



**Bougainville Estate Limited v Kenya Deposit Insurance Corporation (KDIC) (Suing in their capacity as Receiver Managers of Imperial Bank Limited-(In Receivership) & 3 others (Civil Application 34 of 2021) [2021] KECA 132 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 132 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION 34 OF 2021  
SG KAIRU, JA  
NOVEMBER 5, 2021**

**BETWEEN**

**BOUGAINVILLE ESTATE LIMITED ..... APPLICANT**

**AND**

**KENYA DEPOSIT INSURANCE CORPORATION (KDIC) (SUING IN THEIR CAPACITY AS RECEIVER MANAGERS OF IMPERIAL BANK LIMITED-(IN RECEIVERSHIP) ..... 1<sup>ST</sup> RESPONDENT**

**IMPERIAL BANK LIMITED-(IN RECEIVERSHIP) ..... 2<sup>ND</sup> RESPONDENT**

**ARIANNA FAVARETTO ..... 3<sup>RD</sup> RESPONDENT**

**WALTER USSAI ..... 4<sup>TH</sup> RESPONDENT**

*(An application for extension of time to file appeal against the Ruling of the Environment and Land Court at Malindi (Olola, J.) dated 5th December, 2019 in ELC Case No. 212 of 2016)*

**RULING**

1. In a ruling delivered by the Environment and Land Court at Malindi (J.O. Olola, J.) on 5<sup>th</sup> December 2019, the applicant's suit against the respondents in ELC Case No. 212 of 2016 was struck out on grounds that leave to institute the suit had not been obtained as required under Section 56 of the *Kenya Deposit Insurance Act*. Intending to challenge that ruling, the applicant lodged a notice of appeal on 17<sup>th</sup> December 2019.
2. In its application before me dated 8<sup>th</sup> March 2021, the applicant seeks an order that "the record of appeal herein be deemed as duly filed and the court do extend the time for service of the record of appeal herein."



3. It is incumbent upon an applicant seeking extension of time to justify the request for extension. As the Supreme Court of Kenya stated in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR* extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay.
4. Earlier this Court in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. Nai 255 of 1997(1999) 2 EA 23* had given guidelines for the exercise of the court's discretion under Rule 4 of the Rules being first, the length of delay; secondly, the reason for 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.
5. I have considered the application, the supporting affidavit of Gicharu Kimani and the written submissions. The notice of appeal having been lodged on 17<sup>th</sup> December 2019, the applicant had 60 days thereafter to lodge the record of appeal.
6. Whereas Mr. Kimani has deposed that the applicant applied for proceedings and the ruling on 16<sup>th</sup> December 2019, there is no indication when the same were received. A general statement is made in the affidavit that "the delay in failing the record of appeal was caused by the delay in typing proceedings, COVID-19 pandemic and scaling down of operation and the unscheduled reopening of the advocate office" and further that "the time for filing the record of appeal has since lapsed but nevertheless this honourable court has the power to extend such time." It would have been of assistance to the Court for the applicant to demonstrate when the proceedings were in fact received and why this application was not made until 8<sup>th</sup> April 2021.
7. The appeal the applicant has urged the Court to deem as duly filed, being Civil Appeal No. E15 of 2021 was not filed until 8<sup>th</sup> April 2021. The record in that appeal shows that the proceedings and ruling were certified on 9<sup>th</sup> March 2020. A certificate of delay was issued on 19<sup>th</sup> May 2020 in which it is stated that the period between 16<sup>th</sup> December 2019 and 7<sup>th</sup> February 2020 was required for the preparation and supply of the copies of the proceedings and ruling and that the certificate of delay was prepared and ready for collection on 19<sup>th</sup> May 2020. It therefore took almost one year thereafter for the applicant to file the appeal and the present application.
8. As already stated, beyond the general plea that "delay in filing the record of appeal was caused by the delay in typing proceedings, COVID-19 pandemic and scaling down of operation and the unscheduled reopening of the advocate office" no satisfactory explanation is given why after the certificate of delay was ready as at 19<sup>th</sup> May 2020 what specifically prevented the applicant from immediately thereafter making the present application.
9. Moreover, given the express bar in Section 56(2) of the *Kenya Deposit Insurance Act* against institution of suits in the nature of which the applicant had filed without sanction of the court and the concession by the applicant that leave had not been sought prior to the institution of the suit, the intended appeal would appear somewhat tenuous.
10. In the circumstances, absent sufficient material based on which to exercise its discretion favourably, the application dated 8<sup>th</sup> March 2021 and filed in Court on 8<sup>th</sup> April 2021 fails and is hereby dismissed.

I make no orders as to costs.



**DATED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

