I & M Bank Limited & another v Rogers Kagai Ndiema (Environment and Land Miscellaneous Application 10 of 2023) [2024] KEELC 3321 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3321 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 10 OF 2023

FO NYAGAKA, J

APRIL 23, 2024

BETWEEN

I & M BANK LIMITED ..... 1ST APPLICANT

ANTIQUE AUCTIONS AGENICES ..... 2ND APPLICANT

AND

ROGERS KAGAI NDIEMA ..... RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 08/12/2023. On 13/12/2023 it was brought under Sections 1A, 1B, 3, 3A, 63(e) and 79G of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, and all the other enabling provisions of the law. It sought the following reliefs.

    1. ...spent.

    2. That the time within which to file an appeal against the ruling and orders of 26th September 2023 by Honourable J. K. Ng'arng'ar, Chief Magistrate in Kitale ELC Civil Suit No. 83 of 2023 be extended by such period as this honorable court may order.

    3. That the drafting Memorandum of Appeal annexed here to be deemed as properly filed upon payment of the requisite court fees.

    4. That the costs of this application being the course.

2. It was based on twelve (12) grounds which were that the Applicant being aggrieved by the Ruling of the honourable Chief Magistrate in Kitale, Chief Magistrate ELC. Case No. 83 of 2023 applied through their advocates, namely, M/S Kidiavai and Company Advocates, for certified copies of proceedings and ruling for purposes of lodging an appeal. The letter was dated 27/09/2023 and filed the same date. That the Applicant paid for typed proceedings and the ruling on the same date. The Applicant was yet to be supplied with the type proceedings. The 30 days required for appeal had elapsed, yet the applicant was

aggrieved by the ruling and would like to appeal against it. That why they failed to appeal within time was not intentional but due to the fact that the court file went missing after the ruling was delivered on 27/09/2023 and the Applicants' efforts to trace it to enable them to get a copy of the ruling to enable them file the appeal were fruitless. That further, the delay in lodging the appeal was occasioned by the delay in receiving instructions from the Applicant on whether to proceed with the lodging of the appeal or not.

3. Again, that the Applicant had since been given a copy of the ruling and were aggrieved by the decision and desired to appeal. That the Applicant had an arguable appeal, with high chances of success against the ruling and the application had been made without undue delay. That the applicant was willing to deposit security as dishonorable court may order, and therefore. In the circumstances, it was just unfair to grant the prayers stopped.

4. The application was supported by the affidavit sworn on 08/12/2023 by Kevin Songole, an Advocate of the High Court of Kenya. It was filed with the application. He reiterated the contents of the grounds of appeal, but annexed and marked as KS1 a copy of the ruling of the court. He also marked asked as KS2 to a copy of the letter dated 27/09/2023. He marked as KS 3A-B copies of the invoice of payment and receipt evidencing the payment. He repeated that to that date he had been supplied with the typed copies of proceedings. Then he annexed as KS4 a copy of the Memorandum of Appeal. Then he deponed that he believed that the Applicant had an arguable appeal with high probability of success. He prayed that the application be allowed as presented.

5. The application was opposed.

Submissions

6. The Applicants submitted on 16/01/2024. In their submissions, having summed the content of the Application, they relied on the case of *Kamlesh Mansuklal Damji Patnivs Director of Prosecutions and 3 Others* (1995) eKLR. They also relied on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR. They submitted that the length of delay was 38 days was explicitly explained. That the intended appeal was arguable, as demonstrated by annexture KS 4. They relied on Article 159 (2)(d) of the *Constitution* of Kenya and the case of *Harum Meita Lempaka & 2 Others* [2014] eKLR.

7. They submitted on the right to be heard, arguing that it had been demonstrated as was supported by the case of *Mbaki & Others vs Macharia & Another* (2005) EA 206. And finally, that Sections 79G of the *Civil Procedure Act* was clear that an appeal from a subordinate court ought to be filed within 30 days of the decree or order appealed against. Further, that if not filed within the time it may be admitted out of time if the Applicant satisfied the court that he had sufficient cause for not appealing in time. They submitted that they had satisfied the court that they had taken steps towards appealing in good time but for the reason that the court could file could not be traced they delayed.

8. The Respondents submitted that the application had not met the threshold of extension of time as provided for under Section 79 G of the *Civil Procedure Act*. They relied on the case of *Mombasa County Government versus Kenya Ferry Services and Another* (2019) eKLR where the court held that extension of time was not a matter of right. Further, that a party should give reasonable explanation to the satisfaction of the court why they did not file an appeal in time. They also relied on the case of *Francis Manza Mulwa -vs- Kanji Vaniian & 2 Others* [2018] eKLR.

9. They submitted further that the reasons the applicants gave for failing to lodge an appeal out of time was that the file was missing but there was no evidence that it went missing and if it was, the manner in which it was retrieved. Further, they submitted that the ground that the appellant delayed in giving

instructions did not favour them because equity aids the vigilant and ignorance of the law is not a defence. They submitted that it was clear that the defendants were not interested in the appeal in the first place, otherwise they would have taken steps to lodge it as soon as possible. They argued that the application was an abuse of the process of the court and a mockery of the discretion of the court.

10. This court has considered the application, the law and the submissions of the rival parties. The only questions it is to determine are whether the application for extension of time is merited and who to bear costs.

11. Section 79. G. of the *Civil Procedure Act* is explicit, that an appeal from a Subordinate Court ought to be filed within 30 days of the decision and that where a party did not file one within the stipulated time, he or she was at liberty to move the court for extension of time while explaining to the satisfaction of the court why they did not do so in time.

12. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR the Supreme Court outlined the conditions or requirements to be met for the grant of an order for extension of time. It held, among others:

> " This discretion is a very powerful tool which in our view should be exercised with abundant caution, care and fairness; it should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realised."

13. It then considered a number of decisions regarding extension of time. It cited Raila Odinga vs Independent Elections and Boundaries Commission & Others, Petition No. 5 of 2013 the same Court rendered itself on discretion to extend timelines as follows:

> " It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the *Constitution*, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time - lines established are made with special and unique considerations" (Emphasis provided).

14. It also cited with approval Court of Appeal in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR where the said Court held (at paragraph 12):

> " The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In Henry Mukora Mwangi -vs- Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004, this Court held:-
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> > "It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-"Over the years, the Court has, of course set out guidelines on what

a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:-

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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. Further, it cited the case of *United Arab Emirates v Abdelghafar & others* 1995 IRLR 243 where the Employment Appeal Tribunal laid down four principles regarding the exercise of discretion to extend time, as follows:

> " In the light of the guidance contained in these authorities it is possible to state, with reasonable precision, the principles which govern the exercise of the Appeal Tribunal's discretion to extend time and to identify those factors regarded as relevant.
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> 1. The grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the Appeal Tribunal. The result of an exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.
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> 2. As Sir Thomas Bingham M R pointed in Costellow v Somerset CC (*supra*) at 959C, time problems arise at the intersection of two principles, both salutary, neither absolute.
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>> " ... The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met..."
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>> The second principle is that:
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>>> "...a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. ..."
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> 3. The approach indicated by these two principles is modified according to the stage which the relevant proceedings have reached. If, for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances,

grant an extension of time. Unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits. The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.

4. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default."

16. It also relied on the decision by the Supreme Court of Judicature Court of Appeal, Civil Division, in *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645 at paragraph 22 where the Court held:

> " It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider "all the circumstances of the case" including:
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> a. the interests of the administration of justice;
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> b. whether the application for relief has been made promptly;
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> c. whether the failure to comply was intentional;
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> d. whether there is a good explanation for the failure;
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> e. the extent to which the party in default has complied with other rules, practice directions and court orders;
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> f. whether the failure to comply was caused by the party or his legal representative;
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> g. the effect which the failure to comply had on each party; and
>
> h. the effect which the granting of relief would have on each party.

In the case of a procedural appeal the court would also have to consider item (g):

> "whether the trial date or the likely trial date can still be met if relief is granted".

17. What I gather from the above is that first, the power to extend time is wide but should be exercised judiciously, with the Court considering the circumstances of each case. Again, the interests of the administration of justice should be paramount while considering whether the application has been made promptly. Even the aspect of how fast the Court has been moved will depend on the circumstances of each case. But of importance is the explanation for failure to comply with the time lines stipulated.

18. In the instant case the Applicant gives two main reasons for failure to apply within time. One is that the request for the ruling and proceedings was not answered to in time. The Applicants argue that the ruling was delivered on 26/07/2023. That after that delivery they were aggrieved of the ruling and applied for it while requesting for proceedings both on the following day. What the above deposition means is that the contents of the ruling sought to be appealed from were known to the Applicants on the date for delivery. It follows that whether they applied for the ruling or not, they had sufficient content to formulate the grounds of appeal and file the appeal within 30 days irrespective of whether or not the ruling was available. Moreover, they do not indicate anywhere when the said Ruling was finally given to them. Thus, in my humble view that ground is neither here nor there.

19. The other ground was that the Applicants, the clients of the learned counsel who deponed to the affidavit in support of the application, did not instruct the Advocates in time as to file the appeal. It means that learned counsel actually advised the clients but the clients took their sweet time to instruct them to appeal. They can only have themselves to blame. As the Supreme Court stated in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR;

> " This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
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> Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
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> 1. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
> 2. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
> 3. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
> 4. Whether there will be any prejudice suffered by the respondents if the extension is granted;
> 5. Whether the application has been brought without undue delay; and
> 6. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

20. The principles flowing from the above holding are that extension of time is not a walk in the park. The party seeking the exercise of the discretion of the Court must demonstrate that he deserves it: that the delay was neither deliberate nor adverted to or caused simply by inaction. The applicants were advised by learned counsel but they did not take action until after 38 days after the expiry of time. This conduct goes against the need not to be deliberate in inaction: this is what the Applicants demonstrate in the instant application hence if this were the only ground they would not deserve the extension sought.

21. The remaining ground was that the Court file went missing hence they could not trace it within the time. Such unsupported sweeping deposition is one this Court equates to a reed onto which the Applicants wishes to hang on while sinking. There is no evidence whatsoever that the Court file was missing or if so, when it was traced and how. I thus agree with the Respondent in their submission that this important evidence was not given by the Applicant. The applicant needed to demonstrate that the Court file went missing. This they could have done by annexing to the affidavit letters written to Court and actually received which indicate that indeed they were looking for the file but it could not be traced. Moreover, they could have printed from the Case Tracking System (CTS) a printout to show that indeed between those dates the file was missing or had a missing outcome. Further, it behooved the applicants to have a written note or affidavit from a member of staff of the Court to attest to the fact that between the date the Applicants requested for proceedings to a certain date the Court file went missing. Such serious failure to demonstrate this allegation leaves this Court to speculate on the issue and expect that the Court lays blame where it may never have been. This cannot be salvaged by Article 159(2)(d) of the *Constitution* of Kenya as the Applicants wish this Court, in their submissions, to agree.

22. The upshot is that the application lacks merit and is hereby dismissed with costs to the Respondent.

23. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 23RD DAY OF APRIL, 2024.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE.