



University of Nairobi v Ricatti Business College of East Africa (Civil Appeal (Application) E566 of 2021) [2022] KECA 533 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KECA 533 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E566 OF 2021
AK MURGOR, JA
APRIL 28, 2022**

BETWEEN

UNIVERSITY OF NAIROBI APPLICANT

AND

RICATTI BUSINESS COLLEGE OF EAST AFRICA RESPONDENT

(Being an Appeal against the entire judgment of the High Court, Commercial & Admiralty Division at Nairobi (F. Tuiyott, J. (as he then was)) dated and delivered on 6th December, 2019 in HCCC No. 73 of 2015)

RULING

1. By a Notice of Motion dated 8th November 2021, brought pursuant to rule 4 and 42 of this court's rules and article 159 of *the Constitution*, the applicant, University of Nairobi seeks an extension of time for lodging of the record of appeal and for the Record of appeal served upon the respondent on 8th November 2021 to be deemed as duly served within time.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by Muema Kitulu Advocate for the applicant sworn on 8th November 2021, where it was contended that the Notice of appeal was lodged on 13th December 2019 and served upon the respondent on 18th December 2019; that the Record of appeal was lodged on 1st October 2021 after the proceedings in the trial court were supplied and a Certificate of delay issued in that regard; that the process of uploading the Record of appeal was onerous due to its volume; that in the process, the court's e-filing platform developed problems that necessitated repairs to be undertaken; that when the record of appeal was eventually lodged, it could only be done in 25 byte sizes, a process which took over 8 hours to be completed; that subsequent efforts to serve the soft copy of Record on the respondent were equally problematic due to its large size, which resulted in the record having to be broken down into smaller attachments; that the only option left was to scan, print, bind and serve a hard copy on the respondent, which was



accomplished on 8th November 2021, albeit out of time; that the delay in service is regretted; that the respondent will not suffer any prejudice were time to be extended, and in any event, the Record of appeal has since been served on it; that conversely, the applicant stands to suffer irreparable loss and damage if the application was declined.

3. The applicant annexed various correspondences between the applicant's counsel and the Deputy Registrar of this court and a Certificate of delay dated 24th August 2021.
4. Under rule 4 of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997.
5. As concerns the length of delay, the judgment was delivered on 6th December 2019, and this application was brought on 8th November 2021, a delay of one year and 11 months. The applicant explains that the reasons for delay were firstly, the time taken to prepare the certified proceedings and secondly, the challenges experienced in uploading the record onto this court's e-filing platform.
6. Beginning with the period for preparation of the proceedings. This was the period between the date the Notice of appeal was filed on 13th December 2019 and the time of lodging the record onto the e-filing platform on 21st September 2021. The applicant has not attached a letter bespeaking a request for proceedings, but stated that a Certificate of delay dated 24th August 2021 was issued. A consideration of the application and the affidavit does not show that any Certificate was attached. As a result, I am unable to ascertain how long it took to prepare the proceedings. In addition, the motion does not disclose that an explanation was provided for the cause of the delay during this period.
7. Thereafter, the applicant has explained that the remaining days delay was occasioned by the difficulties experienced in uploading the Record of appeal onto this Court's e-filing platform on 21st September 2021, which process was encumbered with technical challenges, and disruptions due to a breakdown of the system caused by the bulky record, not to mention the difficulties that the applicant experienced in attempting to serve the respondent with the same voluminous record. This notwithstanding, it only explains about 20 days delay, yet an extensive period of 1 year and 10 months has not been explained at all.
8. Much as the applicant should have had a shot at ventilating its appeal before this court, given the inordinate and unexplained delay, it goes without saying that the respondent will be prejudiced were time to lodge the appeal extended.
9. In sum, I decline to exercise my discretion to extend time for filing and service of the record of appeal, and dismiss the motion. I make no orders as to costs since the respondent did not participate in these proceedings.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 28TH OF APRIL, 2022.

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

