



**Faulu Microfinance Bank Limited v M'murithi & 3 others (Miscellaneous Application E001 of 2024) [2025] KEHC 5008 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5008 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
MISCELLANEOUS APPLICATION E001 OF 2024  
AK NDUNG'U, J  
APRIL 29, 2025**

**BETWEEN**

**FAULU MICROFINANCE BANK LIMITED ..... APPLICANT**

**AND**

**JOSHUA KAIMENYI M'MURITHI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH G MWEHIA ..... 2<sup>ND</sup> RESPONDENT**

**OFINE MUTUMA MWITI ..... 3<sup>RD</sup> RESPONDENT**

**JAMES KIRIMI NKANATA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling resolves the notice of motion dated 05/08/2024. The application seeks, firstly, leave to appeal out of time and, secondly, stay of execution of the judgment delivered by Honourable Lisper Gakii Nyaga (RM) on 10/06/2024 in Nanyuki SCCCOMM No. E072 of 2024- *Faulu Micro-Finance Bank Ltd v Joshua Kaimenyi M'murithi & 3 others* and if leave be granted, the memorandum of appeal annexed to the supporting affidavit be deemed to have been filed and service be dispensed with.
2. The prayer for stay of execution is already spent as Counsels informed this court on 02/09/2024 that costs were paid fully so the only issue for determination is leave to file appeal out of time.
3. The judgment sought to be appealed was delivered on 10/06/2024. The judgment having been passed on 10/06/2024, appeal ought to have been lodged on or before 10/07/2024 in accordance to Section 79G of the *Civil Procedure Act*, Cap 21 which states that;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:



Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

4. The present application for leave to appeal out of time was filed on 05/08/2024; therefore, the delay that we are dealing with here is about one month. Under the proviso to Section 79G aforesaid, this court may admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
5. The reasons for the delay in lodging this appeal are set out on the face of the application and more particularly in the supporting affidavit annexed to the application sworn by Frerick Nyabuti, Senior Legal Officer at Debt Recovery Unit for the Applicant. Those reasons are – The Applicant instructed the advocate to file an appeal who prepared the memorandum of appeal and the delay in filing the memorandum of appeal in time was unintended, inadvertent, inexcusable and out of the Applicant’s reasonable control.
6. He further deposed that the intended appeal raises triable issues and is predicated on cogent grounds with overwhelming chances of success for reasons that the trial court ordered that the Respondents be furnished with the statement of account within 14 days from the date of judgment but failed to appreciate that the Applicant had supplied the same to the 1<sup>st</sup> Respondent advocate on 09/05/2024. Further, the learned magistrate erred directing reconciliation of accounts as from August 2016 without considering that the Applicant’s claim was with respect to the loan facility advanced vide an offer letter dated 15/02/2020. Further, the learned magistrate erred in admitting into evidence during trial documents that had not been served upon the Applicant contrary to Order 11 of the Civil Procedure Rules. That the Applicant undertakes to lodge and prosecute the appeal expeditiously and the Applicant has a right to be heard under Article 50 of the Constitution and pursuant to the rules of natural justice.
7. The Application was opposed by the 1<sup>st</sup> Respondent who filed a replying affidavit dated 15/08/2024. He deposed that he believed that the Applicant would comply with the court order or file the appeal within the stipulated time but he failed to do so; that no request for certified typed proceedings was made within the period provided for filing of an appeal; that failure to file an appeal within the stipulated timelines has not been explained and is inexcusable; the intended appeal is not arguable as the Applicant was afforded an opportunity to prosecute its case before the trial court; that he demonstrated during trial that payments had been continuously paid to the Applicant by his employer in his counterclaim which was not contested as no response had been filed; that the Applicant is an indolent litigant who is out to frustrate and keep him in court for no good reason and instead of providing statement of accounts in its possession to facilitate reconciliation of accounts, the Applicant is seeking to prolong this litigation.
8. Parties were ordered to canvass the application by way of written submissions. The Applicant’s counsel maintained that the Applicant instructed its advocate to appeal and they proceeded to prepare the memorandum of appeal but due to factors relating to procurement of certified copies of the proceedings and judgment, the appeal could not be filed within time. That the Applicant moved expeditiously thus the delay is not unreasonable and is excusable and this is a fitting case for the court to exercise its discretion in its favour. That the intended appeal raises triable issue with overwhelming chances of success as deposed in paragraph 12 and 13 of its supporting affidavit. That the Respondent will not suffer any prejudice since he has secured a judgment in his favour and it has a right to be heard on merit as guaranteed under Article 50 of the Constitution and the delay for filing the appeal which was not inordinate should not deny it this fundamental right. Further, Article 159(2)(d) mandates courts to administer justice without undue regard to procedural technicalities and allowing the application



