



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI E134 OF 2021

BETWEEN

ADK TECHNOLOGIES LIMITED IN CONSORTIUM WITH TRANSNATIONAL  
COMPUTER TECHNOLOGIES LIMITED.....APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

THE PRINCIPAL SECRETARY,

THE NATIONAL TREASURE AND PLANNING.....2ND RESPONDENT

THE NATIONAL TREASURY AND PLANNING.....3RD RESPONDENT

KINGSWAY BUSINESS SYSTEMS LIMITED

IN CONSORTIUM WITH KOBBY TECHNOLOGIES LIMITED

AND INPLENION EASTERN AFRICA LIMITED.....4TH RESPONDENT

ADK TECHNOLOGIES LIMITED.....5TH RESPONDENT

(An Application for extension of time for lodging Notice of Appeal, Memorandum of Appeal and Record of Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Jairus Ngaah, J.) delivered on 9th April, 2021 in JR Case No. E027 of 2021)

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#### RULING

1. **ADK Technologies Limited** through Cheboi Kiprono Advocates has moved this Court vide a notice of motion dated 29th April, 2021 for orders *inter alia* that:-

“b. This Honourable Court be pleased to extend the time for lodging Notice of Appeal in the intended appeal arising from the Judgment and Decree of the Judicial Review High Court of Kenya at Nairobi (Justice Ngaah Jairus) delivered on the 9th day of April, 2021 in Nairobi HCJR Case No. E027 of 2021), Republic vs Public Procurement Administrative Review Board and 4 Others Ex parte ADK Technologies Limited in Consortium with Transnational Computers Technology Limited.

c. subsequent to grant of order (b) above the Notice of Appeal lodged on 28th April, 2021 be deemed as properly filed.”

2. The motion is predicated on grounds *inter alia* that judgment was entered against the applicant in Judicial Review Petition No. HCJR Case No. E027 of 2021 at the Judicial Review of the High Court at Nairobi on 9th April, 2021. Being aggrieved, the applicant decided to file an

appeal against that judgment and filed a notice of appeal on 23rd April, 2021.

3. However, the notice of appeal was not lodged by the Deputy Registrar of the Judicial Review Division until 28th April, 2021 which fell outside the 14 days provided for under the Court of Appeal Rules. The applicant, being apprehensive that the respondents might move the Court to strike out the notice of appeal has therefore moved this Court praying for extension of time under **Rule 4** of the Rules of this Court among other enabling provisions of the law.

4. In an affidavit sworn in support of the application by Duncan Kiprono, learned counsel for the applicant on 29th April, 2021 he deposes that the notice of appeal was lodged outside the seven days provided for under **Section 175(5)** of the Public Procurement and Asset Disposal Act 2015 (PPAD). He attributes the delay to problems in the Judiciary E-filing system which he said failed him. He has annexed a letter dated 15th April, 2021 addressed to the Deputy Registrar of the Judicial Review Division of the High Court in which he seeks assistance from the Deputy Registrar to file the notice of appeal saying the 'E-filing' system was not functioning. In the said letter, he forwarded the notice of appeal and the letter bespeaking certified copies of proceedings to enable him prepare the record of appeal. That annexure bears the stamp of the Judicial Review Division acknowledging receipt on 15th April, 2021. He therefore, implores the Court to extend time as the late filing was not occasioned by any laxity on his part.

5. The application is opposed through the preliminary objection filed by Gerivia Advocates on behalf of the 4th respondent. The preliminary objection questions this Court's jurisdiction to extend time imposed under **Section 175(4)** of the Public Procurement and Assets Disposal Act (PPADA).

6. The 5th respondent has also opposed the application vide a replying affidavit sworn by Stephen Kivungei on 13th May, 2021. Among the key objections raised is that the applicant had not served the notice of appeal on the 5th respondent pursuant to Rule **77(1)** of the Court of Appeal Rules. On this point however, I wish to state that **Rule 77** kicks in after the notice of appeal has been filed. In this case, there is no valid notice of appeal that could have been served on the respondents, hence the application for extension of time. In the event the applicant is granted leave to file the notice out of time, then he will be enjoined by law to serve the same within seven days as required by **Rule 77**. The complaint on non-service of the notice of appeal is therefore inchoate.

7. The 5th respondent also complains about the applicant's *locus standi* to file the appeal. A cursory look at the intituling of the petition before the High Court seems to suggest that the applicant herein was the applicant in that JR petition while the 5th respondent was the 4th interested party. The applicant is therefore properly before the Court, having been party before the High Court.

8. The parties herein have filed submissions which I have considered in their entirety. There is the jurisdictional issue raised by the 4th respondent. I do not think the issue is idle or frivolous. Indeed, my view is that it is germane and a decision may have to be made on the conflicting timelines between the Court of Appeal Rules and the Public Procurement and Assets Disposal Act.

9. The application before me is premised on **Rule 4**, and other Rules under the Court of Appeal Rules and not under **Section 175(4)** of the Public Procurement and Assets Disposal Act, and I will therefore restrict myself to **Rule 4** of the Rules of this Court which allows the Court to extend time.

Rule 4 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.**

The principles that guide the exercise of discretion under the Rule 4 of the Rules of this Court are now well settled by numerous enunciations in case law both binding and persuasive. See for instance Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231, Fakir Mohamed vs. Joseph Mugambi & 2 Others [2005] eKLR; Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees [2020] eKLR;

The principles encapsulated in the above cases include the following:-

“1. 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.

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

4. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

5. Whether there will be any prejudice suffered by the respondent of the extension is granted.

6. Whether the application has been brought without undue delay.”

The list is by no means exhaustive.

10. I have considered carefully the application before me, parties' rival affidavits, submissions and the law. As stated earlier, this is a **Rule (4)** application, and I will apply the parameters and guidelines enumerated above. Under **Rule 75** of the Court of Appeal Rules, the applicant ought to have filed the notice of appeal by 23rd April, 2021. The notice of appeal was

lodged on 28th April which is only five days late. We have correspondence to the Deputy Registrar expressing the difficulties faced by the applicant in filing the notice of appeal. The letter was actually sent to the Deputy Registrar way before expiry of the time to file the notice of appeal. Even assuming that the applicant was five days late, my view is that the five days is not inordinate delay, and further the same has been adequately/sufficiently explained by the applicant.

11. I am persuaded that time to file the notice of appeal should be extended. I therefore, exercise my discretion and extend time within which the applicant should file the notice of appeal. Accordingly, the application is allowed and the notice of appeal lodged with the Deputy Registrar on 28th April, 2021 is hereby deemed as having been duly filed within time.

12. For the avoidance of doubt, the extension of time granted herein is pursuant to **Rule 4** of the Court of Appeal Rules and not pursuant to **Section 175(5)** of the Public Procurement and Assets Disposal Act 2015.

Costs of the application will abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021**

**W. KARANJA**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**