



**Ongwacho v Kenya Commercial Bank Limited (Civil Application  
8 of 2021) [2021] KECA 64 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KECA 64 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 8 OF 2021  
F SICHALE, JA  
OCTOBER 8, 2021**

**BETWEEN**

**PETIRO ONGWACHO ONGWACHO T/A BLUU NILE INTERNATIONAL  
HOTEL ..... APPLICANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

*(An application for leave to lodge a notice of appeal out of time  
against the ruling of the Environment and Land Court at Kisii  
(Onyango, J) dated 5th November, 2020 in ELC No. 42 of 2019)*

**RULING**

1. The Applicant, Petiro Ongwacho Ongwacho T/A Bluu Nile International Hotel, filed a motion dated 25<sup>th</sup> January, 2021, brought pursuant to Section 3 A & 3 B of the *Appellate Jurisdiction Act- CAP 9*, Rule 4 and Rule 5 (2) (b) of the *Court of Appeal Rules*, 2010 and Article 159 (2) (d) of the *Constitution of Kenya, 2010*<sup>\*\*</sup>. He sought, *inter alia*, that:
  - c. This Honourable Court be pleased to extend the time within which the Applicant may lodge a Notice of Appeal against the ruling of the Honourable Ms. Jane M Onyango delivered on 5th November 2020 in Kisii ELC NO. 42 of 2019.”
2. Briefly, the applicant charged the suit premises (L.R. Wanjare/Bogiakumu/4318) as security to guarantee a loan facility of Kshs 50,000,000.00 advanced by the respondent who later advertised the suit property for auction in Kisii ELC No. 42 of 2019. The applicant sought an injunction to restrain the auction of the suit property. The said application was dismissed and the applicant being aggrieved is desirous of appealing against the ruling rendered on 5<sup>th</sup> November, 2020.



3. According to the applicant, he was unable to file the Notice of Appeal within time because on 5<sup>th</sup> November 2020, he was incapacitated after contracting Covid- 19 and had been advised to self-isolate for at least 14 days. Efforts by his advocates to reach him for instructions with respect to the ruling of the trial court were futile; that the intended sale did not conform to or satisfy the requirements of Section 97 (1) of the *Land Act* No. 6 of 2012 and if effected it would strip the applicant off his proprietary right and render the application nugatory; that it was necessary that the substratum of the instant case be preserved and allowing this application would facilitate and give effect to the applicant’s right of access to justice and lastly, that the applicant was willing to comply with reasonable conditions as may be imposed by this Court.
4. In the applicant’s affidavit sworn in support of the motion by Petiro Ongwacho Ongwacho on 25<sup>th</sup> January 2021, he reiterated the grounds in the motion and further deponed that he applied for a loan facility of Kshs 50,000,000/= which was repayable in a period of 10 years. The loan facility was secured by way of a legal charge against the suit premise on which stands a hotel owned by Gesonso Water Park whose market value was Kshs 115,000,000.00 as per the valuation report dated 15<sup>th</sup> December 2014 by Seven Degree North Limited. Owing to some unpaid instalments, he applied and obtained a restructure of the loan facility on 24<sup>th</sup> July 2018. His application for injunction in Kisii ELC No. 42 of 2019 was dismissed on the 5<sup>th</sup> November 2020.
5. He deponed that failure to file the Notice of Appeal was due to illness and inability to give instructions.
6. The Applicant set out the arguable grounds in the memorandum of appeal as follows:
  - a) The learned Trial Judge failed to take cognizance of and appropriately apply the protection afforded to the Application by section 97 of the *Land Act*, No. 6 of 2012
  - b) The Learned Trial Judge failed to consider that the valuation report relied upon by the Respondent was perfunctory and did not satisfy the requirements of Section 97 of the *Land Act* No. 6 of 2012”.
7. He concluded that it was arguable whether the trial judge aptly considered the effects of Section 97 of the *Land Act* and whether the valuation report undertaken by the respondent and dated 29<sup>th</sup> July 2019 conformed to the legal requirements.
8. On prejudice to be occasioned, it was submitted by counsel that the respondent continues to hold the suit premise and further drew Court’s attention to the case of *R. Billing & Co. Advocates vs. Kundan Singh Construction Limited* for the proposition that:

