



**HFC Limited v Ludaava (Civil Application E062 of 2021)
[2022] KECA 671 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 671 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E062 OF 2021**

P NYAMWEYA, JA

JULY 8, 2022

BETWEEN

HFC LIMITED APPELLANT

AND

PETER ADAMS LUDAAVA RESPONDENT

(An application for extension of time to file and serve a Notice of Motion dated 9th September 2021 seeking to strike out the Record of Appeal against the Judgment and Ruling of the High Court at Mombasa (P.J. Otieno J.) dated 2nd April 2019 and 6th October 2020 in Mombasa HCC No 49 of 2006 (OS))

RULING

1. The application before this Court for ruling is a Notice of Motion dated 28th January 2022, brought by the Respondent in the main appeal, pursuant to section 4 of the [Appellate Jurisdiction Act](#) and Rules 41, 42 and 43(1) of the [Court of Appeal Rules](#). The Respondent had initially sought two prayers, the first for the instant application to be heard in priority before the hearing of the Appellant's application dated 9th September 2021, and the second for extension of time for filing and lodging the Respondent's Notice of Motion application, also dated 9th September 2021. During the hearing of the instant application held on 4th May 2022, Mr. Opole, holding brief for Mr. Kongore learned counsel for the Appellant, with Mr. Asige learned counsel for the Respondents concurring, informed the Court that directions had been given that the Applicant's Notice of Motion dated 9th September 2021 be heard together with the appeal, and the first prayer was therefore overtaken by events.
2. This ruling is therefore on the prayer for extension of time only, and the application was in this regard supported by an affidavit sworn on 28th January 2022 by Michael Ochok, a court assistant at the Respondent's advocates law firm. The Respondent's case is that the deponent filed its Notice of Motion application dated 9th September 2021 at the Court of Appeal registry at Mombasa and it was



duly received by the said registry on the same date. However, that the electronic server of the registry was not working on that day, and the court fees receipt could therefore not be generated and application stamped on that day, and was only stamped the next day on 10th September 2021.

3. The Appellant opposed the instant application in replying affidavit sworn on 21st April 2022 by Christine Wahome, the Appellant's legal manager, and contended that the application is made in bad faith and a belated reaction to circumvent the Appellant's response to the Respondent's application dated 9th September 2021. Further, that the Respondent should have applied for extension of time soon after 10th September 2021, but did not do so until 4 months later, and no reason was given for the inordinate delay. Lastly, that paragraph 8 of the Electronic Case Management Practice Directions of 2020 provides for a remedy for system failures, and that in any event the Respondent did not provide any evidence of the system failure.
4. Both Mr. Asige and Mr. Opole relied on and highlighted their written submissions lodged with the Court dated 28th April 2022 and 4th May 2022 respectively. Mr. Asige reiterated the grounds set out in the averments made in support of the application, and made reference to the decision by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commissions & 7 others* [2014] eKLR for the principles that the Court should consider in exercise of its discretion to extend time under Rule 4 of the Court of Appeal Rules, and urged that that the Respondent have met the threshold laid out therein.
5. Mr. Opole on the other hand provided four reasons why this Court should refuse the application. First, that the discretion to extend time is only exercised when each period of delay is explained as held in *Donald O. Raballa vs Judicial Service Commission & Another* (2018) eKLR, and the Respondent has not explained the delay in filing the instant application; second that the delay that is provided of the system failure is not plausible as no evidence was provided; third, that the Applicant wants the court to excuse his admitted omissions so that he can move the court to punish the Appellant's alleged omissions which would be an hypocrisy as held in *Rose Nyaruru Kiarie vs Zipporah Sentura* [2021] eKLR; and fourth, that the Respondent wants to defeat the Appellant's claim on technicalities so that he can keep the Kshs. 1,838,221.76 already paid out to him, and claim the Kshs. 2,266,532.10 held in a joint account, which would cause the Appellant immense prejudice. The Appellant submitted that the Respondent has thus not brought himself within the principles for extension of time.
6. The principles governing the exercise of discretion in application for extension of time under Rule 4 of the Court of Appeal Rules, which were well stated in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* Civil Application No Nai 255 of 1997 (ur) as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted”
7. Rule 84 of the Court of Appeal Rules of 2010 which were applicable, required that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be. The record of appeal intended to be struck out by the Respondent was lodged on 6th August 2021, and it is not evident from the Respondent's application when the said record of appeal was served on it, for this Court to be able to definitively make a finding on the need to extend the time of filing of the Respondents' application



to strike the record of appeal. In addition, if indeed the stamping of the Respondent's application on 10th September 2021 rendered it out of time, the Respondent was aware of the said stamping on that date, as the Respondent's court assistant specifically deposed in paragraph 10 of the supporting affidavit as follows: "That on the following day, 10th September 2021, I visited the Court of Appeal registry and was given my copies of the motion together with the electronic filing receipt dated 10th September 2021 and the notice of motion was date stamped accordingly ". It has not been explained why it then took over four months to file the instant application for extension of time.

8. Lastly, this Court has also considered the Appellant's contention that the instant application may be intended to circumvent its response in a replying affidavit sworn on 17th September 2021 to the Respondent's application to strike out the record of appeal, and there is thus the risk of other extraneous reasons for the instant application, the main one being a pre-emption of the decision on the application to strike out record of appeal. I am in this respect guided by the principle that my discretion should be exercised judiciously and on sound factual and legal basis, as held Njuguna vs Magichu & 73 Others [2003] KLR 507.
9. In light of the above findings, I do not consider it prudent to address the other factors of the likelihood of success of the intended appeal and the likely prejudice to be occasioned if the orders sought are granted. Arising from these reasons, I decline to exercise my discretion to grant the orders sought in the Respondent's Notice of Motion dated 28th January 2022, which application is hereby dismissed with costs to the Appellant.
10. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF JULY 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

