



**Mwangi & another v Naivasha County Hotel Limited t/a Sawela Lodges (Civil Application E050 of 2022) [2022] KECA 1190 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1190 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E050 OF 2022  
F SICHALE, JA  
OCTOBER 26, 2022**

**BETWEEN**

**JOHN MWANGI ..... 1<sup>ST</sup> APPLICANT**

**VINCENT GITHAIGA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**NAIVASHA COUNTY HOTEL LIMITED T/A SAWELA  
LODGES ..... RESPONDENT**

*(An Application for Extension of Time to file and serve Notice of Appeal against the Ruling of the High Court of Kenya at Naivasha (Ngenye, J as then she was), dated 19th July 2022.)IN(H.C. Petition No. E002 OF 2021.)*

**RULING**

1. The application before me sitting as a Single Judge is a motion dated 22<sup>nd</sup> August 2022, brought pursuant to the provisions of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Rule 4 of the *Court of Appeal Rules*, 2010 and all other enabling provisions of the Law in which John Mwangi and Vincent Githaiga (the applicants herein), seek extension of time to file and serve Notice of Appeal against the ruling of Ngenye, J (as then she was), dated 19<sup>th</sup> July 2022.
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the 1<sup>st</sup> applicant, who deposed inter alia that on 5<sup>th</sup> July 2021; they had filed a petition seeking a raft of constitutional reliefs against the respondent, which petition was struck out on 19<sup>th</sup> July 2022 and that being aggrieved with the aforesaid decision, duly instructed their then advocates on record to immediately file an appeal against the same but the said firm of advocates failed to do so.
3. He further deposed that failure to file and serve the Notice of Appeal within time was occasioned by the fact that the then advocates on record failed to act on instructions to appeal which omission should



not be visited on innocent litigants and that further the delay in lodging the Notice of Appeal was not inordinate and that the respondent would suffer no prejudice.

4. The motion is opposed vide Grounds of Opposition by the respondent dated 6<sup>th</sup> September 2022 and a replying affidavit of even date sworn by Peter Kimani Gitau, the Managing Director of the respondent who deposed inter alia that the applicants being advocates of the High Court of Kenya ought to have known the strict timelines of filing the Notice of Appeal and that the omissions/ errors on part of their erstwhile advocates in delaying to file the Notice of Appeal were inexcusable and that further there was no evidence of instructions to file the appeal which their advocates failed/refused or ignored to act on in good time.
5. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the grounds of opposition and the law.
6. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion the Court should do so judiciously.

See *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge Should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend 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. In the instant case, and as regards the length of the delay, the impugned ruling was delivered on 19<sup>th</sup> July 2022. The Notice of Appeal therefore ought to have been filed on 2<sup>nd</sup> August 2022 whereas the instant motion is dated 22<sup>nd</sup> August 2022. The Notice of Appeal herein is dated 19<sup>th</sup> August 2022 and there has therefore been a delay of about 17 days which in my considered opinion is not inordinate.
8. Regarding reasons for the delay, the applicants blame their previous advocates for failing to file and serve the Notice of Appeal within the required timelines. From the circumstances of this case and even if there is no evidence that the applicants had indeed instructed their then advocate to file the appeal within time (as it could have been verbal), I am satisfied that the delay herein has been explained to the satisfaction of this Court and I find the reasons given for the delay to be plausible.
9. With regard to the possibility of the appeal succeeding, I have looked at the annexed draft Memorandum of Appeal and I am satisfied that the applicants have an arguable appeal worthy of consideration by the Court. Of course, I am alive to the fact that I cannot say more regarding this issue lest I embarrass the bench that will be eventually seized of the appeal.
10. As regards prejudice, the respondent has not demonstrated the prejudice it would suffer if the instant motion were to be allowed.



11. Given the circumstances, I find that the applicants have demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time to file the Notice of Appeal.
12. Accordingly, the applicants motion dated 22<sup>nd</sup> August 2022, is meritorious and the same is hereby allowed in terms of prayer 2 thereof.
13. The Notice of Appeal dated 19<sup>th</sup> August 2022 shall be and is hereby deemed to have been properly filed and served upon the respondent. The applicants shall further file and serve the Record of Appeal within 60 days of this ruling failure to which these orders shall stand vacated.
14. The costs of this motion shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

