



REPUBLIC OF KENYA



KENYA LAW
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Mugah & another v Bank of Africa Kenya Limited & another (Civil Application E067 of 2022) [2022] KECA 1095 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KECA 1095 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E067 OF 2022
F TUIYOTT, JA
OCTOBER 7, 2022**

BETWEEN

ELIJAH JACKTONE ODHIAMBO MUGAH 1ST APPLICANT

GEORGE OCHIENG 2ND APPLICANT

AND

BANK OF AFRICA KENYA LIMITED 1ST RESPONDENT

GARAM INVESTMENT (AUCTIONEERS) 2ND RESPONDENT

(Being an application for extension of time to file notice of appeal out of time from the judgment of the High Court of Kisumu (Kamau, J) delivered on 30th March 2022 in Kisumu High Court Appeal No. 34 of 2020)

RULING

1. Before me is a notice of motion dated 19th May, 2022 said to be pursuant to rules 4 and 5(2)(b) of the [Court of Appeal Rules](#), 2010 and in which the applicants seek the leave of this Court to file an appeal out of time against the decision of Kamau, J. delivered on March 30, 2022 in Kisumu High Court Appeal No. 34 of 2020. Plainly rule 5(2)(b) is wrongly cited as this application is not about stay of the decision or an injunction!
2. In support of the application is an affidavit sworn by the 1st applicant (on his behalf and that of his co-applicant) of even date. His case is that he only became aware of delivery of the said judgment on March 30, 2022 on May 9, 2022 through a WhatsApp message from his previous advocates on record, Amondi and Company advocates, who had previously been none communicative. He deposes that he had earlier made several attempts to reach his previous advocates on phone and through text messages. Eventually the advocates informed him that they were expecting the judgment on April 28, 2022 pursuant to a notice they had received from court only for him to learn through the WhatsApp message that the judgment had been delivered earlier.



3. The respondents have not put any response to the application.
4. The applicant filed submissions to the application rehashing the contents of his affidavit and further contending that the application is filed timeously and without unreasonable delay and that the respondents will not suffer any loss which cannot be compensated by way of costs if granted.
5. Rule 4 reads;
 4. Extension of time

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.
6. The unfettered discretion granted to this Court under Rule 4 is guided by well settled considerations restated in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR) to be, inter alia: -

“The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors...”
7. According to the applicants, the delay was caused by lack of communication from their previous advocates. The judgment sought to be appealed against was delivered on March 30, 2022 and the applicants were made aware of the judgment on May 9, 2022, a matter not controverted. The applicants’ previous advocates did not timeously convey the information of the delivery of the judgment, hence the dismay of the 1st applicant when in response to the information he remarked;

“You mean a judgement could be entered against us and we don’t get any information from your end?”
8. Upon discovery, the applicants acted quickly in instructing their new advocates who almost immediately, 2 days after, requested for certified copies of the proceedings and judgment. In a similar sense of urgency, they filed the current application dated May 19, 2022.
9. Ordinarily mistake of counsel would not be good reason to favour an applicant with an order extending time to file an appeal out of time yet on this occasion I invoke my discretion to do so. I do so because the applicants and their new advocates acted quickly upon discovering that the previous advocates had put the applicants in difficulty. As a result of acting with promptitude some time was saved and the application before Court was filed about fifty (50) days after the date of delivery of the judgment. This is not inordinate delay. A second reason to be benign to the application is that the respondents, who did not respond to it, do not say that the extension of time will prejudice them substantially or at all.
10. The application is therefore allowed. The applicant shall within fourteen (14) days hereof file and serve a notice of appeal and thereafter, within sixty (60) days of filing and serving the notice of appeal, file and serve the record of appeal. Costs of this application shall be in the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

