



**Kenya Ports Authority v Munyao & 4 others (Civil Appeal (Application)  
134 of 2018) [2022] KECA 569 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KECA 569 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) 134 OF 2018  
SG KAIRU, JA  
JUNE 10, 2022**

**BETWEEN**

**KENYA PORTS AUTHORITY ..... APPELLANT**

**AND**

**JOSEPH MAKAU MUNYAO ..... 1<sup>ST</sup> RESPONDENT**

**ELIUS NJOKA ..... 2<sup>ND</sup> RESPONDENT**

**STEPHEN BAYA MWANYULE ..... 3<sup>RD</sup> RESPONDENT**

**MWINYI SULEIMAN SIBABU ..... 4<sup>TH</sup> RESPONDENT**

**BWANA MOHAMED BWANA ..... 5<sup>TH</sup> RESPONDENT**

*(An application for leave to file a notice of appeal out of time from the judgement  
of the Court of Appeal at Mombasa (Visram, Karanja & Koome, JJ.A)  
delivered on 11th July 2019 in Court of Appeal Civil Appeal No. 134 of 2018)*

**RULING**

1. In their application dated 26<sup>th</sup> July, 2019, the respondents in the appeal, who are the applicants in the present application, seek orders that their notice of appeal be deemed as duly filed within time. Alternatively, they seek leave to file their notice of appeal out of time.
2. Based on the grounds on the face of the application, the supporting affidavit sworn by Joseph Makau Munyao and authorities cited by Mr. Aboubakar, learned counsel for the applicants, their case is that they intend to challenge, before the Supreme Court of Kenya, the judgment of this Court delivered herein on 11<sup>th</sup> July 2019; that they met with their advocate on 25<sup>th</sup> July 2019 to give instructions on the filing of the appeal, which was the last day of filing the notice of appeal; that the advocate prepared



the notice of appeal on Friday 26<sup>th</sup> July 2019 but was late to file it but managed to file it the following Monday 29<sup>th</sup> July 2019 by which time the time for filing the notice of appeal had already lapsed.

3. Opposing the application, learned counsel for the appellant/respondent Mrs. Wetende relied on a replying affidavit sworn by Wamuyu Ikegu, a Senior Legal Officer of the appellant and her written submissions in urging that no valid grounds have been set out to warrant the orders sought; and that the applicants have not set out any matters of general public importance as a basis of the intended appeal to the Supreme Court.
4. I have considered the application and the submissions. It is noteworthy, for a start, that the appellant/respondent moved the Court in this appeal by application dated 2<sup>nd</sup> August 2019 seeking extension of time to apply for certification of its intended appeal against the same judgment of this Court, which application was allowed by a ruling delivered on 5<sup>th</sup> November 2021.
5. That as it may, the principles guiding this Court in applications for extension of time are established. Waki, JA summarized those principles in the case of *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005] eKLR where he stated:

“The exercise of this Court’s discretion under Rule 4... 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 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: See *Mutiso vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”

6. The Supreme Court of Kenya, more recently in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration. See also the recent ruling of the Supreme Court of Kenya in *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others* (Application 12 (E021) of 2021) [2022] KESC 3 (KLR) (Commercial and Tax) (10 February 2022) (Ruling).
7. With those principles in mind, the judgment of this Court, as already stated was delivered on 11<sup>th</sup> July 2019. Under Rule 36 of the *Supreme Court Rules*, the notice of appeal ought to have been filed within 14 days from 11<sup>th</sup> July, 2019, that was by 25<sup>th</sup> July 2019. The applicants state that the notice of appeal was filed on 29<sup>th</sup> July, 2019. Although in their application and in the supporting affidavit the applicants have referred to a notice of appeal, it was however not exhibited.
8. The present application, though dated 26<sup>th</sup> July 2019 was lodged on 30<sup>th</sup> July 2019 and a plausible explanation has been offered that time was lost in obtaining a copy of the judgment and in obtaining instructions from the applicants. The delay involved is not, in the circumstances, inordinate. It is not evident what prejudice the appellant/ respondent will suffer by enlargement of time in favour of



the applicants. I am in the circumstances inclined to exercise the Court's discretion in favour of the applicants.

9. Accordingly, I allow the application in terms of prayer 3 of the application. The applicants shall file and serve the notice of appeal within 14 days of delivery of this ruling. If, however, the applicants have already filed and served the notice of appeal on 29<sup>th</sup> July 2019, the same is admitted out of time.
10. I make no orders as to costs.

**DATED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> DAY OF JUNE 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

