



**Gudka Westend Motors Limited v Industrial & Commercial Development Corporation
(Civil Application 175 of 2020) [2022] KECA 741 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 741 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 175 OF 2020**

F SICHALE, JA

MAY 27, 2022

BETWEEN

GUDKA WESTEND MOTORS LIMITED APPELLANT

AND

**INDUSTRIAL & COMMERCIAL DEVELOPMENT
CORPORATION RESPONDENT**

*(Being an Application to file a Notice of Cross of Appeal out of time against the
Judgment of Majanja J dated 28th March 2019 IN Kisii HCCC No. 37 'A' of 2008)*

RULING

1. Industrial & Commercial Development Corporation, (the applicant herein) has vide a motion dated 7th May 2021, brought pursuant to the provisions of Rules 4,42 and 93 of the [Court of Appeal Rules](#) 2010, Sections 3, 3A, 3B and 7 of the [Civil Procedure Act](#) and all other enabling provisions of the Law; sought the following orders:
 - “1. Spent.
 2. THAT this Honourable Court be pleased to grant the applicant leave to file a Notice of Cross Appeal out of time.
 3. THAT upon grant of leave to file the Notice of Cross Petition out of time, the Cross Petition annexed hereto be deemed as duly/properly filed and served.
 4. THAT costs of this application be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by George Kithi, the Advocate who has the conduct of this matter on behalf of the applicant who deposed *inter*



alia that vide a judgment delivered on 28th March 2019, Majanja J had declared that the parties herein had both succeeded and failed in their respective claims.

3. He further deposed that both parties were aggrieved with the aforesaid judgment pursuant to which the appellant filed and served its Notice of Appeal and Record of Appeal and that on its part, following internal consultations, the applicant herein instructed its advocates to appeal against the aforesaid judgment and accordingly, vide a letter dated 8th May 2019, requested for typed proceedings.
4. That, despite the firm's efforts in pursuing the Court to obtain hard copies of the typed proceedings, the same was not forthcoming and neither did the Court notify the firm that the same were ready for collection and that the firm had now drawn and intended to file on the applicant's behalf, a Notice of Cross Appeal which raises substantial grounds and that the applicant was apprehensive that if the orders sought were not granted, the appeal may be heard and concluded in its entirety without having the opportunity to raise and have its grounds of Cross Appeal determined in a similar way as the appeal.
5. The motion was opposed vide a replying affidavit sworn by Ashwin Ramji Gudka, the Director of the respondent on 2nd July 2021, who deposed *inter alia*, that the application before Court was served on the respondent on 22nd June 2021, which was grossly out of time as it was filed approximately 11 months after the Memorandum and Record of Appeal was served upon the applicant, which delay had not been sufficiently explained and that further the applicant's alleged letter dated 8th May 2019, was not copied to the respondent in contravention of Rule 82 (2) of the Rules of this Court and that further there was no evidence exhibited by the applicant to demonstrate that the applicant made any efforts to pursue delivery to itself of the typed proceedings after having allegedly applied for the same.
6. It was submitted for the applicant that extension of time was not a right of a litigant against a Court but a discretionary power of the Courts which litigants have to lay a basis where they seek Courts to grant it and that in the instant case, judgment was delivered on 28th March 2019, pursuant to which the Memorandum and Record of Appeal were served upon the applicant on 30th July 2020, upon which the Notice of Cross Appeal was to be filed within 30 days but owing to Covid 19 pandemic, the applicant's advocates offices closed down for some time owing to the government's directives on containment measures for covid-19 and it was only until the month of May, that the said advocates realized that the Notice of Appeal had not been filed yet the time within which it ought to have been filed had lapsed thereby precipitating the instant application.
7. It was further submitted that the intended Cross Appeal had high chances of success since the applicant had an arguable appeal and if the instant application was not granted, the applicant would be highly prejudiced.
8. On the other hand, it was submitted for the respondent that the application was served on the respondent on 22nd June 2021, which was grossly out of time as it was filled 11 months after the Memorandum and Record of Appeal was served on the applicant, which delay had not been sufficiently explained. As regards the reasons for the delay, it was submitted *inter alia* that the applicant had failed to explain why it was unable to obtain proceedings yet the respondent had been able to obtain the same from the registry 11 months prior and served the same upon the applicant on 30th July 2020, a fact that had been admitted by the applicant and that further there was no Certificate of Delay pursuant to Rule 82 (1) of the Rules of this Court exhibited by the applicant which disentitled the applicant the orders being sought.
9. As regards prejudice, it was submitted that this would cause great prejudice to the respondent who had now been ambushed after inordinate delay and at the tail end of this appeal, both parties having



