



REPUBLIC OF KENYA



KENYA LAW
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**Kenya National Capital Corporation Ltd v Galot & 5 others (Civil Application
8 of 2019) [2019] KESC 82 (KLR) (Civ) (26 November 2019) (Ruling)**

Kenya National Capital Corporation Ltd v Mohan Galot & 5 others [2019] eKLR

Neutral citation: [2019] KESC 82 (KLR)

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

CIVIL

CIVIL APPLICATION 8 OF 2019

**PM MWILU, DCJ & VP, DK MARAGA, CJ & P,
MK IBRAHIM, SC WANJALA & N NDUNGU, SCJJ**

NOVEMBER 26, 2019

BETWEEN

KENYA NATIONAL CAPITAL CORPORATION LTD APPLICANT

AND

MOHAN GALOT 1ST RESPONDENT

L.P GALOT 2ND RESPONDENT

S.P GALOT 3RD RESPONDENT

G.P GALOT 4TH RESPONDENT

GALOT INDUSTRIES LIMITED 5TH RESPONDENT

**KING WOOLEN MILLS LIMITED (FORMERLY MANACHESTER
OUTFITTERS SUITING DIVISION LIMITED) 6TH RESPONDENT**

*(Being an application for extension of time to file an appeal out of time against
the decision of the Court of Appeal (Musinga, Murgor, Kantai, JJA) sitting in
Nairobi, in Civil Appeal No. 324 of 2010, delivered on 8th February, 2019)*

Supreme Court declines to extend time for purposes of filing an appeal.

Reported by Beryl Ikamari

Civil Practice and Procedure - institution of appeals at the Supreme Court - time for filing an appeal - extension of time for filing an appeal - principles related to extension of time - whether an applicant had offered a satisfactory and substantiated reason for delay in filing an appeal at the Supreme Court - Supreme Court Rules, 2012, rules 53 and 31(1).



Brief facts

The applicant made an application for extension of time within which to file an appeal. The applicant wanted to file the notice of appeal out of time and to also seek certification that the appeal raised issues of general public importance out of time. The reason offered for the delay in filing the appeal was that the applicants spent time deliberating on the matter and that there were interruptions of power supply at the applicant's advocates' office which destroyed data that was relevant to the proceedings.

Issues

1. What were the principles related to extension of time by the Supreme Court?
2. Whether the Supreme Court would extend time for the filing of a notice of appeal where the applicant failed to substantiate its reason for delay in filing it.

Held

1. Rule 53 of the Supreme Court Rules, 2012 granted the court discretion to extend time limits set under the Rules. Pursuant to rule 31(1) of the Supreme Court Rules, the applicant had 14 days from the time that the Court of Appeal delivered its judgment to file a notice of appeal. The judgment was delivered on February 8, 2019 and the notice of appeal ought to have been filed on or before February 22, 2019.
2. The applicant had to explain the delay and show whether there were any extenuating circumstances that would allow the court to exercise discretion in its favour. The guiding principles related to extension of time by the Supreme Court were the following:-
 1. 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;
 2. a party who sought extension of time had the burden of laying a basis, to the satisfaction of the court;
 3. whether the court should exercise the discretion to extend time, was a consideration to be made on a case- to- case basis;
 4. where there was a reasonable cause for the delay, the same should be expressed to the satisfaction of the court;
 5. whether there would be any prejudice suffered by the respondents, if extension was granted;
 6. whether the application had been brought without undue delay; and
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.
1. None of the reasons offered by the applicant for the delay in filing the appeal was substantiated. The applicant did not annex any correspondence to its affidavit to confirm that there were consultations going on or that there were power interruptions for the entire period in which the notice of appeal ought to have been filed. Therefore, the applicant did not satisfactorily explain the inordinate delay.

Application dismissed

Orders

- i. *Application dismissed*
- ii. *Costs to the respondents.*

Citations

Statutes

1. Constitution of Kenya, 2010

Advocates

None mentioned



RULING

A. Introduction

1. This is an application by way of a Notice of Motion dated 7th March, 2019 brought under Rules 3, 24(1), 31, 53 of the Supreme Court Rules, 2012, and Articles 159(2)(d) and 163(4)(b) of the Constitution. The application seeks the following substantive orders:
 1. That this Honourable Court be pleased to extend the time limited for filing a Notice of Appeal and grant the Applicant leave to file the Notice of Appeal herewith annexed against the Judgment of the Court of Appeal at Nairobi (Musinga, Murgor, Kantai, JJA) dated 8th February, 2019.
 2. That this Honourable Court be pleased to extend time and grant the Applicant leave to file at the Court of Appeal the Application herewith annexed for certification that a matter of general public importance is involved in the Applicant's intended appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal at Nairobi (Musinga, Murgor, Kantai, JJA) dated 8th February, 2019.
 3. That the costs of, and incidental to this application abide the result of the intended appeal.
2. The application is founded on eleven (11) grounds in the body of the application and the supporting affidavit of the Manager Recoveries Department of the Applicant, sworn on 7th March, 2019.