will ensure that substantive justice prevails. That the Applicant stands to suffer substantial loss as the 1<sup>st</sup> Respondent's loan account is still in arrears and continues to accrue interest and the Applicant stands to suffer prejudice as opposed to the 1<sup>st</sup> Respondent.

9. In rejoinder, the 1<sup>st</sup> Respondent submitted that the Applicant has not explained the failure to lodge the appeal within the stipulated time. Judgment was delivered in the presence of its advocate and there was nothing preventing it to lodge the appeal on time. The draft memorandum of appeal was drawn without the benefit of the certified copy of the proceedings hence it should have been filed within the required time. That copies of the proceedings were only applied for almost two months after the delivery of judgment which was done after the attachment of its properties. He urged the court to find that the Applicant is an indolent litigant undeserving of the orders sought. He argued that the appeal is not arguable as the trial court was faced with conflicting evidence on the amount actually said owing and order of delivery of statement of accounts in Applicant's possession was made hence delivery of the said statement and reconciliation will resolve the issue. Therefore, the challenge on the decision is merely academic.
10. I have considered the application, the response and the rival submissions by the respective learned counsels. It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. The Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR while relying on the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported); stated that;

“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”
11. See also the conditions that were set by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others*, [2014] eKLR where the Apex court held that a court exercising its discretion to extend time has to consider the following factors;
  - a. 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;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and

.....
12. To enable this court to exercise its discretion in favour of the Applicant, the Applicant had the duty to satisfy the court that he had good and sufficient cause for not filing the appeal in time. The reason advanced by the Applicant is that it instructed its advocate to appeal and they proceeded to prepare



the memorandum of appeal but due to factors relating to procurement of certified copies of the proceedings and judgment, the appeal could not be filed within time.

13. The Applicant attached a letter addressed to the Executive Officer of the court dated 30/07/2024 requesting for typed proceedings. The judgment was delivered on 10/06/2024. The Respondent counsel submitted that the judgment was delivered in presence of the Applicant's advocate. So, suggesting that the Applicant was waiting for typed proceedings and judgment for it to lodge an appeal is not a sufficient cause for failing to file an appeal on time. It appears from the pleadings filed that the Applicant went to slumber after the judgment was delivered but was woken up after it was served with warrant of attachment dated 29/07/2024 by auctioneers. It thereafter applied for typed proceedings on 30/07/2024.
14. A perusal of the Application, the supporting grounds and affidavit readily confirms that other than a plain statement that the delay in filing the appeal in time was completely unintended, inadvertent, inexcusable (*sic*) and out of the intended Appellant's reasonable control, no particulars of such impediments are explained.
15. Further the constitutional imperatives under Article 50 of the Constitution are not a carte blanche or refuge for a party who having been afforded a chance to be heard as within the laws and rules established fails to be compliant. It behoves on such a party to explain to the satisfaction of the court why the delay should be excused. Both the Applicant and the Respondents have equal protection of the law and the court must weigh the interests of both sides.
16. In the instant matter, the Applicant fails to establish the threshold set by the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat. (*supra*)
17. I have also had occasion to consider the draft Memorandum of Appeal and the judgment of the trial court. . Am not persuaded that the intended appeal has overwhelming chances of success.
18. On the whole, I make a finding that the application lacks merit. The same is dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF APRIL 2025.**

**A.K. NDUNG'U**

**JUDGE**

