



**Kamula v Barclays Bank of Kenya Limited (Now ABSA Bank Kenya PLC) (Civil Appeal (Application) E470 of 2021) [2022] KECA 846 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 846 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E470 OF 2021**

**F SICHALE, JA**

**MAY 27, 2022**

**BETWEEN**

**STEPHEN KIVANDI KAMULA ..... APPLICANT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED (NOW ABSA BANK KENYA PLC) ..... RESPONDENT**

*(An Application for Extension of Time to file an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ongaya, J), dated 9th April 2020.)INELRC Cause No. 269 of 2016)*

**RULING**

1. Stephen Kivandi Kamula (the applicant herein), has by a motion dated 21st December 2021, brought pursuant to the provisions of Articles 10,22, 159 and 259 of the Constitution of Kenya, Sections 3, 3A, & 3B of the Appellate Jurisdiction Act, Rules 4, 47 & 53 of the Court of Appeal Rules Sought the following orders:
  1. That leave be granted to extend time to the applicant to file his Memorandum and Record of Appeal out of time from the judgment of the Employment and Labour Relations Court (Justice Byram) delivered on 9th April 2020 in ELRC Cause No. 269 of 2016; Stephen Kivandi Kamula vs Barclays Bank Kenya Limited.
  2. That the applicant’s Notice of Appeal filed herein be deemed as duly served.
  3. That the name of the respondent, Barclays Bank of Kenya Limited be substituted with Absa Bank Kenya Plc.
  4. That costs of this application be in the cause.”



2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant and Mathew Muoki, counsel on record on behalf of the applicant, who deposed inter alia that vide a judgment delivered on 9th April 2020, Ongaya, J dismissed his memorandum of claim and that being aggrieved with the aforesaid judgment, he instructed his advocates to institute an appeal to the Court of Appeal which notice was served on the respondent on 13th May 2020, which was outside the statutory timeline of 7 days' timeline for service of the Notice of Appeal and that failure to serve the Notice of Appeal within time was completely inadvertent.

3. He further deposed that he did not file his appeal within 60 days of collecting the typed proceedings which was as a result of mistake occasioned by his advocate on misperception on when the 60 days' period starts running; between when the Certificate of Delay was issued and when the proceedings were collected and that further, this application had been brought immediately upon realization of the said mistake and that as such, there was a good and sufficient cause for not filing the appeal within the prescribed time.

4. There was no response from the respondent.

It was submitted for the applicant that he had set out the reasons for the delay in filling the appeal and serving the Notice of Appeal, which reasons were wholly attributable to his counsel and not himself and that further the delay was discovered on 16th December 2021, being 24 days from 22nd November 2021 when the 60 days period lapsed and that upon discovery of the said mistake, the applicant filed the instant application on 21st December 2021 and that as such there was no inordinate delay in bringing this application.

5. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's submissions, the cited authorities and the law.

6. 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."

7. 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. In *Fakir Mohamed V Joseph Mugambi 2 Others* C.A. No. NAI. 332 of 2004, this Court stated as follows regarding discretion under the rule and the factors that ought to guide its exercise:

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, (possibly) 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 the 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 ...”

8. In the instant case, the impugned judgment was delivered on 9th April 2020 whereas the Notice of Appeal was filed on 23rd April 2020 which was within time. The Notice of Appeal was however served upon the respondent on 13th May 2020, which was 14 days beyond the statutory period. Similarly, there was a delay of about 24 days in filing the appeal, which the applicant contended that upon discovery of the same on 16th December 2021, the applicant filed the instant application on 21st December 2021.
9. From the circumstances of this case, I am of the considered opinion that a delay of 14 and 24 days in serving the Notice of Appeal and filing the appeal respectively is neither inordinate nor unreasonable. As regards the reasons for the delay, the same has been blamed on inadvertence on part of the applicant’s advocates. From the circumstances of this case, I am satisfied albeit reluctantly, that the delay has been explained to the satisfaction of this Court.
10. As to whether there is a possibility of the appeal succeeding, I have looked at the annexed draft Memorandum of Appeal and I am satisfied the applicant has demonstrated that he has an arguable appeal. Of course, I am mindful of the fact that I cannot say more regarding this issue as a single Judge.
11. As regards prejudice, there is no doubt that the applicant will suffer prejudice if the instant application is not allowed, as his right of appeal will have been completely shut out.
12. Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time and therefore allow the motion in terms of prayers 1,2 and 3.
13. Accordingly, the applicant is hereby granted leave to file his Memorandum and Record of Appeal from the judgment of Ongaya, J dated 9th April 2020, within 7 days from the date of this ruling failure to which these orders will stand vacated.
14. In light of the applicant’s advocates own admission that they are to blame for the predicament that the applicant finds himself in, the costs of this motion shall be personally borne by his advocates.

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**