B. Background

i. The High Court

3. On 8th October, 2002 the Court, Ringera J (as he then was) found that the Appellant had not placed before the court any material to enable him exercise his jurisdiction on an application for review. He also found that the consent order required the Registrar to do what amounted to judicial acts in addition to ministerial acts and further, that reference of the parties on the dispute on accounts to the Registrar did not involve an issue of jurisdiction. The Learned Judge held that the consent order as agreed was capable of implementation because the interest rates and the periods for their application had been agreed, that the application had been brought with inordinate delay and dismissed the same. He however found that the consent order could not dispose of the whole dispute between the parties because there were reliefs sought in the plaint which went beyond accounts. The Judge therefore corrected the omission or oversight and ordered that once the Registrar had concluded his mandate of determining accounts, he should submit his report and findings to the Court for further proceedings and final orders in the suit. This ruling was never appealed.
4. Subsequently, parties appeared before A.L. Kindy, Deputy Registrar and made their respective cases, through their accountants on the issue of accounts. The Deputy Registrar delivered a ruling on 27th August, 2004 and found that the Applicant owed the Respondents an overpayment of KShs. 48,951,536/=, which ruling was reduced into a formal order dated 22nd October, 2004. Based on the aforementioned order, the Respondents filed an application to have the Registrar's finding adopted as the judgment of the Court, a decree issued, discharged of charged and mortgaged properties, and a release of the title deeds of the properties.



5. On 29th October, 2008, Kimaru J found merit in the Respondent’s application effectively adopting the Deputy Registrar’s decision and entered judgment in favour of the Respondents against the Applicant for the Sum of Kshs. 48, 951, 536/= together with interest at 19% per annum. The Court directed further that the other prayers of the plaint and counter-claim to be determined in a full trial.

ii. Proceedings at the Court of Appeal

6. Aggrieved by the orders of Kimaru J, issued on 29th October, 2008, the Applicant preferred an appeal, Nairobi Civil Appeal No. 324 of 2010, Kenya National Capital Corporation vs. Mohan Galot & 5 Others. The Appeal was premised on 8 grounds namely, that the learned Judge erred in law and fact by: adopting the decision of the Deputy Registrar as a decree of the court thereby occasioning a miscarriage of justice to the Applicant; ignoring an earlier decision of Ringera, J, and purported to overrule a Judge of parallel jurisdiction; determining the pending suit without taking viva voce evidence and in contradiction of an earlier decision of the same court occasioning serious miscarriage of justice; clothing an order of the Deputy Registrar with legality when it was a nullity ab initio occasioning a serious miscarriage of justice; invoking the inherent jurisdiction of the court in circumstances that did not warrant the same; entering judgment for the said sum and for ignoring the Applicant’s counter-claim. The Applicant also alleged that the motion before the Judge was fatally defective and, finally, that the reasoning of the Judge and conclusions reached were plainly wrong given the factual circumstances obtaining in the matter.
7. On 8th February, 2019 the Court of Appeal reached a finding that the appeal lacked merit and proceeded to dismiss it with costs to the Respondents. This decision by the Court of Appeal further aggrieved the Applicant who has approached this Court seeking an extension of time within which to file a Notice of appeal and an application for certification before the Court of Appeal.

iii. Proceedings at the Supreme Court.

C. Parties’ Submissions

a. The Applicant

8. The Applicant filed written submissions dated 7th March, 2019. The Applicant cites Civil Application No. Sup. 18 of 2018, Reuben Muna Kangethe vs Athanas Bonaventure Wanyama & 2 Others [2019] eKLR, to justify why they have filed this application before this Court. In that decision, the Court of Appeal held that it is only the Supreme Court that can extend time to file an appeal out of time.
9. The Applicant submits that it is in the interest of the administration of justice that the Application be allowed so as to give the Applicant an opportunity to present its application for certification before the Court of Appeal to be heard on merits. They urge, the application has been made promptly and there is no ordinate delay from the date the Court of Appeal judgment, that the application has been filed in good faith and the failure to comply with the time limits was a fault beyond the Applicant’s and its advocates control.
10. The Applicant argue that it is a public institution whose shareholders and beneficiaries are the people of Kenya and the managers and directors put in place to safeguard their interest needed to consult and seek approval before proceeding in the matter.
11. Further, the Applicant urges that the construction along Ngong road where its advocates’ offices are located lead to interruption of power supply which has resulted in the destruction of relevant data to



these proceedings multiple times. The Applicant cites *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*(supra).

