



**Kuhiara v Industrial and Commercial Development Corporation & 2 others  
(Civil Application E098 of 2022) [2022] KECA 663 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 663 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E098 OF 2022  
MSA MAKHANDIA, JA  
JULY 8, 2022**

**BETWEEN**

**RUTH NJOKI KUHIARA ..... APPLICANT**

**AND**

**INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION .... 1<sup>ST</sup>  
RESPONDENT**

**MATIS ENTERPRISES ..... 2<sup>ND</sup> RESPONDENT**

**CATHERINE NJERI NGUNJIRI (SUING AND BEING SUED AS THE LEGAL  
REPRESENTATIVE OF ANTHONY N. NGUNJIRI) ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time to lodge a notice of  
appeal from the judgment of the High Court of Kenya at Nairobi  
(Majanja, J.) dated 27th January 2022 in HCCC NO. 326 of 2008)*

**RULING**

1. Before me is a notice of motion dated 23<sup>rd</sup> March 2022 brought under Section 3 (1) & (2), 34, 3B of the *appellate jurisdiction Act*, Rules 4 and 5 (2) (b) of the *Court of Appeal Rules*. The substantive prayer is for extension of time within which to lodge a notice of appeal against the ruling and order of Majanja, J. delivered on 27<sup>th</sup> January 2022. There is also a prayer for stay of execution of the said ruling under Rule 5(2) (b) but I will not delve into it on account of want of jurisdiction.
2. The application is supported by the grounds on its face and the supporting affidavit of the applicant. It has not been opposed by the respondents. It was however canvassed by way of written submissions without oral highlighting submissions by the applicant.
3. In summary the applicant's dispositions and submissions are inter alia that the applicant was aggrieved by the ruling of the trial court which ruling emanated from an application she had lodged for stay of



execution of the judgment and decree in High Court Civil Case No 326 of 2008. That in the said ruling, orders of stay were granted on condition that the applicant pays into a joint account of the applicant and the 3<sup>rd</sup> respondent's advocates a sum of Kshs.70,000 every month for a period of one year or until further orders of the court. That she complied with the order for the first two months but thereafter faced financial hardships due to her elderly age and sickliness. That she wishes to appeal the said decision and is apprehensive that the respondents may execute the judgment and decree.

4. The applicant submits that the delay is not inordinate as the ruling was delivered on 27<sup>th</sup> January 2022 and the notice of appeal was filed on 14<sup>th</sup> March 2022 and that the mistake by an advocate should not be visited on her as it has been held in various decisions of this Court including Phillip Kiptoo Chemwolo & Another Vs. Augustine Kubende [1986] KLR 493. That if the applicant continues with the payments, the appeal shall be rendered nugatory as she will have complied with the ruling. That so far, she had deposited Kshs.210,000 at the time of making this application.
5. I have considered the application, the affidavits on record, list of authorities, submissions by counsel and the law. The discretion that I am being called upon to exercise in this application is provided for under Rule 4 of the Rules of this Court which provides inter alia; -

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a Superior Court, for doing any act authorized or required by these Rules, whether before or after doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

6. The principles guiding the court on an application of this nature are well settled.

See *Wasike Vs. Swala* [1984] KLR 591 where this Court stated: -

“As Rule 4 now provides that the Court may extend the time or such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors; -

- a) That there is merit in his appeal.
  - b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and
  - c. That the delay has not been inordinate.”
7. Rule 4 of the Court of Appeal Rules requires me to exercise my discretion judicially. There has to be valid and clear reasons upon which discretion can be favourably exercised.
  8. The applicants do not contend that they have an arguable appeal against the ruling of the trial court. There is no draft memorandum of appeal annexed to the application which would inform the court in commending on whether the appeal is arguable.
  9. On the issue of delay, I note that the impugned judgment was delivered on 27<sup>th</sup> January 2022, while the notice of appeal was filed 14<sup>th</sup> March 2022. Rule 75 provides that a notice of appeal be lodged within 14 days from the date of the impugned judgment. The instant application was filed on 23<sup>rd</sup> March 2022 about two months after the delivery of the impugned ruling and equally after part performance of the conditions of the said ruling. There is no letter bespeaking a copy of the proceedings, copied to counsel for the respondent as provided for in Rule 82 of the Court Rules.



10. The applicant has not singled out any reason or explanation for the delay in filing the notice of appeal save to state that the mistake of the advocate should not be visited on an innocent litigant but does not state what is it that the advocate was required but didn't do.
11. Regarding the applicant's illness, there is absolutely no evidence regarding the nature of the illness, when she fell ill, or the time it took her to recover if at all. No documentary evidence was produced to support the applicants' claim. There is also no documentary evidence to prove that the applicant, was unable to communicate and instruct his counsel.
12. Regarding the filing of the notice of appeal, Rule 75(1) of the Court Rules provides that: -

“5(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.”
13. The filing of the notice of appeal is routine and mechanical. It does not require any sophisticated input. I find that the reasons advanced by the applicant for the delay in filing the appeal are not excusable. The delay is in the circumstances, though of a few months but there being no explanation given I consider the same inordinate and inexcusable.
14. On the issue of prejudice, it is not in dispute that the impugned ruling was delivered over 6 months ago. The applicant has fulfilled partly the conditions imposed by the court and has so far paid a sum close to Kshs.210,000. The money is not being paid to the respondents directly but rather it is being deposited in a joint account of both parties. Thus it cannot be said that the applicant will suffer prejudice. To the contrary, I find that the respondents are likely to suffer prejudice if the application is granted as they will be denied the fruits of their judgment.
15. In conclusion, I find that there are no special circumstances demonstrated by the applicant for me to exercise my discretion in her favour. The result is that I dismiss the notice of motion dated 23<sup>rd</sup> March 2022 with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2022.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

