



**Waiyaki Way Developers Limited & another v Waweru & another (Civil Appeal (Application) E312 of 2022) [2022] KECA 1325 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1325 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E312 OF 2022  
GWN MACHARIA, JA  
DECEMBER 2, 2022**

**BETWEEN**

**WAIYAKI WAY DEVELOPERS LIMITED ..... 1<sup>ST</sup> APPLICANT**

**VIRJI MEGHJI PATEL ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CHRISTOPHER THIONGO WAWERU ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MWANGI KABUGI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for enlargement of time to file a Notice of Appeal from the Ruling of the High Court at Nairobi (D.S. Mananja, J.) dated 24th June 2022. in H.C. Misc. Application No. E086 of 2020.)*

**RULING**

**Brief Background**

1. The applicants herein moved the High Court vide a Chamber Summons application dated 28<sup>th</sup> April, 2021 and amended on 2<sup>nd</sup> June, 2021 seeking enforcement of an undertaking as to damages executed by the respondents on 26<sup>th</sup> August, 2020. The court delivered its ruling on 24<sup>th</sup> June, 2022 dismissing the application with costs.

**Application**

2. The applicants filed a notice of motion dated 29<sup>th</sup> August, 2022, brought under rule 4 of the [Court of Appeal Rules](#), seeking the following orders; -
  - i) That this Honourable court be pleased to extend the time allowed for the intended appellants/ applicants to file and serve the Notice of Appeal against the ruling of the High Court (Mananja, J) delivered on 24<sup>th</sup> June 2022.



- ii) The costs of this Application be in the intended appeal.
3. The application is supported by the grounds on the face of it and an affidavit sworn by the 2<sup>nd</sup> applicant, who averred that by a judgment dated 24<sup>th</sup> June, 2022 the court dismissed their application and their counsel received a copy of the said judgment on 8<sup>th</sup> July, 2022 and shared with them. That they sought a detailed opinion from their counsel which was availed on the 15<sup>th</sup> July, 2022 upon which they instructed their advocates on 24<sup>th</sup> August, 2022 to pursue an appeal at which point, the time to file a Notice of Appeal had lapsed. That the delay was occasioned by an honest endeavor to understand the implications of the ruling, which mistake was genuine and not premeditated, callous or ingenious and fit would be in the interest of justice that this Court extends some latitude and reasonable accommodation to them to file and serve their notice of appeal. That the application herein was brought without undue delay and the intended appeal has high chances of success and it is in the interest of justice that the application be allowed.
4. The respondent opposed the application vide a replying affidavit sworn by the 2<sup>nd</sup> respondent on 2<sup>nd</sup> October, 2022. It is deposed that; the judgment of the High Court was delivered in the presence of the applicants' advocate, thus, the applicants were aware of the judgment and they neglected to file the Notice of Appeal within the stipulated period; the applicants have not demonstrated why they failed to do so hence the delay and laxity is inexcusable; the respondents continue to suffer at the hands of the applicants who have refused to release their units and are subjecting them to suffer hardships; the intended appeal is merely meant to drag the respondents into unnecessary, lengthy and costly proceedings in the Court of Appeal and, the application which is an abuse of the court process should be dismissed with costs.

### Submissions

5. The applicants' submissions are dated 2<sup>nd</sup> November, 2022 in which they basically reiterated the grounds on which the application is premised. I see no reason to rehash them save to emphasize that the applicants attach the delay to the fact their Society's board took long to approve a decision that an appeal be pursued.
6. Equally, the respondents, in their submissions dated 2<sup>nd</sup> November, 2022 also restated the averments in the Replying Affidavit and added that the matter is of no public interest to warrant the reliefs sought. They posited that the applicants failed to meet the threshold for grant of the orders as set out in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2013] eKLR and that of *Wasike v Swala* [1984] KLR.

### Analysis & Determination

7. I have considered the application, responses, submissions and authorities relied upon. The only issue for determination is whether the application has met the threshold for grant of the orders sought.
8. 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.”



9. This Court differently constituted in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determining an application under rule 4. 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.”

10. Bearing these principles in mind and applying them to the motion before me, the facts are that the judgment intended to be appealed was delivered on 24<sup>th</sup> June, 2012 and the application for leave to extend time to file appeal out of time on 29<sup>th</sup> August, 2022 which translates into a two months’ delay. The applicants aver that the full judgment was availed on the 8<sup>th</sup> July, 2022 and that they needed to await the decision of the board of directors on whether to appeal, which decision was communicated to their counsel on the 28<sup>th</sup> August, 2022. I agree with the respondents that a counsel does not need a copy of a full judgment being appealed from to file a notice of appeal. It is also true that a counsel does not necessarily need instructions from his client to file a notice of appeal. Filing a Notice of appeal may precede a client’s instructions so as to cushion a party from unnecessary applications such as this one which often times could be a waste of precious judicial time.

11. Be that as it may, in a situation where a decision is not made by an individual such as in this case, a delay may occur since meetings must be scheduled at the convenience of the decision- makers. In this instance, the board of the applicants had to meet and make a unanimous decision on the way forward after the petition in the high court was dismissed. It is therefore safe to conclude that, the applicants were not indolent in both filing the notice of appeal and instituting this application. They should be given an opportunity to ventilate their case, which I find arguable. They did attach a draft memorandum of appeal which arguably raises issues that ought to be heard and determined. They have proffered a reasonable explanation as to why a challenge to the judgment was not made within a reasonable time. The application is merited.

12. I hereby allow the application, with the following orders: -

- a. The applicants are hereby allowed to file and serve the notice of appeal within 14 days of this ruling.
- b. The applicants do file and serve the record of appeal within 60 days of filing the record of appeal.
- c. The costs of the application shall be in the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> 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**

