdiction Act* (Cap. 9) confer powers on this Court to dispense justice with greater latitude (see *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli v Orient Commercial Bank Limited* Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008) (Unreported).

21. Having found that there is no notice of appeal properly on record, I find and hold that I have no jurisdiction to determine the applicant’s Motion or grant any of the orders sought. In the circumstances, I need not address myself to the remaining issues that would ordinarily fall to be determined in similar applications.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 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

