



**Ecobank Kenya Limited v Meya Agri Traders Limited (Civil Application 20 of 2020) [2021] KESC 58 (KLR) (24 March 2021) (Ruling)**

*Ecobank Kenya Limited v Meya Agri Traders Limited [2021] eKLR*

Neutral citation: [2021] KESC 58 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL APPLICATION 20 OF 2020**

**PM MWILU, AG.CJ & AG. P, MK IBRAHIM, SC  
WANJALA, NS NDUNGU & I LENAOLA, SCJJ**

**MARCH 24, 2021**

**BETWEEN**

**ECOBANK KENYA LIMITED ..... APPLICANT**

**AND**

**MEYA AGRICULTURAL TRADERS LIMITED ..... RESPONDENT**

*(An application for extension of time to lodge a Notice of Appeal against the Judgment of the Court of Appeal at Nairobi (Kiage, Sichale & Okwengu, JJ.A) delivered on 5th June 2020 in Civil Appeal No. 108 of 2016)*

**Supreme Court declines to extend the time allowed for the filing of a notice of appeal**

*The application was for the extension of time in which to file a notice of appeal at the Supreme Court. The application was made after the lapse of 51 days from the last date in which the notice of appeal ought to have been filed. The court highlighted the principles applicable to the extension of time for filing a notice of appeal at the Supreme Court.*

Reported by Beryl Ikamari

**Civil Practice and Procedure** – computation of time - extension of time - delay in filing a notice of appeal - where a delay of 51 days was explained as the consequence of movement restrictions meant to contain the coronavirus pandemic - whether the Supreme Court would extend time for the filing of a notice of appeal - Supreme Court Rules 2020, rules 15(2) and 36(1).

**Brief facts**

An application for the extension of time in which to file a notice of appeal at the Supreme Court was made. The application was made after the lapse of 51 days from the last date in which the notice of appeal ought to have been filed. The reason offered for the delay was that travel restrictions meant to contain the coronavirus pandemic did not allow the applicant's advocates to travel from Nakuru in order to discuss the judgment,



which would be the subject of the intended appeal, and lodge a notice of appeal at the Court of Appeal registry at Nairobi.

### Issues

- i. What were the principles applicable to the extension of time for filing a notice of appeal at the Supreme Court?
- ii. Whether the Supreme Court would allow a party to file a notice of appeal out of time.

### Held

1. Under rule 36(1) of the Supreme Court Rules, a notice of appeal had to be filed within fourteen days from the date of the judgment or ruling that was the subject of appeal. If the matter was one of general public importance, it was not necessary to obtain certification before filing the notice of appeal. Rule 15(2) of the Supreme Court Rules, 2020 granted the court discretion to extend time where time for undertaking certain actions was limited under the rules or by an order of the court. Therefore, the court had discretion to extend time for the filing of the notice of appeal.
2. The principles underlying the exercise of discretion by the court for purposes of extending time were the following:-
  - a. extension of time was not a right of a party - it was an equitable remedy that was only available to a deserving party, at the discretion of the court;
  - b. a party who sought extension of time had the burden of laying a basis, to the satisfaction of the court;
  - c. whether the court should exercise the discretion to extend time, was a consideration to be made on a case to case basis;
  - d. where there was a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the court;
  - e. whether there would be any prejudice suffered by the respondents, if extension was granted;
  - f. whether the application had been brought without undue delay; and
  - g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.
3. There was need for the applicant to explain the whole period of delay to the court. The applicant said that there were movement restrictions which hindered discussions and the issuance of instructions for the filing of a notice of appeal. The applicant did not explain why other means of communication such as e-mail, zoom, skype, teleconferencing or google teams were not used to issue instructions for the filing of a notice of appeal.
4. The judgment which would be the subject of the intended appeal arose from the High Court at Nakuru. Under rule 6(3) of the Court of Appeal Rules, the appropriate registry for the filing of the notice of appeal was the Court of Appeal sub-registry at Nakuru. The applicant's advocates were at Nakuru and the cessation of movement would not have affected their ability to file the notice of appeal at the appropriate registry.
5. Pursuant to the orders of the court in *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others ; Kenya National Commission on Human Rights & 3 others (Interested Parties)*, HC Petition No. 120 of 2020 (COVID 025); [2020] eKLR, the Schedule to the Public Order (State Curfew) Order, 2020, was amended to include members of the Law Society of Kenya in the list of services, personnel or workers that were exempted from the provision of the Public Order (State Curfew) Order, 2020. Lawyers were subsequently issued with an essential service provider Identity card to enable them to move within and out of the areas restricted by Public Order (State Curfew) Order, 2020. The applicant's argument that its advocates were unable to travel was untenable.
6. The applicant's argument that the notice of appeal could not be filed in time because of the closure of both the Supreme Court and Court of Appeal registries in Nairobi was incorrect. Even though service delivery in the Judiciary was scaled down, the Judiciary still offered services when there were



movement restrictions. The applicant failed to utilize the online filing platform in order to comply with set timelines.

7. The issues that arose for determination both at the High Court and the Court of Appeal were not of public interest and they did not persuade the court to extend time.

