



**Mohamed v Barclays Bank of Kenya Limited (Civil Application
41 of 2020) [2022] KECA 637 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 637 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 41 OF 2020
P NYAMWEYA, JA
JULY 8, 2022**

BETWEEN

KASSIM ABDULATIFF MOHAMED APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

(An application for extension of time to file a Notice of Appeal and to appeal out of time against the Judgment of the Employment and Labour Relations Court at Mombasa (Rika J.), dated 12th March 2020 in Mombasa ELRC Cause No 739 of 2016)

RULING

1. The Applicant herein, Kassim Abdulatiff Mohammed, filed an application by way of a Notice of Motion dated 27th May 2020, in which he seeks extension of time within which to file and serve a Notice of Appeal from the ruling of the Employment and Labour Relations Court (ELRC) (Rika J.) dated on 12th March 2020, in Mombasa ELRC Cause No 739 of 2016. The application is supported by an affidavit sworn on 27th May 2020 by Peter Omwenga, the Applicant's advocate. The said advocate deposed that on 15th March 2020, following the delivery of the said ruling, the Honourable Chief Justice made an order for the closure of all courts countrywide following the outbreak of coronavirus, as a result of which the advocate closed office and was not able to file the Notice of Appeal in time. The advocate further averred that the draft Notice of Appeal, Memorandum of Appeal and letter to the Deputy Registrar of the trial Court seeking certified copies of the proceedings have since been prepared and are ready for filing, and he attached the copies.
2. Barclays Bank of Kenya, the Respondent herein, opposed the application in a replying affidavit sworn on 1st October 2020 by Vaslas Odhiambo, its Head of Employee Relations. The said deponent contended that the Honourable Chief Justice made practice directions as regards the online filing of pleadings and court operations during the corona pandemic, and that the Respondent has not been



served with the Notice of Appeal, nor the letter to the Deputy Registrar requesting copies of the proceedings as required by law.

3. A virtual hearing of the application was held on 4th May 2022, and Mr. Omwenga, the learned counsel for the Applicant was present, as was Ms. Kaguri, the learned counsel for the Respondent. The counsel reiterated the averments made by the Applicant and Respondent, while relying on their respective written submissions dated 4th May 2022 and 25th April 2022. According to Mr. Omwenga, the delay in filing the Notice of Appeal was not inordinate and was excusable, and he cited the decisions in [*LSG Luftbansa Service Europa/Afrika GmbH & Another vs Eliab Muturi Mwangi \(practicing in the name and style of Muturi Mwangi & Associates Advocates\)*](#) (2019) eKLR and [*Vishva Stone Suppliers Company Limited vs RSR Stone\(2006\) Limited*](#) (2020) eKLR where the delay of 30 days and three (3) months respectively were found not to be inordinate.
4. Ms. Kaguri on her part submitted that the Applicant has not demonstrated any steps it has taken to file the Notice of Appeal, and made reference to the the Practice Directions on Electronic Case Management that came in place on 4th March, 2020; the Practice Directions for The Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and The General Public From The Risks Associated with the Global Corona Virus Pandemic which were published and came into operations on the 20th March, 2020; and the Practice Notes for The Conduct of Court Business During The Global Coronavirus Pandemic which came into operation on 21st April 2020. Reference was also made to the principles that guide a single Judge in the exercise of the discretion to extend time as set out in [*Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commissions & 7 others*](#) [2013] eKLR and [*County Government of Mombasa vs Kooba Kenya Limited*](#) [2019] eKLR. The counsel's position was that the Applicant was undeserving of the exercise of this Court's discretion, and cited the decision in [*Abdul Azizi Ngoma vs Mungai Mathayo*](#) [1976] KLR 61 that this court's discretion to extend time under rule 4 only comes into existence after sufficient reason has been established.
5. The principles governing the exercise of the discretion to extend time under Rule 4 of the [*Court of Appeal Rules*](#) were well stated in the case of [*Leo Sila Mutiso v Rose Hellen Wangare 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 settler 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”
6. Rule 75(2) of the [*Court of Appeal Rules*](#) of 2010 in this respect required that a Notice of Appeal is lodged within fourteen days of the decision intended to be appealed against. The same requirement is now found in Rule 77 (2) of the [*Court of Appeal Rules*](#) of 2022. It is not in dispute that the ruling intended to be appealed from by the Applicant was delivered on 12th March, 2020 and that the Notice of Appeal was therefore required to be filed by 26th March 2020 which was not done. The Applicant is in this respect seeking leave to lodge the said Notice of Appeal out of time, and the relevant period of delay is therefore the two months between 26th March 2020 and the date of lodging of the instant application, which was on 27th May 2020.
7. I have considered the reasons for the delay proffered by the Applicant, and I find that firstly, the delay has been adequately explained arising out of the emergence of the coronavirus. This Court in this



regard takes judicial notice of the Covid-19 pandemic and the disruptions it caused to the judicial system operations in its early stages, before the measures that have been identified by the Respondent were put in place and became fully operational. The 2 month's delay was therefore not inordinate in the circumstances and is excusable. Secondly, there is no specific requirement under Rule 4 that the Notice of Appeal needs to have been filed and served before an application for extension of time, and the timelines for taking steps in an appeal start to run once a Notice of Appeal is competently before the Court.

8. On the chances of the intended appeal succeeding, at this stage all that I need to be persuaded on is that the Applicant has demonstrated the existence of plausible grounds of appeal and not their merit. The counsel for the Applicant in this respect availed a draft memorandum of appeal, in which the variation of a consent judgment in the impugned ruling by the ELRC has been raised as the main ground. Lastly, there are interventions that are available to mitigate and address any prejudice that may be suffered by the Respondent during the pendency and conclusion of the intended appeal, and the more appropriate course of action in balancing the interests of both parties and in the interests of substantive justice in the circumstances is to allow the appeal to proceed to hearing.
9. I therefore find that the Applicant merits the exercise of this Court's discretion for the above stated reasons. I accordingly allow the Applicant's Notice of Motion application dated 27th May 2020, and grant the Applicant extension of time to file and serve a Notice of Appeal within fourteen days of the date of this ruling against the ruling dated 12th March 2020 delivered by the Employment and Labour Relations Court (Rika J.) in Mombasa ELRC Cause No 739 of 2016. The costs of the application are awarded to the Respondent.
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

