



**Ngei v Kibe & another (Civil Appeal (Application) E359 of 2021)
[2021] KECA 243 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 243 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E359 OF 2021
KI LAIBUTA, JA
DECEMBER 3, 2021**

BETWEEN

JAMES MUCHENE NGEI APPLICANT

AND

JOSEPH KIBE 1ST RESPONDENT

BOC KENYA LIMITED 2ND RESPONDENT

(Being an application for extension of time to lodge and serve the Notice of Appeal and Record of Appeal out of time, from the Judgment and Decree of the High Court of Kenya at Nairobi (C.W Githua, J) delivered on 25th June 2020) in HCCC No. 680 of 2002)

RULING

1. By a Notice of Motion dated 9th July 2021 made under Rule 4 of the [Court of Appeal Rules](#), the Applicant, James Muchene Ngei, seeks extension of time pursuant to Rule 4 to serve the Notice of Appeal, and to lodge and serve the Record of Appeal, out of time. He also requests that the Record of Appeal filed herein be deemed as duly filed, and prays that the costs of this application be in the appeal.
2. The intended appeal arises from the judgment and decree of the High Court of Kenya at Nairobi (Civil Division) Civil Suit No. 680 of 2002 (C. W. Githua, J.) delivered on 25th June 2020.
3. The Motion is supported by the applicant's annexed affidavit sworn on 9th July 2021, and is made on 7 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 his intended appeal. A summary of those



grounds, which are also deposited in the applicant'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 and decree on 25th June 2020, the applicant filed his Notice of Appeal on 8th July 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 judgment on 8th July 2020, which he obtained on 17th May 2021;
 - c. the delay in filing the Record of Appeal was occasioned by delay in obtaining the certified copies of the proceedings, judgment and decree as shown on the Certificate of Delay issued on 2nd July 2021; and
 - d. according to the Certificate of delay, the time required for the preparation and delivery of certified copies of the proceedings was from 29th June 2020 to 17th May 2021, after which the applicant collected them on 27th May 2021.
4. Learned counsel for the applicant and learned counsel for the respondents were duly served with Hearing Notice by way of email on 12th November 2021. None of the respondents have filed an affidavit in reply to the applicant's Motion. Likewise, only counsel for the applicant has filed written submissions, a List of Authorities and a Digest of decision of the Supreme Court *John Ochanda v Telecom Kenya Limited* [2014] eKLR), all dated 16th November 2021. Though presumably unopposed, the applicant's Motion must nonetheless meet the requirements of Rule 4 for extension of time to lodge an appeal out of time, and the need to comply with the requirements of Rules 75, 77(1) and 82 of the Court of Appeal Rules.
5. On the authority of *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others* [2018] eKLR, 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.”
6. 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.



7. 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.”

8. In addition to the foregoing, I have considered the decision in *Pothiwalla 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.”

9. 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. Although the applicant complied with Rule 75 as regards the lodging of the requisite Notice of Appeal, the delay in issue relates to service thereof within the time prescribed under Rule 77(1). He now seeks extension of time to serve the Notice, and to lodge and serve the Record of Appeal dated 10th June 2021. It is noteworthy that the Record has since been filed, even though the exact date of filing is not disclosed. I can only assume that the Record was lodged either shortly before or together with this application, a delay which I do not consider to be inordinate.

10. 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, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. From the annexed draft Memorandum of Appeal dated 10th June 2021, I am satisfied that the grounds set out on the face of the draft Memorandum point to a reasonable conclusion that the intended appeal is arguable. In particular, it is arguable whether the learned Judge erred in law or in fact in –

- a. failing to find for the applicant in defamation in consequence of which the applicant allegedly suffered loss and damage on account of which he had claimed damages; or
- b. failing to award the applicant such quantum of damages as were anticipated in his claim.

11. While I have no jurisdiction to scrutinise the possible merits or demerits of the intended appeal, suffice it to observe that the grounds therein advanced raise arguable points of law or fact. Whether or not the intended appeal will succeed is not for me to judge.



12. By so determining, I am guided by this Court’s decision in *Atbuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2015 (Unreported), where the Court observed:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

13. On the authority of *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, I am of the considered view that allowing time for the Applicant to pursue his desire to pursue the intended appeal would not unduly prejudice the Respondents. In Muchungi’s case, the Court had this to say:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”

14. Having carefully considered the contents of the Applicant’s Notice of Motion, the supporting affidavit, his draft Memorandum of Appeal, and the written submissions of learned counsel for the Applicant, I find that the Applicant’s Notice of Motion dated 9th July 2021 succeeds. Accordingly, I hereby ORDER AND DIRECT that:

- a. the applicant do serve its Notice of Appeal and Record of Appeal within 7 days from the date hereof;
- b. the applicant’s Record of Appeal filed herein be deemed as duly filed; and
- c. costs of this application be costs in the appeal.

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