*Application dismissed with costs to the respondent.*

#### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

None mentioned

## **RULING**

1. Before the Court is a Notice of Motion Application dated 30th July 2020 and filed on 11th August 2020, brought pursuant to Rule 15(2) of the Supreme Court Rules, 2020, and is premised on several grounds in the body of the application and the Supporting Affidavit of Caroline Mbenge, the Head of Legal and Company Secretary of the Applicant sworn on 30th July 2020.
2. The Application raises one issue for determination by this Court, namely, *whether this Court should grant an extension of time for the Applicant to file a Notice of Appeal?*
3. Rule 15(2) of the Supreme Court Rules, 2020 grants this Court the discretion to extend time in the following specific terms:

"The Court may extend the time limited by these Rules or by any decision of the Court"

4. The timelines for filing a Notice of Appeal are provided for under Rule 36(1) which states that a Notice of Appeal shall be filed within fourteen days from the date of the judgment or ruling which is subject of appeal. Sub-Rule (4) provides that in lodging an appeal on a matter of general public importance, it shall not be mandatory to obtain such certification before filing the notice of appeal.
5. In the present case, we note the Judgment of the Court of Appeal was delivered on 5th June 2020. Accordingly, the last day for filing the Notice of Appeal was 19th June 2020. An application for extension of time before this Court was not done until 11th August 2020 some 51 days later.
6. This Court has set the guiding principles on extension of time in the case of Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others, SC. Application No. 16 of 2014; [2014] eKLR as follows:

"... 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.

"... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. 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;



2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
  3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
  4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
  5. whether there will be any prejudice suffered by the respondents, if extension is granted;
  6. whether the application has been brought without undue delay; and
  7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]
7. Further, this Court has emphasized the need for the Applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the Court in the case of ***County Executive of Kisumu v County Government of Kisumu & 8 others***, SC. Civil Appl. No. 3 of 2016; [2017] eKLR.
  8. In a bid to justify why the Notice of Appeal could not be filed within the time, the Applicant avers that their then firm of advocates on record was based in Nakuru County, hence they could not travel to Nairobi discuss the Judgment with their clients and file a Notice of Appeal at the Court of Appeal Registry in Nairobi as movement to and from Nairobi was prohibited in a bid to contain coronavirus pandemic. The Applicant does not explain why it could not consult with its advocates via email, teleconferencing, skype, zoom, google teams or any other available channel so as to instruct its advocates on whether or not to file an appeal.
  9. The Applicant also chose to remain mum on Rule 6 of the Court of Appeal Rules which makes provision for Registry and sub-registries. Pursuant to sub-rule 3, “the appropriate registry” in case of an appeal from the High Court of Kenya sitting in Nakuru should be Nakuru. We have taken note of the fact that the Judgment that was subject of appeal before the Court of Appeal originated from the High Court of Kenya at Nakuru. Therefore, there is no justified reason why the Applicant could not file its Notice of Appeal at the sub-registry in Nakuru which was within its advocates’ jurisdiction and not affected by the cessation of movement.
  10. Furthermore, this Court takes judicial notice that on 16th April, 2020, *W. Korir J*, in ***Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others ; Kenya National Commission on Human Rights & 3 others (Interested Parties)***, HC Petition No. 120 of 2020(COVID 025); [2020] eKLR, issued an order of mandamus compelling Cabinet Secretary for interior and coordination of national government, to amend the Schedule to the Public order (State Curfew) order, 2020 so as to include the members of the Law Society of Kenya in the list of “services, personnel or workers” exempted from the provision of the Public Order (State Curfew) Order, 2020. We also take note that lawyers were subsequently issued with an essential service provider Identity card to enable them to move within and out of the areas restricted by Public Order (State Curfew) Order, 2020. We therefore find the Applicant’s argument that its then advocates were unable to travel untenable.



11. We also find the Applicant's assertion, that it could not file the instant application on time because both the Supreme Court and the Court of Appeal Registries in Nairobi remained closed and therefore inaccessible to members of the public, incorrect. We note that even though service delivery in the Judiciary scaled down, services were still offered, and urgent applications prioritized. Furthermore, the Applicant failed to utilize the online filing platform to comply with set timelines. We find that the delay in bringing the instant application late has not been sufficiently justified.
12. The Applicant submitted that the Court of Appeal's decision has *the likelihood of disrupting the Kenyan Banking industry and the standard banking practices which have been adopted over time thereby negatively affecting many financial institutions*. On this, we have taken note of the issues for determination both at the High Court and at the Court of Appeal and are convinced that none of them are for the public interest to persuade us to extend time.
13. Towards that end, the application for extension of time to file a notice of appeal fails with costs to the Respondent.
14. Consequently, we make the following Orders:
  - i. The Notice of Motion dated 30th July 2020 and filed on 11th August 2020be and is hereby dismissed.
  - ii. The Applicant shall bear the costs of the Respondent.Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH, 2021.**

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**P. M. MWILU**

**Ag. CHIEF JUSTICE & Ag. PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

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**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

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**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

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

Registrar, Supreme Court of Kenya

