



REPUBLIC OF KENYA



KENYA LAW
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**Mukuha v Mukuha & another (Civil Appeal (Application)
E339 of 2022) [2022] KECA 1302 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1302 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E339 OF 2022
GWN MACHARIA, JA
DECEMBER 2, 2022**

BETWEEN

NEWTON KAGIRI MUKUHA APPLICANT

AND

SIMON GASHWE MUKUHA 1ST RESPONDENT

DAVID KIMANI GASHWE 2ND RESPONDENT

*(An application for extension of time to file an appeal out of time
from the Ruling and Order of the High Court of Kenya at Nairobi
(D. Chepkwony, J.) dated 29th July 2022 in Civil Case No. 45 of 2013)*

RULING

Brief background

1. The learned Judge in the High Court Civil Case No 475 of 2013 dismissed the applicant's application dated October 5, 2021 seeking leave to join Naivas Ltd as a substantive party. The applicant is desirous to appeal against the said ruling of the High Court.

Application

2. The applicant filed a notice of motion dated August 29, 2022, brought under rule 4 and 75 of the *Court of Appeal Rules*, seeking that this court grants leave to him to lodge an appeal against the afore stated ruling and order of the High Court delivered on July 29, 2022 and that costs of the application do abide the outcome of the intended appeal.
3. The application is supported by the grounds on the face of it and affidavit sworn by the applicant together with his further affidavit dated September 26, 2022. He avers that the delay was unintentional and thus excusable. That the order from the High Court was not received in due time due to the



court's August vacation hence the delay and that the intended appeal is arguable and has high chances of success. That such extreme and highly prejudicial consequences would subvert the ends of justice and render the intended appeal nugatory, as such, it would be in the interests of justice and fairness if the application was allowed.

4. The respondent did not file a response to the application.

Submissions

5. The applicant filed his submissions dated September 27, 2022 which basically reiterate the averments of the grounds on the application and the supporting and further affidavits. I do not therefore find it necessary to duplicate them. In support of the submissions, he relied on the cases of *Muringa Company Ltd v the Archdiocese of Nairobi Registered Trustees (2020) eKLR*, *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet (2018) eKLR*.

Analysis & Determination

6. I have considered the application, submissions and the cited case law. The issue arising for determination is whether the application is merited.

7. Rule 4 of the *Court of Appeal Rules*, provides as follows:

“4. 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 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.”

8. The Court in *Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR* held thus:

“As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for 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 this parties, whether the matter raises issues of public importance, are all relevant but not exhaustive factors.”

9. I will start by clarifying that the applicant's application in the High Court was not dismissed in its entirety. The applicant had sought leave to be allowed to amend his pleadings, which application was allowed to the extent that he was granted leave to amend his pleadings as per the annexed draft plaint in so far as the said amendments did not alter the cause of action. The effect of the amendments would be to substitute the 1st respondent (deceased) with his legal administrators. The court denied the prayer for joinder of Naivas Limited as a necessary party to the suit. This, I presume, is what the applicant is seeking to appeal.

10. The impugned ruling was delivered on July 29, 2022 while the application herein is dated September 12, 2022. The application herein seeks to invoke the court's discretion, which must be exercised on reasonable basis with the applicant demonstrating he is deserving of the same. I further place reliance on *Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others*, Supreme Court Application No 16 of 2014 which laid down the underlying principles that a court should consider in exercise of discretion to extend time:



- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
11. The reason advanced by the applicant for the delay is that the judgment was delivered and immediately after, the court proceeded for August vacation, thus he did not get the judgment in time so he could fully analyse it. He has annexed letters dated August 11, 2022 and August 23, 2022 written to the Deputy Registrar requesting for certified copies of the ruling. However, he fails to state when he actually received the impugned ruling. He ought to have filed his notice of appeal by August 12, 2022 which he failed to do. As such, there is a 1-month delay which delay I do consider not to be inordinate as to be inexcusable.
 12. On the reasons for the delay, I am satisfied that the applicant has proffered a reasonable explanation why a challenge to the ruling of July 29, 2022 was not made within a reasonable time.
 13. On the chances of the intended appeal succeeding, I am not satisfied that there are such chances. The learned judge in denying the prayer reasoned that Emukule, J (as he then was) in his judgment in Succession Cause No 92 of 2011 (*In the matter of the Estate of Peter Kago*), dated October 31, 2014, held that the applicant herein had no interest, legal or equitable in Naivas Limited. The court noted that the said judgment had not been appealed and allowing the joinder of Naivas Limited in the suit would be akin to sitting on appeal against Emukule, J's ruling.
 14. From the applicant's submissions he avers that there might be an appeal against Emukule, J's ruling being Nakuru Court of Appeal Civil Appeal No 204 of 2016. As such, I do find that the application herein cannot be allowed as the intended appeal will be raising an issue which is directly before another court of equal status being the Court of Appeal Nakuru.
 15. Further, I find the applicant cagey. The issue as to whether there exists an appeal against Emukule, J's ruling is a matter of fact which he should state categorically as to its existence, and not the possibility of its existence to be a ground to be determined in an appeal. I see no chance of success of the intended appeal and hold that the intended appeal is not one that can be argued before this court.
 16. It is for these reasons that I am of the respectful view that the motion has no merit and it is hereby dismissed with no orders as to costs.

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

G W NGENYE-MACHARIA

JUDGE OF APPEAL.



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