b. 1st, 5th and 6th Respondents

12. The 1st, 5th and 6th Respondents strenuously opposed the application. They filed a replying affidavit sworn on 3rd May 2019 by the 1st Respondent together with their written submissions filed on 22nd May 2019. The Respondents urge that the application dated 7th March 2019 is fatally defective, bad in law, an abuse of the court process, misconceived and as such ought to be struck out or dismissed with costs. On this, the Respondents submit that the Applicant ought to have approached the Court of Appeal under Rule 4 for extension of time to file the said application, that filing of the Notice of appeal in this Court is not condition precedent to an application on certification of a matter as raising issues of general public importance at the Court of Appeal and that the application is an abuse of the court process. They cite this Court’s decision in *Sum Model Industries Ltd v Industrial & Commercial Development Corporation* [2011] eKLR to support their argument.
13. It is the Respondents’ submissions that this Court lacks jurisdiction to entertain an application for extension of time to file a notice of appeal in the Court of Appeal as sought by the Applicant. They cite this Court’s decision in the *Matter of Interim Independent Electoral Commission* [2011] eKLR to buttress this submission.

D. Issues For Determination

14. The Application raises one issue for determination by this Court, namely:
Whether this Court should extend time for the Applicant to file its notice of appeal?
15. Rule 53 of the Supreme Court Rules, 2012 grants this Court the discretion to extend time limited by the Rules. It provides thus:

“The Court may extend the time limited by these Rules, or by any other decision of the Court.”

E. Analysis

16. Rule 31(1) of the Supreme Court Rules thus provides:
“A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the First Schedule, with the Registrar of the Court or with the tribunal, it is desired to appeal from.”
17. The Applicant therefore had 14 days from the delivery of the judgment of the Court of Appeal, to file a Notice of Appeal. Consequently, the Applicant ought to have filed the Notice of Appeal on or before 22nd February, 2019 since the Court of Appeal delivered its judgment on 8th February, 2019. It is the Applicant’s submission that upon the delivery of judgment they could not file the Notice of appeal and the application to have the matter certified as one involving a matter of general public importance(before the Court of Appeal) within time for two reasons namely, its advocates had not yet received instructions to file the Notice of Appeal due to time spent by the Applicant in deliberating on the matter and acquiring requisite board approvals and the same advocates experienced power disruption at their office premises due to the ongoing expansion of Ngong road near Karen which resulted in destruction of data relevant to these proceedings on multiple occasion.



18. Concerning extension of time, this Court has already set the guiding principles in *Nicolas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* SC. App. No. 16 of 2014; [2015] eKLR (the Nick Salat Case) 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]

19. It is critical for us to determine if the application herein meets the criteria set in Nick Salat Case. One of the requirements is that the applicant should furnish the Court with sufficient reasons for the delay. Of the two reasons cited by the Applicant, none is substantiated. The Applicant has not annexed any correspondence to its affidavit to confirm that there were indeed consultations going on, in its organization. Additionally, there is nothing annexed to the Applicant’s supporting affidavit to ascertain that there were power interruptions during the entire period when the Applicant was expected to file the Notice of Appeal. If the Applicant had been diligent, it would have had its notice of appeal, which is about a page, typed elsewhere and filed in this Court.

Consequently, it is our finding that the applicant has not satisfactorily explained the inordinate delay as decided by this 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, where this Court 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 and the first prayer of the application therefore is disallowed.

20. In the foregoing, we are inclined to disallow the application in entirety.

F: Orders

21. Consequently, we make the following Orders:



- i. The Notice of Motion dated March 7, 2019 be and is hereby disallowed.
- ii. The Applicant shall bear the costs of the Respondents.

22. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2019.

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D.K. MARAGA

CHIEF JUSTICE & PRESIDENT OF SUPREME COURT OF KENYA

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P.M. MWILU

DEPUTY CHIEF JUSTICE & DEPUTY PRESIDENT OF SUPREME COURT

.....

M. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR SUPREME COURT OF KENYA