filed their respective submissions in preparation for the hearing of the appeal which would result in additional costs and the delay to be occasioned in preparing the responses to the Cross Appeal.

10. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the applicant's further affidavit in response to the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
11. The applicant's motion is brought *inter alia*, under Rule 4 of this Court's Rules. The said Rule provides:

"4.

Extension of time

The Court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

12. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997 where the Court stated;

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons 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."

13. In the instant case, the impugned judgment was delivered on 28th March 2019, whereas the instant application was filed on 7th May 2021, a period of about 2 years and 2 months from the date of the impugned judgment which period is no doubt inordinate. The applicant contends that the delay in filing the Cross Appeal was due to the fact that its advocate's efforts in pursuing the Court to obtain hard copies of the typed proceedings were futile and that further the applicant's advocates offices closed down for some time owing to the government's directives on containment measures for Covid-19 and it was only until the month of May (year not indicated), that the said advocates realized that the Notice of Appeal had not been filed yet the time within which it ought to have been filed had lapsed.
14. Save for a letter dated 8th May 2019, by the applicant requesting for certified typed proceedings, there is no evidence whatsoever either in terms of correspondence or otherwise to demonstrate that the applicant made any other effort to have the typed proceedings supplied to them. Similarly, the contention by the applicant that the Court did not notify the applicant's advocates that the proceedings were ready for collection is rather absurd as a diligent party has a corresponding duty to keep on checking for the same.
15. Additionally, the contention by the applicant that its advocates had closed offices owing to the Covid-19 pandemic containment measures is without basis in the instant case for the reason that the impugned judgment was delivered on 28th March 2019 whereas the alleged containment measures were put in place by the Government sometimes in the month of April 2020 which was within public



knowledge and hence, this Court takes judicial notice of such. No explanation has been forthcoming from the applicant to demonstrate the measures that they took from March 2019 up to April 2020 when Covid-19 containment measures were put in place by the Government. In any event, the respondent had obtained the typed proceedings as early as 30th July 2020 and even served upon the applicant the Record of Appeal and there is no explanation whatsoever as to why the applicant was equally not able to obtain the typed proceedings within the same period as the respondent.

16. Consequently, I am of the considered opinion that the delay herein is inordinate and the same has not been satisfactorily explained to this Court.
17. As to whether there is a possibility of the appeal succeeding, I have looked at the Notice of Appeal and I am not satisfied that the applicant has raised substantial issues of law as contended. Of course I am mindful of the fact that I cannot say more regarding this issue as a single Judge. I have also taken note of the fact that the applicant did not even appear at the hearing of this matter before the High Court.
18. As regards prejudice, the applicant has not demonstrated the prejudice that it would stand to suffer if the instant application is not allowed. On the other hand, I am satisfied that to allow this application at this stage when the parties have already filed their respective submissions in preparation for the hearing of the appeal will occasion the respondent great prejudice both in terms of additional costs and the delay to be occasioned in preparing for the Cross Appeal albeit late in the day.
19. Taking into totality all the circumstances in this case, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of this Court as laid out in *Leo Sila Mutiso* case (*supra*), to extend time and therefore decline to extend time within which to file a Notice of Cross Appeal.
20. Accordingly, the applicant's motion dated 7th May 2021, is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2022.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

