



Monaco Engineering Co. Ltd v Njeru, Nyaga & Co Advocates (Civil Appeal (Application) E639 of 2021) [2022] KECA 863 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 863 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E639 OF 2021
MSA MAKHANDIA, JA
JULY 22, 2022**

BETWEEN

MONACO ENGINEERING CO. LTD APPLICANT

AND

NJERU, NYAGA & CO ADVOCATES RESPONDENT

(An application for extension of time to file and serve a notice of appeal out of time from the ruling and order of the High Court of Kenya at Nairobi (Majanja, J.) dated 10th September 2021 in Misc. Civil Application No. E412 of 2019)

RULING

1. The applicant, by way of an undated motion on notice and brought under Sections 3, 3A & 3B of the [Appellate Jurisdiction Act](#), Rule 4 of the [Court of Appeal Rules](#) seeks various prayers but cardinal to my jurisdiction are prayers that the time limited to serve the notice of appeal be extended and that the notice of appeal filed on 21st September 2021 be deemed to have been filed and served within time.
2. It is supported by the grounds on its face, the supporting affidavit of Stanley Karani dated 5th November 2021 and the written submissions dated 28th December 2022.
3. It is the applicant's case that a ruling in Miscellaneous Civil Application No. E412 of 2019 Monaco Engineering Limited and Njeru Nyaga & Company Advocates was delivered on 10th September 2021 and the applicant filed a notice of appeal on 21st September 2021 but failed to serve the same on the respondent as well as a letter bespeaking proceedings in time due to a regrettable inadvertence on its part. That the application has been brought without undue delay. The applicant has relied on the cases of [Muringa Company Ltd Vs. Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019](#), Muchungi Kiragu & Another Civil Application No. Nai 356 of 1996 and Article 159 of [the Constitution](#) to urge me not to drive it away from the seat of justice and find that it has made a case for the grant of the orders sought.



4. The application is opposed by the respondent on the grounds that, the application is malicious, frivolous, vexatious and a gross abuse of the court process. That it lacks substance and is meant to cause the respondent unnecessary anxiety, trouble and expense. Relying on the case of *Kiranga Estates Limited Vs. National Bank of Kenya Limited* [2019] eKLR, the respondent urged me to dismiss the application.
5. I have considered the pleadings, the respective submissions as well as the law. The principles upon which this Court determines an application for extension of time under Rule 4 are well settled. The Court considers the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi* [1999]2 EA 231; *Njuguna Vs. Magichu & 73 Others* [2003] KLR 507, *Fakir Mohammed Vs. Joseph Mugambi & 2 Others* [2005] eKLR; *Muringa Company Ltd Vs. Archdiocese of Nairobi Registered Trustees* , Civil Application No. 190 of 2019.

In *Njuguna Vs. Magichu & 73 Others*(supra) Waki, J.A. rendered himself thus:

The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless, discretion has to be exercised judicially, that is on sound factual and legal basis.”

6. The trial court delivered its judgment in the matter on 10th September 2021 and the applicant duly filed the notice of appeal in time. However, the applicant failed to serve the same within the prescribed period of seven days and equally failed to write a letter bespeaking proceedings and judgment as required by the rules of this Court. There is a time gap of about 40 days between the date of filing of the notice of appeal and the date of filing of the instant application. The applicant has explained the reasons for the delay in his supporting affidavit as being one of a regrettable error. I am persuaded that even though there was delay, the same was not inordinate and has sufficiently been explained. I think that the applicant is sincere in its explanation and the same is plausible. Accordingly, the applicant is deserving of the exercise of my unfettered discretion in its favour.
7. On the aspect of the chances of success of the intended appeal, it is not within my province at this stage to determine definitively the merits of the intended appeal. That is the duty of the full court when it is ultimately presented with the intended appeal. In this regard, I revert to the case of *Arthuman Nusura Juma Vs. Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated as follows:

This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word possibly.”
8. Going through the draft memorandum of appeal annexed to this application, I am satisfied that the applicant has bona fide issues for consideration on appeal.
9. On the issue of the degree of prejudice to be occasioned on the applicant if the application is not allowed, the applicant argues that if the impugned judgment and decree by the trial court is executed, the appeal will be rendered nugatory.
10. The respondent on the other hand, has not argued that it stands to suffer any prejudice if the application is granted. Taking all the circumstances of the dispute into consideration, it is my view that the degree of prejudice that the applicant will suffer if this application is not allowed far outweighs the



prejudice that the respondent may suffer if this application is allowed, given that the ruling of the High Court involves a colossal sum of Kshs.28,000,000.

11. Consequently, I allow the application as prayed. The costs of the application shall abide the outcome of the intended appeal.

Dated AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

