



Anthony Burugu & Company Advocates v Electrowatts Limited (Civil Appeal (Application) E444 of 2021) [2022] KECA 415 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 415 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E444 OF 2021
DK MUSINGA, JA
MARCH 4, 2022**

BETWEEN

ANTHONY BURUGU & COMPANY ADVOCATES APPLICANT

AND

ELECTROWATTS LIMITED RESPONDENT

(An application for leave to file an application to strike out the appeal out of time and an application for extension of time to file and serve the Memorandum of Appeal and the Record of Appeal out of time in an intended appeal against the Judgment of the Environment & Land Court of Kenya at Nairobi (Bor, J.) dated 16th December 2020 in Misc. Case No. 131 of 2019)

RULING

1. Before me are two separate applications filed by the opposing parties herein, each seeking the exercise of my discretion to extend the time frame within which certain events should take place. I must state from the onset that the outcome of one application could effectively determine the other.
2. The first application was brought by way of a Notice of Motion dated 2nd November 2021 by Electrowatts Limited (the applicant) under section 3A and 3B of the *Appellate Jurisdiction Act*, rules 4 and 84 of this Court's Rules. The substantive order sought in the application is that this Court be pleased to grant leave to the applicant to file an application to strike out the appeal herein out of time. The gist of the application is that the firm of Anthony Burugu & Company Advocates (the respondent) lodged a notice of appeal at the Environment & Land Court evincing its intention to appeal against the whole decision of the Bor, J. delivered on 16th December 2020 in ELC Misc Case No. 131 of 2019.
3. It is argued that the notice of appeal dated 17th December 2020 was lodged at the Environment & Land Court at Nairobi on 11th January 2021 and was later served upon the applicant's Advocates on 15th January 2021.



4. According to the averments of Stephen Elkington, the Managing Director of the applicant, after service of the notice of appeal, the firm of Anthony Burugu & Company Advocates went into deep slumber up to 3rd September 2021 when it served upon the applicant the record of appeal and the memorandum of appeal. According to the applicant, there was no activity by the firm of Anthony Burugu & Company Advocates for a period of about 7 months, that is to say, between 15th January 2021 and 3rd September 2021.
5. The applicant states that at the time of service of the record of appeal and memorandum of appeal, its Advocates' firm was in the process of moving offices from the 3rd floor to the 2nd floor of the 680 Building in the Nairobi Central Business District; that because of the activities associated with the moving exercise such as setting up of computers, internet cabling and other fixtures, its advocates were no able to prepare the application to strike out the record of appeal within 30 days from the date of service as contemplated under rule 84 of this Court's Rules.
6. It is also argued that upon perusal of the record of appeal, the applicant's advocate realized that the same was filed more than 6 months after the typed proceedings became ready for collection. According to the applicant, the delay by the respondent in filing the record of appeal led it to believe that the respondent had abandoned the appeal.
7. The applicant argues that it will suffer prejudice if the respondent is allowed to disregard the Rules of this Court and proceed with hearing of an appeal that was filed out of time and without leave.
8. The respondent did not file any replying affidavit opposing the application.
9. The second application on record is by the firm of Anthony Burugu & Company Advocates (the applicant) by way of an application dated 16th November 2021. The application is premised on section 3A and 3B of the [Appellate Jurisdiction Act](#) as well as rules 4 and 82 of this Court's Rules. The applicant principally seeks two orders which are that this Court be pleased to extend the time required to file the appeal herein, or in the alternative that this Court be pleased to deem the appeal dated 9th August 2021 and filed on the even date as properly filed before this Court.
10. The grounds in support of the application are set out on the face of the application and in a supporting affidavit sworn by one Anthony Burugu, an advocate in the applicant law firm. It is stated that after filing and serving the notice of appeal on the respondent, the applicant assigned the file to one of its employees known as Elvis Itaa Muthoka to prepare and file the record of appeal.
11. However, and unbeknown to the applicant, the said employee continually and dishonestly misled the applicant into believing that he was in the process of filing the record of appeal based on the updates he would give on the status of the file. This continued up to 6th April 2021 when the said employee ceased to show up for work; that after an audit of the files he was attending to was undertaken, it was realized that he had not filed the record of appeal within the stipulated timeline as instructed and the applicant immediately embarked on the process of filing the record of appeal by procuring the certificate of delay from the trial court.
12. The argument by the applicant therefore is that the delay in filing the record of appeal is attributable to circumstances beyond its control and therefore it should not be punished for the mistake that arose from the dishonesty of one of its employees.
13. The application was opposed by way of a replying affidavit sworn by the Managing Director of the respondent on 6th December 2021. He deponed that the applicant had already filed the appeal out of time without leave of this Court and therefore the application was a mere afterthought. Further,



that in filing the application, the applicant appears to have been triggered by the application dated 2nd November 2021.

