



**Noah Investment Limited v County Government of Nyamira (Civil Application E019 of 2022) [2022] KECA 692 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 692 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E019 OF 2022**

**F TUIYOTT, JA**

**JULY 22, 2022**

**BETWEEN**

**NOAH INVESTMENT LIMITED ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF NYAMIRA ..... RESPONDENT**

**RULING**

- [1] Before me is a Notice of Motion dated 31<sup>st</sup> January, 2022 said to be brought pursuant to rules 4 and 75 of the rules of this Court and in which Noah Investment Limited (the applicant) seeks the leave of this Court to file an appeal out of time against the decision of E.N. Maina, J. delivered on December 2, 2021 in Nyamira HCCC No. 3 of 2019.
- [2] In support of the application is an affidavit sworn by the applicant's counsel, Kevin Mochiemo Gichana on January 31, 2022. Counsel deposes that the judgment was delivered virtually from Nairobi as the learned Trial Judge had been transferred from Nyamira but that he was logged out from the session due to technical difficulties and as a result missed the gist of the decision. He further deposes that, through a letter dated December 8, 2021 addressed to the Deputy Registrar of Nyamira law courts, he made effort to get a copy of the full judgment but by an email response dated December 14, 2021, he was advised that the court file was still in Nairobi. He further states that he nevertheless proceeded to prepare a Notice of Appeal but was unable to file it due to the missing court file. He explains that the office of his law firm was closed for the Christmas holidays from 15<sup>th</sup> December, 2021 to January 17, 2022 and he was only able to receive a copy of the judgment on January 21, 2022 when the time for lodging an appeal had lapsed. Lastly, that he received instructions on January 25, 2022 from the applicant to file the appeal.
- [3] Counsel filed a supplementary affidavit sworn on March 4, 2022 wherein he further deposes that he awaits the court registry of Nyamira to furnish him with copies of the typed proceedings.



- [4] The application was opposed by the respondent via the replying affidavit of James Ntabo, the county secretary of the respondent, sworn on May 10, 2022. He deposes that neither the applicant nor its counsel were present at the time the court read its judgment on December 2, 2021. That it took the applicant six (6) days to write to the Registrar inquiring of the judgment and at no time was it intimated that an appeal was intended. He notes that the applicant is not truthful in that; it did not apply for the proceedings pending appeal; it did not serve the respondent's advocate with respect to that request; and that the notice of appeal was prepared on January 18, 2022 which is 45 days after delivery of judgment. He further notes that no explanation was given by the applicant as to why the notice of appeal was not paid for, less that the same was forwarded to the Deputy Registrar and if so, whether the Deputy Registrar refused to sign it in the absence of the court file. Finally, that the notice of appeal is dated January 18, 2022 while the applicant gave instructions to appeal on January 25, 2022 which shows that the counsel's averments are untruthful.
- [5] The short submissions of the parties are substantially a regurgitation of the position taken in the application and the response set out above.
- [6] The discretion granted to this court by Rule 4 of the Court of Appeal Rules when considering an application for extension of time must be exercised judiciously and as a guide are the well settled principles restated in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR) :-
- “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...”
- [7] It has to be common knowledge that virtual court proceedings are sometimes disrupted by technical glitches. Technology can fail! It is therefore believable when counsel for the applicant says that due to failure of technology on his end he was logged out from proceedings in which the decision was rendered. So, the success or failure of the application before court turns on the conduct of the applicant after the botched court appearance.
- [8] Six days later, counsel for the applicant writes to the court seeking a copy of the judgement. Although the respondent thinks counsel should have acted faster, I do not sense any indiligence on his part as he acted well within the 14 day window within which a Notice of Appeal must be filed. The answer from court that came through the email of December 14, 2021 was that the file was still in Nairobi and a copy of the judgement was therefore not available.
- [9] Counsel for the applicant then explains that by the time the court file was returned to the Nyamira registry, his offices had closed for the Christmas break and the earliest he could follow up the matter was on January 18, 2022 when his offices opened. He got the judgment three (3) days later. He then takes and receives instructions from his client on January 25, 2022. While the respondent thinks it improbable, and therefore a sign of lack of candour, that Counsel could have prepared a draft notice of appeal before receiving instructions, I do not see an inconsistency. There is some industry in an advocate preparing a notice in advance of confirmation from the client that it should be filed. I am unable to fault the explanation given by the applicant and hold it to be reasonable.
- [10] Similarly, the application dated 31<sup>st</sup> January, 2022 is brought thirty-six (36) days (excluding Christmas vacation) after the date of delivery of the judgment and it is not inordinate. In addition, and not without significance, the respondent does not state that grant of leave will prejudice it in any way.



[11] I therefore exercise my discretion in favour of the applicant and allow the application of January 31, 2022. The applicant shall within fourteen (14) days hereof file and serve a notice of appeal and thereafter, within sixty (60) days of filing and serving the notice of appeal, file and serve the record of appeal. Costs of this application shall be in the intended appeal.

**DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JULY, 2022.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

**Signed.**

**DEPUTY REGISTRAR**

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