



**Kimemia t/a Jenne Enterprises Limited v Assets Recovery Agency & another;
Rafiki Microfinance Bank Limited (Interested Party) (Civil Application
E428 of 2022) [2022] KECA 1405 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1405 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E428 OF 2022
AK MURGOR, JA
DECEMBER 16, 2022**

BETWEEN

ANNE KIMEMIA T/A JENNE ENTERPRISES LIMITED APPLICANT

AND

HON. RIGATHI GACHAGUA 1ST RESPONDENT

ASSETS RECOVERY AGENCY 2ND RESPONDENT

AND

RAFIKI MICROFINANCE BANK LIMITED INTERESTED PARTY

(An application for extension of time to file and serve the Record of Appeal out of time in an intended Appeal from an Order of the Anti-Corruption and Economic Crimes Division of the High Court at Milimani (E. Maina, J) delivered on 16th June 2022 in High Court ACEC Civil Suit No. E020 of 2020)

RULING

1. By a notice of motion dated July 12, 2022, brought pursuant to section 7 of the [Appellate Jurisdiction Act](#) and under rule 4 of the [Court of Appeal Rules, 2022](#) the applicant, Anne Kimemia t/a Jenne Enterprises Limited, seeks leave to file and serve a notice and record of appeal out of time; that the time for filing and serving the notice and record be extended and for a temporary order staying delivery of the judgment in High Court ACEC civil suit No E020 of 2020 on July 28, 2022 or on any other date to be issued pending the hearing and determination of the applicant's intended appeal.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by the applicant, wherein it was contended that on July 8, 2022, her advocates applied for a certified copy of the proceedings with a copy to the other parties' advocates; that the proceedings were typed and



certified on the July 12, 2022. It was further stated that the delay in filing the notice of appeal and preparation of the record of appeal was not deliberate nor inordinate and was occasioned partly by her having been unwell, and partly because she had yet to decide whether or not to file the appeal against the impugned orders of the High Court; that part of the delay could also be attributed to failure of the High Court registry to supply the certified copies of the proceedings and the order against which she seeks to appeal, in a timely manner.

3. She further contended that it was her equitable and legal right to prosecute the intended appeal, and was at grave risk of being completely ‘extinguished’, unless the application is heard and determined as a matter of urgency; that her intended appeal has significant chances of success and will be rendered nugatory unless the instant application is allowed; that the respondents will not suffer any prejudice were time to be extended.
4. The factors for consideration in applications for extension of time are set out in rule 4 of this *Court’s Rules*. Under rule 4, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – civil application No Nai 251 of 1997.
5. In this case, the applicant seeks time to be extended to file the notice and record of appeal. Ordinarily, if an appellant intends to lodge an appeal against a decision, he or she must have filed a notice of appeal within 14 days, and served such notice on an affected party within 7 days after lodging it. Those are the provisions of rules 77 and 79 of the rules. Additionally, the appeal should have been filed within 60 days of the date on which notice of appeal was lodged. This requirement is specified in rule 84 of the rules. But it would appear that essential steps necessary to be undertaken were not adhered to in this case. This is because I have been through the pleadings and the annexures and cannot find a filed notice of appeal upon which I can rely to invoke the jurisdiction of this court.
6. In the Supreme Court case of *University of Eldoret & another v Hosea Sitienei and 3 others* [2020] eKLR it was observed at paragraph 36 that;

“The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.”

And referencing the Supreme Court decision in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR in the case of *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, this court emphasised thus;

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

7. In view of there being no notice of appeal that has been filed, clearly, an issue pertaining to jurisdiction becomes of pertinence. Where there is no jurisdiction, a court is devoid of a foundation upon which to grant the orders sought. It is also evident that without a notice of appeal computation of time for filing an appeal is rendered an impossibility. In effect, without the requisite jurisdiction, a court must down its tools and step away.
8. Given that there is no notice of appeal properly filed on the record, I find and hold that I have no jurisdiction to determine the applicant’s notice of motion dated July 12, 2022 or to grant any of the orders sought. I make no orders as to costs.



It is so ordered

Dated and delivered at Nairobi this 16th day of December, 2022

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

