



REPUBLIC OF KENYA



Suchan Investment Limited v Ministry of National Heritage and Culture & 3 others (Civil Appeal (Application) E518 of 2021) [2021] KECA 160 (KLR) (19 November 2021) (Ruling)

Neutral citation: [2021] KECA 160 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E518 OF 2021
MA WARSAME, JA
NOVEMBER 19, 2021**

BETWEEN

SUCHAN INVESTMENT LIMITED APPLICANT

AND

MINISTRY OF NATIONAL HERITAGE AND CULTURE 1ST RESPONDENT

SANDEEP DESAI 2ND RESPONDENT

DIPA PULLING 3RD RESPONDENT

KEVIT DEVIT & NIRANJAN DESAI 4TH RESPONDENT

(An application for leave of this Honourable Court for extension of time to file and serve a notice and record of appeal against the ruling of the High Court Judicial Review Division at Nairobi (C.A. Muchoki, Deputy Registrar) delivered on 21st July, 2021 in JR Miscellaneous Application No. 129 of 2009)

RULING

1. By a Notice of Motion dated 9th September 2021, brought under section 3A, 3B of the *Appellate Jurisdiction Act*, Rules 4 42 and 43 of the *Court of Appeal Rules*, the applicant is seeking leave for extension of time to file and serve a Notice and Record of Appeal arising out of the ruling of the High Court Judicial Review Division (C. A. Muchoki, DR) delivered on 21st July 2021. The said ruling was delivered in the applicant's absence struck out the applicant's application on the basis that the 3rd respondent met the threshold for raising a preliminary objection against the motion for the attachment of the 2nd and 3rd respondent's shares in the property known as LR. No. 209/1916/2.
2. The applicant, though aggrieved by that ruling, did not file a Notice of Appeal within 14 days as stipulated under Rule 75 of this Court's Rules and attributed the delay in filing its intended appeal to the High Court's failure to furnish notice of delivery of the ruling electronically by email. The



applicant moved this Court by way of this notice of motion about 36 days later. The reason given for this delay in the supporting affidavit dated 9th September 2021 is that on 28th June, 2021 when the Deputy Registrar confirmed the ruling date was scheduled for 21st July, the applicant was informed that the Deputy Registrar was indisposed and the ruling would be delivered on notice electronically vide email. It was only until 2nd September, 2021 when the applicant checked the e-filing portal when the applicant discovered that the ruling was delivered and immediately wrote to the Deputy Registrar seeking certified typed copies to lodge its intended appeal.

3. Hence, the applicant argued in its written submissions that the failure to file the Notice of Appeal within the prescribed time was not intentional but an inadvertent error the same having been occasioned by the High Court in failing to furnish the applicant with a copy of the ruling electronically as directed on the 21st July, 2021.
4. When considering an application for extension of time, the Supreme Court expressed that a court should consider whether there are any extenuating circumstances that would allow it to exercise its unfettered jurisdiction to extend time. (See *Bernard Kibor Kitur vs. Alfred Kiptoo Keter & Another [2018] eKLR*). It also settled 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. (See *Abdul Aziz Ngoma vs. Mungai Mathayo & Another [1976] eKLR*). The issue for consideration before this Court in the instant application is whether the applicant has offered sufficient explanation for the delay between 21st July 2021 the delivery date and 9th September 2021 when the present application for extension of time was filed.
5. A party who desires to appeal to this Court from a finding of the High Court is required to lodge with the Registrar in writing within 14 days of the date of the decision against which it desired to appeal pursuant to Rule 75 of the Court of Appeal Rules. (See *Daudi Kiptugen vs. Commissioner of Lands & 6 Others [2021] eKLR*). I have considered the application and the choice to follow up on the delivery of judgement only until 2nd September 2021 is not a sufficient reason to justify the exercise of my unfettered jurisdiction to extend time.
6. The decision whether or not to extend time for appealing is essentially discretionary. Like any other judicial discretion, the decision to grant orders under Rule 4 must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.
7. The applicants must satisfy the Court that he has a good cause for doing so. Although the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the applicant, its interpretation must be in accordance with judicial principles. If the applicant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the applicant. Consequently, I am convinced that the explanation given is not satisfactory and fails meets the threshold for the exercise of my discretion in favour of the applicant. The same is dismissed with costs.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

M. WARSAME



.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

