



REPUBLIC OF KENYA



KENYA LAW
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Mulu v Fairdeal Superstores Limited alias Fairdeal Furnitures (Civil Miscellaneous Application E304 of 2023) [2025] KEHC 11612 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION E304 OF 2023**

EN MAINA, J

JULY 31, 2025

BETWEEN

CHARLES MUTISO MULU APPLICANT

AND

**FAIRDEAL SUPERSTORES LIMITED ALIAS FAIRDEAL
FURNITURES RESPONDENT**

RULING

1. Before this court is the Notice of Motion dated 13th December 2023 by which the Applicant seeks firstly, the leave of this court to file an appeal out of time and secondly to have the Memorandum of Appeal dated 6th December 2023 deemed as duly filed.
2. The application is expressed to be brought under Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 79G and 3A of the *Civil Procedure Act*.
3. The gist of the application as can be discerned from the grounds on its face and facts deposed to in the supporting affidavit, is that whereas the Applicant's instruction to his Counsel to file this appeal was timely, the Memorandum of Appeal had a typographical error which occasioned it to be sent to the wrong office for filing, to wit Makueni instead of Machakos and the appeal was therefore late by two days. It is contended that the appeal has merit, raises arguable issues with high chances of success and if the application is not granted the Applicant will suffer irreparably; that the delay was not intentional but was a result of a mistake of the Advocate which should not be visited on the Applicant.
4. The application is vehemently opposed through a replying affidavit sworn by Geoffrey Kilonzo on 28th February, 2025. This court is urged to find that the application is not merited as no sufficient cause was shown as to why the appeal was not filed on time. The court is urged to note that the judgment in the court below was delivered in the presence of Counsel for the Applicant. It is contended that the application as filed is malicious, an afterthought and unfair as the Respondent had settled the



- claim and closed their file. The court is urged to note that the Respondent was not aware of this application until 13th February 2025 when it was served upon them; that he who seeks equity must do equity and the actions of the Applicant are unfair and unjust for reason that, despite exchanging several correspondences, the Applicant did not intimate that he intended to appeal.
5. Further that the Respondent duly notified the Applicant that it had settled the claim and marked the claim as settled and closed its file; that the Applicant's conduct is uncouth and unethical for having pursued payment and then accepting the payment only for him to file this application at the expense of the Respondent and the court should not grant leave to a litigant who seeks to benefit at the expense of another; that the Applicant is a man of straw and when the appeal is dismissed the Respondent will not be able to recover any monies from him and lastly that the Applicant has demonstrated bad faith and sharp practice, disgraceful or dishonorable conduct incompatible with the status of an advocate. It is also contended that there is no appeal on record capable of being admitted out of time.
 6. I have considered the application, the grounds thereof, the affidavits in support and in reply, the rival submissions of learned Counsel for the parties, the cases cited and the law. I shall start with the submissions that there is no appeal on record capable of being admitted and state that there is indeed a Memorandum of Appeal filed together with the application (see annexure FMM II) and that suffices. In the case of *Nicholas Salat v Independent Electoral and Boundaries Commission & 7 others* (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling) the Supreme Court stated:
 53. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.
 54. To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record."
 7. Secondly, the discretion of this court to extend the time for filing an appeal or for admitting an appeal out of time is unfettered the only fetter being that the Applicant must have a reasonable explanation for the delay. The other fetter would of course be, that the discretion of the court must never be exercised in favour of an indolent party and hence the delay must not be inordinate.
 8. My above findings are lent support by the decision of the court in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR where the court stated that:-

"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”.

9. It is my finding that in this case, the delay was by two days only; that the Applicant has given a plausible explanation for the delay and that the appeal is definitely not frivolous. Further, should the appeal not succeed, the Respondent shall be compensated by an award for costs and hence it cannot be said that he shall suffer irreparably. To refuse to grant leave to the Applicant for the reasons advanced by the Respondent is tantamount to taking into account extraneous factors and to exercise the discretion of this court capriciously and at a whim.
10. The upshot is that the application is granted. The Memorandum of Appeal shall be filed and served within fourteen days of this ruling and the costs of this application shall be borne by the Applicant.

Orders accordingly.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY 2025.

E.N. MAINA

JUDGE

In the presence of:

Ms Owino -for Applicant

Ms Mwobe - for Respondent

Geoffrey - Court Assistant