14. It was also argued that the applicant did not disclose the position or the capacity in which the said employee was supposed to prepare and file the record of appeal. In this regard, the respondent pointed out that the application does not disclose whether the said employee was an advocate or not. The respondent argues that the delay in filing the record of appeal cannot be placed on the employee for the reason that the said employee left work on 6th April 2021 while the record of appeal was filed on 9th August 2021. The respondent takes issue with the time gap of 4 months which has not been explained.
15. The respondent argues that certified copies of proceedings were ready for collection on 25th February 2021 and that the applicant was duly notified. According to the respondent, nothing stopped the applicant from filing the record of appeal after being notified to collect the certified copies of typed proceedings.
16. I have considered the two applications, the grounds in support thereof, as well as the law. The principles upon which this Court determines an application for extension of time under rule 4 are well settled. The Court considers the length of the delay; the reason for the delay; (possibly) the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi [1999] 2 EA 231*; *Fakir Mohammed vs Joseph Mugambi & 2 Other [2005] eKLR*; and *Muringa Company Ltd vs Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019*.
17. The power to extend time is a discretionary one. However, the discretion must be exercised judiciously and on sound factual and legal basis. See *Njuguna vs Magichu & 73 Others* [2003] KLR 507.
18. There is no doubt that after delivery of the ruling by the trial court on 16th December 2020, the firm of Anthony Burugu & Company Advocates lodged a notice of appeal on 11th January 2021. The notice of appeal appears to have been filed out of the timeframe contemplated under rule 75(2) of this Court's Rules. I am alive to the fact that the application before me is not one challenging the competence of the notice of appeal but one seeking leave to extend time within which to file an application to challenge the competence of the appeal. In any case, my jurisdiction as a single judge is merely to consider the question of extension of time.
19. The applicant in the Notice of Motion dated 2nd November 2021 states that after being served with the record of appeal on 3rd September 2021, it could not immediately file an application to strike out the record of appeal since it was settling down, having relocated its offices within the 680 Building. There is a time gap of about 59 days from the date of service of the record of appeal and the date the instant application was filed. Pursuant to the provisions of rule 84 the applicant ought to have filed its application within 30 days from the date of service of the record of appeal. It is evident therefore, that there was a delay of about 29 days in filing the application. The applicant has explained the reasons for the delay and I am satisfied that the reasons are plausible. Office relocation can be cumbersome and may occasion delay of some processes, especially where a proper settling down is dependent on other factors such as working internet and a proper file retrieval system. In the circumstances, I do not think that the delay of 29 days is inordinate.
20. Turning to the Notice of Motion dated 16th November 2021, there is a delay of close to 6 months from the date the applicant was notified that the certified typed proceedings were ready for collection. The applicant blames the delay in filing the record of appeal on the dishonesty of one of its employees. It is noteworthy that the office designation of the employee was not stated. Was he an advocate who was supposed to prepare court documents or was he an Office Assistant or a Clerk whose work was merely to present the record of appeal for filing? If the employee left employment on 6th April 2021,



why did it take the applicant up to 9th August 2021 to file the record of appeal? That four months' delay was not explained.

21. Additionally, it has not been explained why after filing the record of appeal on 9th August 2021 without leave the applicant had to wait up to 16th November 2021 to file the instant application for extension of time. I agree with the respondent that the applicant was not intent on pursuing his appeal and was only triggered into action by the respondent's application dated 2nd November 2021. I therefore do not find the reasons espoused by the applicant for the delay in filing the record of appeal plausible.
22. In the circumstances of this application and in view of my findings on the issue of delay, it will not serve any purpose to consider other factors such as the likelihood of success of the intended appeal and the likely prejudice to be occasioned if the orders sought are granted.
23. In the end, I decline to exercise my discretion to grant the orders sought in the Notice of Motion dated 16th November 2021. The same is hereby dismissed with costs. The Notice of Motion dated 2nd November 2021 is hereby allowed as prayed. Electrowatts Limited shall file and serve its intended application within 14 days hereof.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

