



**Commissioner of Customs & Border Control v Lachlan Kenya Limited (Civil Appeal (Application) E335 of 2022) [2022] KECA 1349 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1349 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E335 OF 2022  
GWN MACHARIA, JA  
DECEMBER 2, 2022**

**BETWEEN**

**COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... APPLICANT**

**AND**

**LACHLAN KENYA LIMITED ..... RESPONDENT**

*(Being an application for enlargement of time to file and serve Notice of Appeal from the Judgement of the High Court at Nairobi (A. Mabeya, J.) delivered on 12th August 2022)*

**RULING**

**Brief Background**

1. The respondent imported Nitro Zinc fertilizer and declared it under Tariff Code 3102 9000. The applicant subsequently issued a tariff ruling on July 26, 2018 declaring that the fertilizer was classifiable under Tariff Code 3824 90 90 and on December 13, 2018, he issued a demand letter for Kshs 1,133,385.00 being extra taxes resulting from the new classification. The respondent appealed this decision to the Tax Appeals Tribunal, which delivered its judgment in favor of the respondent. The applicant herein appealed to the High Court which, by a judgment dated July 12, 2022 upheld the Tax Appeals Tribunal's judgment and dismissed the appeal with costs.

**Application**

2. The applicant filed a notice of motion dated September 19, 2022, brought under rule 4 and 42 of the [Court of Appeal Rules](#), seeking the following orders; -
  - a. That the time be extended for the applicant within which to file a notice of appeal against the judgement of Hon Justice A. Mabeya delivered on August 12, 2022.



- b. That the time be extended for the applicant within which to file and serve the record of appeal should the same have expired by the time this application is heard and determined.
  - c. That costs of and incidental to this application be costs in the appeal.
3. The application is supported by the grounds on the face of it and affidavit of Nick Otieno Osoro, the applicant's advocate, who averred that judgment in the High Court was delivered on August 12, 2022 but the copy of the judgment was dated July 12, 2022. That he only realized the error when a hard copy of the judgment was availed on the August 24, 2022 and when he tried correcting the same, he faced challenges in accessing Milimani Law Courts due to the then ongoing presidential election petition. The applicant is aggrieved and dissatisfied with the said judgment and has instructed his advocates on record, to appeal against the same. That the statutory timeline for issuing notice of appeal lapsed even before the correction of the error apparent on the judgment and would seem locked out of his right to appeal.
4. It is averred that on September 19, 2022, counsel wrote formally to the Deputy Registrar of the High Court requesting for a certified copy of the judgment and typed proceedings and filed the statutory notice of appeal and has since served the same upon the respondents. That there has been no inordinate delay on the part of the applicant in bringing this application which it urged be allowed.
5. The respondent did not file a response to the appeal.

#### **Submissions**

6. The applicant through his submissions dated November 1, 2022, submitted that the period of delay was not inordinate as the application herein was filed within 1 month of delivery of the judgment. That the applicant experienced challenges in getting the certified copy of the judgment dated July 12, 2022 noting that it was delivered on August 12, 2022. In addition, that during this period there was a notice from the Chief Justice sealing off Milimani Law Courts for purposes of hearing and determining the presidential election petition from August 26, 2022 to September 5, 2022. That the subject appeal is on the technical aspect of the application of harmonized commodity description. That time was taken up in reviewing the judgment and getting instructions on how to proceed. Further, that the respondent will suffer no prejudice as the taxes remain uncollectable pending the hearing of the appeal. In support of the application, the applicant cited the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission*.

#### **Analysis And Determination**

7. I have considered the application, submissions and the law and deduce that the only issue for determination is whether the application is merited.
8. It is settled that under rule 4 of this Court's Rules, the court has unfettered discretion to determine whether to extend time or not. This discretion should be exercised judiciously, and not capriciously. In adherence to the guiding principles, the court should evaluate the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court were to grant the extension sought. This was well enunciated in the case law of *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231. The court held that:

“the decision whether or not to extend time is discretionary. The court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”

9. The applicant avers that judgment was delivered on August 12, 2022 and the notice of appeal filed on September 19, 2022. From a copy of the annexed judgment, it is dated July 12, 2022 which the applicant says is an error apparent which he tried to have corrected and in the process, a delay occurred. Simultaneously with the notice, the applicant requested the registry for certified proceedings.
10. According to my computation, the period of delay in filing the notice of appeal was 22 days as the applicant has 14 days to file the notice of appeal from the date of judgment, which would imply it was meant to be filed by August 28, 2022. The applicant lodged it on the September 19, 2022. The question at this juncture is whether the delay was satisfactorily explained. It is trite that a copy of the proceedings is not a prerequisite to filing a notice of appeal. I would have no doubt that the alleged error might have brought challenges in filing the said notice of appeal. I do not find a 22-day delay to be inordinate.
11. But having said that, the applicant annexed a letter dated September 19, 2022 to the Deputy Registrar requesting for certified copy of proceedings. It would appear that the certified proceedings are yet to be supplied to him by the registry and until the proceedings and the certificate of delay are supplied to the applicant, he will not be in any position to prepare and lodge the record of appeal. This, in my view, would satisfactorily explain why the record of appeal has not been filed.
12. On the likelihood of success of the intended appeal, the applicant did not attach a draft memorandum of appeal for the court’s consideration. Thus, the material before me is insufficient to determine the possibility of success of the appeal.
13. All factors considered though, I am persuaded to exercise my unfettered discretion to allow the application, which I hereby do. I do not consider there will be any significant prejudice to the respondents if the application is allowed. I order that the notice of appeal be filed and served within 7 days of this ruling and if the proceedings have already issued, the same be filed and served within 45 days of this ruling. Costs shall be in the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.**

**G.W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL.**

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

*Signed*

**DEPUTY REGISTRAR**

