



Commissioner of Domestic Taxes v Sturrock Shipping (Kenya) Limited (Civil Appeal E 328 of 2021) [2021] KECA 251 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 251 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E 328 OF 2021
KI LAIBUTA, JA
DECEMBER 3, 2021**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

STURROCK SHIPPING (KENYA) LIMITED RESPONDENT

(Memorandum and Record of Appeal out of time, from part of the Judgment of the High Court of Kenya at Nairobi (F.Tuiyott, J) delivered on 7th February 2021) in High Court Income Tax Appeal No. 33 of 2017)

RULING

1. By a Notice of Motion dated 16th June 2021 made under Rules 4, 42 and 47 of the *Court of Appeal Rules*, the Applicant, the Commissioner Domestic Taxes, seeks extension of time pursuant to Rule 4 to file the Memorandum of Appeal and the Record of appeal out of time and, in the alternative, the Memorandum of Appeal and Record of Appeal filed on 9th June 2021 be deemed as duly filed. The applicant also prays that costs of and incidental to this application be costs in the appeal.
2. The intended appeal arises from the judgment of the High Court of Kenya Income Tax Appeal No. 33 of 2017 (F. Tuiyott, J.) delivered on 7th February 2021.
3. The applicant's Motion is supported by the annexed affidavit of Raphaela Muruka (learned counsel for the applicant) sworn on 16th June 2021, and is made on 19 grounds set out on the face of the Motion, which I need not recite here, save to observe that they contain the Applicant's explanation for the delay in lodging the intended appeal. A summary of those grounds, which are also deposed in the learned counsel's supporting affidavit, suffice to guide the exercise of my discretion in determination of the applicant's Motion. Briefly stated, the grounds are that –



- (a) following delivery of the impugned judgment on 7th February 2020, the applicant filed a Notice of Appeal dated 21st February 2020 in compliance with Rule 75(2) of the Court of Appeal Rules;
 - (b) counsel for the Applicant applied for certified copies of the proceedings and of the impugned judgment on 21st February 2020;
 - (c) the applicant was supplied by the court with certified copies of the proceedings and judgment on 1st February 2021; and
 - (d) the Certificate of delay was issued to the applicant by way of email on 24th May 2021.
4. The respondent, Sturrock Shipping (Kenya) Limited, filed a replying affidavit sworn by Dominic Gichengo (the respondent's Branch Manager) on 4th November 2021.
 5. In his 3-paragraph replying affidavit, Dominic Gichengo does not expressly oppose the applicant's Motion, but make reference to certain grounds contained in the respondent's Notice of Motion dated 21st July 2021 and the affidavit in support thereof, both of which are not exhibited in the record before me, and whose contents, intent and purpose are not disclosed. To my mind, there appears to be two corresponding Motions filed by the parties in these proceedings. However, my task is restricted to the applicant's Motion coming for hearing before me today
 6. Except for the applicant's List of Authorities dated 16th November 2021 and the Digest of 11 Cases, none of the parties have filed written submissions. I shall nonetheless proceed to determine the applicant's Motion on the basis of the twin principle applicable for determination of applications for extension of time pursuant to Rule 4 of the Rules of this Court.
 7. In *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others [2018] eKLR* where this Court stated that –

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”
 8. Rule 4 of the Rules of this Court gives the Court unfettered discretion to “... 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 ...,” on such terms as it thinks just.



9. In its decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court held that

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

10. In addition to the foregoing, I have considered the decision in *Potbiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others* [2005] eKLR where the Court, at p.733, called to mind the criteria applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* [1984] KLR p591 where this Court stated:

“As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

- (a) that there is merit in his appeal;
- (b) that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and
- (c) that the delay has not been inordinate.”

11. Rule 75(1) and (2) of the Court of Appeal Rules requires “any person who desires to appeal to the Court” to “... give notice in writing within 14 days of the date of the decision against which it is desired to appeal.” Rule 77(1) requires that the Notice be served on the Respondent within 7 days next following. The applicant has complied with Rule 75 as regards the lodging and service of the requisite Notice of Appeal, but filed the Record of Appeal on 9th June 2021, 15 days after obtaining the requisite Certificate of Delay. In my considered view, that period of delay is by no means inordinate. Neither would grant of the orders hereby sought occasion prejudice to the respondent, who is equally intent on pursuing further proceedings herein.

12. That leaves me with the decisive issue as to whether the intended appeal is arguable with the possibility of success. With regard to the merit of the appeal, the Applicant must demonstrate that he or she has an arguable appeal with the likelihood of success. See *Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015 (Unreported)*,

13. Apart from a sweeping statement contained in paragraph 19 of Ms. Mureka’s supporting affidavit to the effect that “the intended appeal is arguable, has overwhelming chances of success, [and] of public importance ...,” there is nothing before me to suggest what those grounds of the intended appeal are. The application before me does not contain a draft memorandum of appeal or other statement of the grounds on which an appeal is preferred. Indeed, I find no basis on which to draw a conclusion that the applicant has an arguable appeal. Consequently, the applicant’s Notice of Motion dated 16th June 2021 fails on this score and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

