



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kenya Tea Development Agency v Kobia (Civil Application
E209 of 2020) [2022] KECA 843 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 843 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E209 OF 2020**

F SICHALE, JA

MAY 27, 2022

BETWEEN

KENYA TEA DEVELOPMENT AGENCY APPELLANT

AND

RUFUS KITHELA KOBIA RESPONDENT

(Being an Application to Strike Out the Appeal from the Judgment of the High Court of Kenya at Nairobi (Njuguna J), dated 26th September 2019.)IN(Nairobi HCCC No. 630 of 2007)

RULING

1. Before me is a motion dated 16th June 2021, brought pursuant to the provisions of Sections 3A, 3B of the [Appellate Jurisdiction Act](#), CAP 9 of the Laws of Kenya and Rules 4 and 84 of the [Court of Appeal Rules](#) 2010, in which Kenya Tea Development Agency (the applicant herein), seeks the following orders;
 - “1. Time provided under Rule 84 of the Court of Appeal Rules to file an application to strike out an appeal be extended.
 2. The applicant’s Notice of Motion dated 28th May 2021 and filed on 3rd June 2021 be deemed as properly filed.
 3. 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 Dr. John Kennedy Omanga the Group Company Secretary and Chief Legal Advisor of the applicant who deposed *inter alia* that the respondent had lodged his appeal on 30th July 2020 and served the same on the applicant on 30th April 2021. That, the applicant was required to file the application to strike out the appeal within 30 days of being served with the Record of Appeal which time lapsed on 30th



May 2021 which was a Sunday and hence, the applicant was obliged to file the application on 31st May 2021.

3. He further deposed that the applicant forwarded the application to the Court registry on 31st May 2021 and made a request for the same to be mapped on e-filing on the same day, but the same was not mapped until 3rd June 2021 and that the 3 days' delay to file the application was not inordinate, intentional or unreasonable and that the same was occasioned by the time taken by the registry to have the matter mapped on the e-filing platform.
4. The application was opposed vide a replying affidavit sworn by *Rufus Kithela Kobia, the respondent herein, who deposed inter alia that the applicant had filed its application to strike out the appeal on 3rd June 2021, after the lapse of the 30 days' mandatory period and that further the alleged date that the applicant made a request for mapping on e-filing, on 31st May 2021 was still outside the 30 days' mandatory period required to file an application to strike out an appeal under the Court of Appeal Rules 2010.
5. It was submitted for the applicant the application was filed 3 days out of time, which delay had been explained in that the Court Registry did not map out the matter expeditiously and that the delay herein was neither inordinate nor intentional and that further if the instant application was not allowed, the applicant would suffer prejudice as the respondent will be able to prosecute his appeal which has been filed and served out of time without leave of the court.
6. On the other hand, it was submitted for the respondent that the application to strike out the respondent's appeal was filed outside the mandatory 30 day timeframes commanded by Rule 84 of this *Court's Rules* and consequently, the applicant's motion ought to be dismissed with costs to the respondent.
7. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
8. 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.” (Emphasis added).

9. 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 ...”

10. In the instant case, it is indeed not in dispute that the Record of Appeal was served on the applicant on 30th April 2021. The applicant therefore was supposed to have filed the application to strike out the appeal within 30 days of being served with the Record of Appeal i.e. on 30th May 2021. The same was however not filed until 3rd June 2021 which was 3 days later.
11. The applicant contends the delay of 3 days was occasioned by the time taken by the registry to have the matter mapped on the e-filing platform. From the circumstances of this case, I do not consider the delay of 3 days to be inordinate nor unreasonable. Likewise, the reason put forth for the delay is plausible and the same has been explained to the satisfaction of this Court.
12. As regards prejudice, the applicant has contended that it will suffer prejudice as the respondent will be able to prosecute his appeal which has been filed and served out of time without leave of the court, a contention that has not been controverted by the respondent.
13. 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 under Rule 4 of this Court’s Rules to extend time.
14. Accordingly, the applicant’s motion dated 16th June 2021, is allowed in terms of prayer 1 and 2 thereof. The costs of this motion shall abide the outcome of the motion dated 28th May 2021.

Orders accordingly.

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

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

