



**Spacotech Limited & another v Gulf African Bank Limited (Civil Appeal
(Application) E335 of 2021) [2022] KECA 888 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 888 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E335 OF 2021
AK MURGOR, JA
MAY 13, 2022**

BETWEEN

SPACETECH LIMITED 1ST APPLICANT

CHARLES THAIRU NJUGUNA 2ND APPLICANT

AND

GULF AFRICAN BANK LIMITED RESPONDENT

(An application for extension of time to file an appeal against the ruling and order of the High Court at Nairobi (W. A. Okwany, J.) delivered on 8th July 2021 in HCCC No. 222 of 2019)

RULING

- 1 This Notice of Motion dated 15th September 2021, is brought pursuant to rules 4 of the Court of Appeal rules, where the applicants, Spacotech Limited and Charles Thairu Njuguna, seek an order to set aside the High Court orders of 8th July, 2021 pending the hearing and determination of this application, and for this Court to enlarge time for filing of the applicants' Notice of appeal so as to deem it as properly filed together with this application.
- 2 The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by Charles Thairu Njuguna on 13th September 2021, and in written submissions, wherein the applicants contend that on 6th December, 2019, an interlocutory judgement was entered against the applicants; that they were aggrieved and filed an application seeking to have the trial judge's decision set aside; that in a ruling dated 8th July 2021, the trial judge allowed the applicants' application on condition that the applicants file a defence, witness statements and their list of documents within 15 days; that the applicants were also ordered to deposit Kshs.12 million in an interest earning account in the joint names of their advocates within 45 days; that the applicant complained that the amount to be deposited was oppressive and tantamount to condemning them unheard. The applicants were aggrieved and intend to file an appeal which they assert is arguable and has good chances of success;



that the respondent will not suffer any prejudice were time to be extended. They prayed that in the interest of justice, that time to be extended to allow them to file the Notice of appeal.

- 3 The respondent filed a replying affidavit on 13th October 2021 sworn by Lawi Sato, the respondent's Senior Legal Officer, where it was deponed that no Notice of appeal had been filed against the ruling delivered on 8th July 2021; that the ruling was delivered in the presence of the applicants' then counsel, and that no explanation was provided for the failure to file the Notice of appeal within the stipulated period; that instead, central to the applicants' motion was the prayer seeking to have the ruling and orders of 8th July 2021 set aside. In their written submissions, the respondent asserted that notwithstanding the delay of over 55 days in bringing this application, no explanation was presented to the Court.
- 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 vs Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997.
- 5 At the outset, before I determine the application for extension of time which is rightly before this Court, it is observed that the applicants' application mainly seeks to set aside the trial court's orders. As this is not a matter that a single judge can entertain, I decline the invitation to deal with the prayer seeking to set aside the orders of the trial court.
- 6 Turning to the application to extend time, the applicant seeks for time to be extended to file a Notice of appeal out of time and to deem the notice filed together with this application as having been properly filed. Though I have been through the record, I cannot find the Notice of appeal referred to, and without such Notice, this Court has no basis upon which to entertain this application.
- 7 But having said that, in the event the applicant has failed to file the Notice of appeal for the reason that it intends to do so after time has been extended, then what requires to be considered at this juncture is whether the requirements of rule 4 have been satisfied.
- 8 Beginning with the period of delay, and whether it has been satisfactorily explained, the ruling was rendered on 8th July 2021, and this application was filed on 15th September 2021. This would give rise to a delay of about 69 days, yet the Notice of appeal ought to have been filed within 14 days. A consideration of the applicants' motion, and supporting affidavit does not disclose that any explanation was advanced for the delay. There is absolutely no reason given as to why the applicants did not file the Notice of appeal within the period specified by this Courts' rules. Instead, the applicants have sought to advance arguments in support of the prayer seeking to set aside the ruling and orders of the trial judge's which are not matters that are for consideration by this Court.
- 9 In the case of *Trade Bank Ltd In liquidation vs LZ engineering Construction Ltd and another* Civil Appln NAI. 282/98, this Court observed;

The inaction” which was being overlooked was a delay of nearly 3 months. We think it is now settled that where there is such a long delay or in action or whatever else it may be called, there ought to be some kind of explanation or material to enable the judge to exercise the discretion given by rule 4. As we have said the discretion can only be exercised upon reason not sympathy. On this aspect of the matter, the



applicants placed before the learned single judge no material upon which he could exercise his discretion.”

- 10 In sum, whether or not the applicants have filed a Notice of appeal, since no explanation has been provided for the delay, there is nothing upon which I can exercise my discretion to extend time to file the Notice of appeal.
- 11 With respect to whether the intended appeal is arguable, the applicants contend that the conditions for grant of the order of setting aside are prohibitive, and tantamount to condemning them unheard. In granting the orders, it is trite that the trial judge was exercising her discretion. Given these circumstances, the applicants will be hard pressed to challenge the judge’s exercise of discretion that gave rise to the resultant decision.
- 12 Finally, as to whether the respondent will be prejudiced, my view is that any further delay in bringing an appeal against the trial judge’s ruling of 8th July 2021, will only seek to deny the respondent the enjoyment of the fruits of a judgment that was rendered two years earlier on 6th December 2019, which is a prolonged period for which they have already had to wait.
- 13 In sum, the applicants having failed to fulfil the threshold requirements, I decline to exercise my discretion to extend time for filing of the Notice of appeal, and accordingly dismiss the motion dated 15th September 2021 with costs to the respondent.
- 14 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

