



**Family Bank Limited v Nthiwa & another (Miscellaneous Civil Application
E013 of 2024) [2025] KEHC 9214 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS CIVIL APPLICATION E013 OF 2024**

CW MEOLI, J

JUNE 26, 2025

BETWEEN

FAMILY BANK LIMITED APPLICANT

AND

JAMES MUEMA NTHIWA 1ST RESPONDENT

UPSCALE AUCTIONEERS 2ND RESPONDENT

RULING

1. For determination is the motion dated 7.02.2024 by Family Bank Limited (hereafter the Applicant) seeking leave to file appeal out of time against the judgement delivered on 25th January 2022 in *Kajiado CMCC No. 395 of 2018*. The motion is expressed to be brought inter alia under Sections 75, 79(b) of the [Civil Procedure Act](#) and Order 42 Rule 6 of the [Civil Procedure Rules](#), among others.
2. The application was supported by the affidavit of Wambani Deya, described as the Applicant's legal manager. To the following effect. That by the judgement dated 25.01.2022 the lower court restrained the Applicant by way of a permanent injunction from proceeding with its statutory power of sale of land parcel No. Kajiado/Kaputiei North/20379 by way of public auction, thereby denying the Applicant the option of recovery of monies due under a contract between it and the Applicant, despite the Respondent being in continued breach thereof, thereby occasioning economic loss to the Applicant.
3. Blaming the delay in filing appeal on the Applicant's erstwhile advocate, the deponent asserts that it was only after the Applicant instructed new counsel in 2023 that they discovered that judgement had been rendered in 2022, the previous advocate having failed to act in the matter or to inform them of the judgement. Asserting that the Applicant's intended appeal had high chances of success, the deponent stated that if the orders sought are not granted, the Applicant stood to be greatly prejudiced through



- loss as the Respondent had failed to service the facility advanced to him. And that no prejudice will be suffered by the Respondent.
4. By his replying affidavit, the Respondent opposed the motion, citing inter alia the inordinate delay in making the application. He views the motion as frivolous and an abuse of the process of the court, as the applicant has not demonstrated that they have an arguable case.
 5. The motion was canvassed by way of written submissions. The Applicant filed their rather lengthy submissions dated 27.02.2025. Counsel for the Applicant invited this court to exercise its discretion under Section 95 of the *Civil Procedure Act* in the Applicant's favour. Relying on the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and the Court of Appeal decision in *Imperial Bank Limited (In Receivership) & another v Alnashir Popat & 18 others* [2018] as to principles governing applications for extension of time
 6. Regarding delay, the Applicant's counsel relied on the Court of Appeal case of *Njoroge v Kimani* (2022) eKLR. Reiterating that the delay due to mistake of their erstwhile counsel, who failed to act on the matter and also failed to inform them that the matter was ripe for appeal/review. Rehashing the affidavit material on the point, counsel asserted that the 2-year delay in filing appeal was excusable, further citing the case of *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR.
 7. Emphasizing depositions concerning the 1st Respondent's default in respect of a loan facility in the sum of Kes. 2.7 Million, counsel asserted that if the Applicant's right to exercise its remedies to recover the loan amounts were curtailed by denial of the orders sought, its financial position would be adversely affected.
 8. Further arguing that the Applicant has an arguable appeal, counsel cited the Supreme Court decision in *George Boniface Mbugua v Mobammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Janmohamed)* [2021] eKLR for the proposition that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court, and that the question does not call for the interrogation of the merits of the appeal. Thus, at this stage the court ought not to make any definitive findings of either fact or law.
 9. By his submissions dated 18.03.2025, the 1st Respondent argued that to succeed, the Applicant must demonstrate an arguable appeal and that the delay to file an appeal out of time was not inordinate. Restating the history of the matter, counsel pointed out that the impugned judgement was delivered on 25.01.2022 and the application herein was filed in 2024, which delay is inordinate, inexcusable, and has not explained.
 10. Moreover, the appeal is not arguable because the applicant having filed the unsuccessful application for review of the impugned judgement is barred from appealing from the judgment. And therefore, the only remedy available is to appeal against the decision delivered on 19.9.2023 dismissing the application for review. Here citing *HA v LB* (2022) eKLR.). Further contending that the Applicant have not annexed a resolution of the bank authorizing this litigation and citing *Kenya Commercial Bank Limited v Stage Coach Management Ltd* (2014) eKLR.