“The Applicant’s submissions filed on 30th November 2017, the Court having directed on 17th February 2017 that the Applicant file submission 30 days from the date hereof was inordinate delay but allowed prayer to enlarge time as there would be no prejudice to the Respondent”
9. On reasons for the delay and the length of the delay, the applicant submitted that he could not give instructions as he was in isolation and further that a delay for two (2) months was not inordinate delay. He made reference to the case of *Vishva Stone Suppliers Company Limited v RSR Stone [2006] eKLR* for the proposition that:

“The law does not set out any minimum or maximum period of delay. Delay should be satisfactorily explained”



10. In the respondent's replying affidavit sworn on 24<sup>th</sup> May 2021 by Jude Ragot, counsel for the respondent, he depones that the instant application is an omnibus application as it sought to have temporary injunction as well as an order for extension of time.
11. On the question of extension of time, counsel depones that the delay which ought to be explained is between 5<sup>th</sup> November 2020 to 29<sup>th</sup> January 2021 being a delay of 85 days and that the explanation offered was for 25 days, that is from 5<sup>th</sup> November 2020 to 30<sup>th</sup> November 2020 and that no explanation had been offered for the remaining 60 days between 1<sup>st</sup> December 2020 and 29<sup>th</sup> January 2021. The respondent further deposed that there was no medical evidence to support the applicant's contention of indisposition.
12. In the respondent's submissions dated 24<sup>th</sup> May 2021, it reiterated the contents of the replying affidavit and added that extension of time is discretionary and not an automatic right; that the exercise of discretion depends on the length of the delay as the longer the delay the more unlikely is the exercise of discretion, whether the intended appeal has good chances of success and finally, the prejudice to the parties. For these propositions the respondent made reference to the case of *Nicholas Kiptoo Arap Salat v IEBC 7 others*. The respondent relied on the decision of *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet*, the gist of the case being that the law does not set out any minimum or maximum period of delay, all it states is that any delay should be satisfactorily explained. Further, that there was no need to obtain instructions from the applicant before a Notice of Appeal was filed as it is a simple mechanical task. Reliance was placed on the decision of *Bi-Mach Engineers Limited vs. James Kaboro Mwangi [2011] eKLR* for the proposition that the filing of a Notice of Appeal is a simple and mechanical task.
13. I have considered the motion, the supporting affidavit, the applicant's submissions and the law. Firstly, the applicant's motion seeks several prayers some of which are for consideration by a full bench of this Court. I shall therefore not address the prayers for consideration by a full bench save to state that Rule 4 of this Court's Rules provides:  
  
"4 Extension of time  
  
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 or 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."
14. The principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in *Abdul Azizi Ngoma vs. Mungai Mathayo*, wherein this Court held:

"We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered."

And in *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997* where the court stated:

It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay,



secondly the reasons 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.”

15. In the instant case it is not in dispute that the loan facility has not be fully paid. The only issue presented is the variation in the valuation report. I find that the applicant has not demonstrated that the appeal is arguable as it is true that there is a loan facility outstanding.
16. The contention by the applicant that due to Covid 19 they were unable to personally engage an advocate and share the documents is not supported by any evidence and in any event, the period of isolation as deponed by the applicant was 14 days. There was no explanation for the remainder of the days, noting that the ruling was delivered on 5<sup>th</sup> November, 2020 and the motion is dated 25<sup>th</sup> January, 2021.
17. In the end, I find that the applicants have not demonstrated the existence of the principles for consideration in the exercise of my unfettered discretion as laid out in Abdul Azizi Ngoma vrs. Mungai Mathayo and Leo Sila Mutiso case (supra), to extend time and therefore decline to exercise my discretion to grant the instant application and accordingly dismiss it with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER, 2021.**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

