



REPUBLIC OF KENYA



**Euromec International Limited v Shandong Taikai Power Engineering Co. Ltd (Civil Appeal (Application) E111 of 2022) [2022] KECA 1048 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1048 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E111 OF 2022  
W KARANJA, JA  
SEPTEMBER 23, 2022**

**BETWEEN**

**EUROMECC INTERNATIONAL LIMITED ..... APPELLANT**

**AND**

**SHANDONG TAIKAI POWER ENGINEERING CO. LTD ..... RESPONDENT**

*((Being an application seeking extension of time to serve the Notice of Appeal against the Ruling of the High Court at Nairobi by (J. M. Mativo, J.) delivered on 21st September, 2021 in HCCOMM/E527/2020))*

**RULING**

1. Before me is a notice of motion dated April 5, 2022 brought under rule 1(2) and 4 of the [Court of Appeal Rules](#), substantively seeking an order granting leave to the applicant to serve the notice of appeal against the ruling and order of Hon Mr Justice Mativo of September 21, 2021 in HCCC No E257 of 2020, out of time, together with an attendant order that costs of the application do abide the outcome of the appeal.
2. The motion is supported by grounds on its body and a supporting affidavit of Simon Karanja Ngugi sworn on April 5, 2022. In sum, the applicant's averments and submissions are, *inter alia*, that the applicant was aggrieved with the judgment of the trial court, and instructed its previous advocates on record to appeal against the judgment, which they did by filing a notice of appeal on September 28, 2021 and a letter bespeaking proceedings was also sent to the deputy registrar.
3. It is the applicant's case that it has yet to be supplied with the proceedings and has thus failed to comply with rule 82 of the [Court of Appeal Rules](#), through no fault of their own; that despite non – adherence with the strict technical procedures, their appeal is predicated on cogent grounds and has a high chance of success.



4. The applicant filed submissions in which it is averred that on September 21, 2021 almost immediately after Hon Justice J M Mativo delivered a ruling in this matter in the High Court, the appellant instructed its previous advocates' on record to file an appeal and the notice of appeal was filed timeously but the appellant failed to serve the aforementioned notice on the respondent within 7 days, as required by rule 77(1) of the [Court of Appeal Rules](#), hence the application for enlargement of time.
5. Counsel relies on the case of [Muringa Company Limited vs Archdiocese of Nairobi Registered Trustees](#), Civil Application No 190 of 2019 and [Muchugi Kiragu v James Muchugi Kiragu & Another](#), Civil Application No NAI 356 of 1996 for principles that guide the court in the exercise of its mandate under rule 4 of the [Court of Appeal Rules](#).
6. The court has been called upon to invoke rule 4 of the [Court of Appeal Rules](#), which provides as follows:
 

“ 4. 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 of a superior court, for the doing of any act authorized or required by these rules, whether before or after the 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.”
7. There is no replying affidavit in opposition to the motion. There is on record two affidavits of service indicating that the respondent’s counsel on record was served with the motion on May 5, 2022 and again on June 25, 2022. In spite of service on the two occasions, there was no replying affidavit or grounds of opposition filed in answer to the application. I have also confirmed that the respondent’s counsel was served with the hearing notice on June 24, 2022 at 3.51 pm, which notice included directions on filing of submissions. No submissions were filed on behalf of the respondent.
8. That being so, it would appear to me that the application for extension of time is not opposed. The principles that guide the exercise of jurisdiction under the rule 4 of the [Court of Appeal Rules](#) are well settled by numerous enunciations in case law both binding and persuasive, some of which are [Leo Sila Mutiso v Rose Hellen Wangari Mwangi](#) [1999] 2E A 231, [Fakir Mohamed v Joseph Mugambi & 2 Others](#); [2005] eKLR; [Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees](#) [2020] eKLR.
9. The principles distilled from the above case law may be enumerated, inter alia, as follows:
  - i. The mandate under rule 4 is discretionary, unfettered and does not require establishment of “sufficient reasons”. Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.
  - ii. Orders under rule 4 of the [Court of Appeal Rules](#) should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the courts indulgence or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.
  - iii. The discretion under rule 4 of the [Court of Appeal Rules](#) must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see *Githere v Ndiriri*.



- iv. As the jurisdiction is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant to the issues falling for consideration before the court.
  - v. The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.
  - vi. The conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity;
  - vii. Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word "possibly";
  - viii. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.
10. Having considered the application along with the submissions filed by the applicant, and the principles enumerated above, I have no doubt that the applicant's counsel filed the notice of appeal on time. What is in issue at this point is why the notice was not served on the respondent's counsel. To start with, I would like to clarify for the benefit of counsel for the applicant that failure to serve a notice of appeal on time is not "a mere technicality" It is a requirement none compliance of which can result in striking out of an appeal.
11. That said, however, I note that the delay involved cannot be said to be inordinate. In absence of any submissions to the contrary, I hold the view that the application is merited. The respondent will not be prejudiced if the leave sought is granted. If there was prejudice the respondents would definitely have opposed the application.

Accordingly, I allow the application and grant the applicant leave to serve the notice of appeal on counsel for the respondent within 7 days from the date of this ruling. There will be no order as to costs as the application was not opposed.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**W. KARANJA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

