



**Sea Angel Service Station Limited v Abdul (Civil Application
E063 of 2022) [2022] KECA 1265 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1265 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E063 OF 2022
P NYAMWEYA, JA
NOVEMBER 18, 2022**

BETWEEN

SEA ANGEL SERVICE STATION LIMITED APPLICANT

AND

YUSUF ABDUL RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Mombasa (P. J. Otieno J.) delivered on 3rd May 2017 in Mombasa H.C Civil Appeal No 108 of 2013)

RULING

1. Sea Angel Service Station Limited, the Applicant herein, is desirous of pursuing an appeal against the ruling delivered by the High Court (P.J. Otieno J.) on May 3, 2017 in Mombasa H.C Civil Appeal No 108 of 2013. The Applicant accordingly wrote a letter dated 3rd May 2017 to the Deputy Registrar of the High Court, requesting for certified copies of the judgment and proceedings, and on May 17, 2017 lodged a Notice of Appeal of even date. On August 26, 2019 the applicant subsequently lodged a Record of Appeal dated July 18, 2019 in this Court. Yusuf Abdul, the Respondent herein, thereupon filed an application dated September 27, 2019 being Mombasa Civil Appeal (Application) No 116 of 2019, seeking to have the said Record of Appeal struck out. The application was heard and a decision delivered thereon by this Court on September 23, 2022, striking out the Applicant's Record of Appeal, on account of lack of service of the request for a copy of the proceedings on the Respondent within the required timelines as provided under Rule 82(2) of the *Court of Appeal Rules of 2010*.
2. The Applicant has now filed a Notice of Motion application dated September 30, 2022 brought under Rule 4 of the *Court of Appeal Rules, 2010*, in which it seeks leave to serve the letter requesting for a certified copy of the judgment and proceedings, and to file and see a new Record of Appeal out of time. The application is supported by an affidavit sworn on even date by Gulamhussein Fakrudin Gulamhussein, the applicant's director. The Applicant attached the judgment delivered on June 22, 2017 in Mombasa HCCA No 108 of 2013, a copy of the Notice of Appeal dated and filed on 17th May



- 2017, the draft Memorandum and Record of Appeal dated 26th August 2019, and of the ruling of this Court (A.K. Murgor, P. Nyamweya & J. Lesiit JJ.A) delivered on September 23, 2022 in Mombasa Civil Appeal (Application) No 116 of 2019.
3. The Applicant argues that the cause of the delay in filing the Record of appeal was due to the typed proceedings being issued on July 15, 2019 and a certificate of delay was subsequently issued on August 2, 2019. The Applicant urged that the substratum of the appeal sought to overturn the decision of the High Court that found its suit statutorily barred despite leave being granted to file the suit out of time, and that it would suffer grave risk and/ or prejudice of injustice considering he was an unpaid seller for goods and services rendered.
 4. A virtual hearing of the application was held on October 24, 2022 and learned counsel Ms. Sharon Maiga holding brief for Mr. Odingo appeared for the Applicant, while learned counsel, Mr Mwakisha, appeared for the Respondent. Ms. Maiga relied on written submissions dated October 11, 2022 while Mr. Mwakisha, on his part, stated that he left the matter to the Court to decide and was not contesting the application.
 5. The Applicant's counsel in his submissions invoked this Court's jurisdiction under Rule 4 of the *Court of Appeal Rules* and placed reliance on the principles laid down in the decisions in *Thuita Mwangi vs Kenya Airways Ltd* [2003] eKLR and *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 others* [2014] e KLR on the exercise of this court's discretion in this regard. It was urged that the delay in filing the record of appeal was inadvertent and had been frankly and honestly explained, and that a certificate of delay was filed but was found to be improper. The counsel pleaded that it was in the overriding interests of justice that the intended Appeal was filed and determined on its merit, lest the applicant suffers prejudice and enormous financial loss arising from the inadvertent delay in serving and filing of the requisite documents.
 6. The discretion of this Court to extend time under Rule 4 is unfettered, but must still be exercised judiciously. The factors that govern the exercise of the discretion to extend time under the said Rule were well stated in the case of *Leo Sila Mutiso vs Rose Hellen Wangare Mwangi* Civil Application No Nai 255 of 1997 (ur) as being 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. Similar factors were also stated by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Salat vs IEBC* [*supra*], including whether justice can nevertheless be done. Rule 82 of the *Court of Appeal Rules of 2010* which was then applicable, required a Record of Appeal to be lodged within sixty days of the decision appealed against. There was however a proviso that where an application for a copy of the proceedings was made to the Registrar of the superior court in writing and served upon the Respondent within thirty days of the date of the decision appealed against, the time certified by the said registrar as having been required for the preparation and delivery of such copy would be excluded in computing the time within which the appeal is to be instituted. The same requirements are now found in Rule 84 of the *Court of Appeal Rules of 2022*.
 7. It is not in dispute that the Applicant's request for a copy of proceedings was not served on the Respondent within the timelines of thirty days provided in Rule 82(2) of the *Court of Appeal Rules of 2010*, which vitiated the certificate of delay subsequently issued by the Registrar, with the result that the record of appeal was found to have been filed out of time. The applicant has submitted that the delay was inadvertent, and has explained that the proceedings were received late. The applicant did not give an explanation for the failure to serve the request for proceedings on the respondent, however in light of the steps it took to file the Notice of Appeal within time and to request for proceedings, and the prejudice it has averred it will suffer if the appeal is not canvassed, it is my view that an extension of time should be granted in the circumstances to enable the Applicant exercise its right of appeal.



8. I therefore exercise my discretion in favour of the Applicant for the foregoing reasons, and hereby allow the Applicant's Notice of Motion application dated September 30, 2022, for extension of time. The applicant shall accordingly serve the respondent with the letter dated May 3, 2017 addressed to the deputy registrar of the high court requesting for a certified copy of the judgment and proceedings within fourteen days of today's date, and is also granted leave to file and serve a new Record of Appeal within thirty days of today's date. There shall be no order as to the costs of the application.

9. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF NOVEMBER 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