Analysis and Determination

11. The Court has considered rival affidavit material and submissions in respect of the motion. In the court's view, the motion turns not on the substance of the thereof but on the question whether the prayers in the motion are properly before this court. In other words, whether Applicant is entitled to



appeal the judgment of the lower court having already exhausted the remedy of review under Order 45 of the Civil Procedure Rules.

12. Order 45 rule 1(b) of the Civil Procedure Rules, provides as follows:

- “(1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellants, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

13. The foregoing provision is in tandem with Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya which states as follows:

- “Any person who considers himself aggrieved—
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

14. The Applicant did not address the objection raised by the 1st Respondent concerning the propriety of the intended appeal. In the court’s considered view the 1st Respondent’s objection has merit. The Applicant has admittedly applied albeit unsuccessfully, to review the subject judgment of the lower court and has subsequently approached this court by the motion dated 7th February 2024. The key prayer in the said motion seeks leave to file an appeal out of time “against the Judgement ...in *Kajiado CMCC 395 of 2018* delivered on 25th January 2022”. (sic).

15. The Court of Appeal while addressing a similar situation in *Chairman Board of Governors Highway Secondary School v William Mmosi Moi* [2007] eKLR, observed that: -

- “An aggrieved party under Order XLIV of the Civil Procedure Rules can only apply for the review of a decree or order either where “no appeal has been preferred” or where “no appeal is allowed”. An appeal is allowed on orders made under Order 9A r 2 Civil Procedure Rules, as in this case, and indeed the Board filed a notice of appeal under Rule 74 of the rules to



challenge the orders. A notice of appeal is however only a formal notification of an intention to appeal, and it cannot be said that the aggrieved party had “preferred” an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent, having filed a notice of appeal which had not been withdrawn had a right to apply for review was answered in the affirmative by this Court in *Yani Haryanto v E. D & F. Man (Sugar) Ltd.* Civil appeal No. 122/92 (UR). In that case, the application for review under Order 44 of the Civil Procedure Rules was filed two years after the filing of the notice of appeal. After examining the relevant provisions of the law, the court stated: -

“The Court of Appeal for Eastern Africa in the case of *Motel Schwetser v Thomas Cunningham & Another* (1955) 22 EACA 252, held that an appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid, and security lodged as provided in Rule 58 of the East African Court of Appeal Rules, 1954. Rule 81 of the Court of Appeal Rules, in addition, requires the inclusion of a memorandum of appeal. This statement of the law regarding the status of a notice of appeal was subsequently approved by the Court of Appeal for Eastern Africa in the case of *Ujaga Singh v Runda Coffee Estates Ltd* [1966] E.A 263. So, quite clearly, the Judge had jurisdiction to entertain the application for review.....”

So that, the Board was at liberty to pursue the option of review of the orders made on 26th September, 2003 despite the filing of a notice of appeal to challenge the same orders. We have no hesitation however in stating that upon the exercise of that option and pursuit thereof until its conclusion, there would be no further jurisdiction exercisable by an appellate court on the same orders of the court. The record here shows that the Board filed an application for review dated 24th February, 2004, on 4th March, 2004. That application was determined by the Superior Court on 7th December, 2004 when it was dismissed for whatever reason. No further action appears to have been taken by the Board after that dismissal. In our view that was the end of the matter, and the notice of appeal was rendered purposeless. Both options in our judgment cannot be pursued concurrently or one after the other.” (sic)

16. Evidently, in the admitted circumstances of this case, the Applicant’s option of challenging the lower court judgment by way of appeal is closed. The only recourse available to them is to lodge an appeal against the ruling of the lower court dismissing the application for review. In the result, the motion dated 7.02.2024 is found to be incompetent and is hereby struck out with costs to the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 26TH DAY OF JUNE 2025.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Khamisa for Mr. Orende

For the 1st Respondent: N/A

For the 2nd Respondent: N/A

C/A: Lepatei

