



REPUBLIC OF KENYA



KENYA LAW
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Kenya Anti-Corruption Commission v Somaia & 9 others (Civil Appeal (Application) E093 of 2022) [2022] KECA 1009 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KECA 1009 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E093 OF 2022
MSA MAKHANDIA, JA
SEPTEMBER 23, 2022**

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION APPLICANT

AND

**KETAN SOMAIA 1ST RESPONDENT
DOLPHIN HOLDINGS LTD 2ND RESPONDENT
DOLPHIN MANAGEMENT SERVICES 3RD RESPONDENT
BLOCK HOTELS HOLDINGS LTD (FORMERLY UNITED TOURING GROUP
(K) LTD 4TH RESPONDENT
BLOCK HOTELS 5TH RESPONDENT
UNITED TOURING LTD 6TH RESPONDENT
DOLPHIN INVESTMENT LTD 7TH RESPONDENT
MARSHALLS INVESTMENTS LTD 8TH RESPONDENT
MARSHALLS ENTERPRISES LTD 9TH RESPONDENT
DRISCOLL INVESTMENTS LTD 10TH RESPONDENT**

(An application for extension of time to file notice of appeal from the ruling and order of the High Court of Kenya at Nairobi, Milimani (Kamau, J.) dated 7th May 2020 in 2 HCCC No. 1111 of 2003)



RULING

1. The notice of motion before me is dated 23rd March 2022. It is brought under the provisions of Rule 4, 42 and 75 of the *Court of Appeal Rules*, Section 3A of the *Appellate Jurisdiction Act* and all other enabling provisions of the Law. The main prayer sought is that: -

"Time within which to file notice of appeal from the ruling and orders of the High court of Kenya at Nairobi Milimani Law courts (Hon. Justice J. Kamau) given on 7th May 2020 in Nairobi HCCC No. 1111 of 2003 be extended and that Civil Appeal No. E136 of 2022 EACC Vs. Ketan Somaia & 9 Others be deemed duly filed and served."
2. The motion is based on the grounds that the impugned judgement was delivered on May 7, 2020 without the knowledge of the applicant; that the respondents did not inform the applicant of the outcome until after a period of one year; that it is then that it learned the purport of the ruling; that soon thereafter it lodged an application before the trial court for leave to appeal to this Court as it did not have automatic right of appeal over the ruling and order. Upon being granted the prayers, it filed a notice of appeal. That failure to file the notice of appeal within 14 days of the decision was because it did not have notice of delivery of the ruling and had thereafter to make a formal application for leave to appeal upon learning of the same.
3. The same is further premised on the affidavit of Ben Murei, counsel of the applicant dated on the March 23, 2022 in which affidavit he merely reiterates and expounds on the grounds above and I need not rehash them.
4. The application was opposed by the respondents through the replying affidavit of James Ochieng Oduol, learned counsel. It is their case that the application stems from originating summons dated October 30, 2003, which was compromised on 9th April 2008 through a consent order. Thereafter, the respondents filed party and party bill of costs. The applicant subsequently filed an application to strike out the party and party bill of costs which was dismissed. Dissatisfied with the decision, it appealed to the High Court which appeal was dismissed on May 7, 2020 hence the current application. That they received a notice from the court on April 6, 2020 of the delivery of the ruling for May 7, 2020 which sought consent of the parties to have the ruling delivered via email.
5. That on July 29, 2021 the respondents invited the applicant to fix a convenient date for taxation of their bills of costs only to receive an email on 30th July 2021 from the applicant stating that it was not aware of the ruling and requested for a copy thereof. That ideally, the applicant knew of the ruling on July 29, 2021 and it was expected that it would file the notice of appeal within 14 days from then but only did so on December 10, 2021, a delay of 134 days. That delay has not been explained sufficiently or at all. That the fact that the applicant did not have an automatic right of appeal from the ruling of the trial court was not a bar and did not prohibit it from filing a notice of appeal within the stipulated period of 14 days. It is further deposed that the applicant had kept the respondents in Court for a period of over 14 years and allowing this application will greatly prejudice them who have been stopped from enjoying the fruits of their judgment.
6. The matter proceeded by way of written submissions. In its submissions, the applicant reiterated and expounded on the chronology of events as set in the motion and the supporting affidavit, I need not rehash the same. That notwithstanding, the applicant relied on the case of *Visha Stone Supplies Ltd Vs. SR Stone [2006] Ltd*, [2020] eKLR which case laid down the principles that guide the courts in determining an application for extension of time. He urged me in the premises to allow the application.



7. On the other hand, the respondents submitted that in an application of this nature, the court exercises discretion. But that discretionary power should be exercised judicially upon considering various parameters as was set out in the case of *Stanley Kiboro Mwangi & 2 Others Vs. Kanyamwi Trading Company Limited* [2015] eKLR.
8. On arguability of the appeal, the respondents submitted that the appeal is not arguable given that the High Court orders of 30th April 2008 on costs are still in force and have never been challenged. Further, that the two applications filed in the High Court on the same were dismissed and even an appeal to this Court had been dismissed on 27th September 2019; that as such all issues have been litigated upon and the only thing the applicant was up to is to reopen matters that have been litigated upon and determined; that the respondents will be greatly prejudiced if the application was to be allowed. On the other hand, the applicant still has a chance to challenge the said bill of costs before the taxing master and if dissatisfied, has the right to lodge a reference and even an appeal to this court hence, it will suffer no prejudice.
9. Rule 4 of this Court's Rules (the Rules) 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 or 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."
10. Therefore, by dint of Rule 4 of the Rules, this Court has wide discretionary powers in its consideration of applications of this nature. In the case of *Donald O. Raballa Vs. Judicial Service Commission & Another* [2018] eKLR the Court of Appeal held as follows: -
- "From a long line of authorities including *Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi*, Civil Application Nai. 251 of 1997 the single judge has unfettered discretion to consider an application for extension of time and generally the matters taken into account are 'the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.'"
11. Those factors are not exhaustive, and indeed the Supreme Court, in the case of *Fahim Yasin Twaha Vs. Timamy Issa Abdalla & 2 Others* [2015] eKLR laid out some general principles in matters of extension of time thus: -
- "As regards extension of time, this Court has already laid down certain guiding principles. In the *Nick Salat* case, it was thus held: -
- '... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
- ... we derive the following as the underlying principles that a Court should consider in exercising such discretion:
1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;



3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”. [Emphasis supplied].
12. The circumstances disclosed in this case do not amount to a mistake of the applicant alone, but also inaction on the part of counsel upon receiving information that the ruling had in fact been delivered. Further, failure by counsel to follow up with the court to inquire whether the ruling had been delivered or not for a whole year is in itself lethargical on the part of the applicant and or its counsel.
13. In the absence of any depositions from the applicant’s erstwhile counsel to explain the steps he took to find out from the court whether the ruling had been delivered and only waiting for the respondents to inform him is no reason to inform this Court to exercise its discretion in its favour. I would have been persuaded to find in favour of the applicant on the ground that the ruling was delivered without knowledge if it had demonstrated that after sometime it made a follow-up to the court to find out what had become of the ruling. This was not done at all and the applicant seems to have only waited for the respondents to act so that it could come to court.
14. It’s failure to file the notice of appeal for a lengthy period of time, can only be surmised that it was guilty of inaction. It is therefore my view that the applicant by failing to follow-up on the matter when the ruling was not delivered on the scheduled date and only wait to be informed by the respondent is indolent on its part and cannot get favour from this Court.
15. Accordingly, I refuse to grant the orders sought in the motion dated March 23, 2022 with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

