



REPUBLIC OF KENYA



**Tactaf International Limited v GMC Investments Limited (Civil Appeal E063 of 2023)  
[2024] KEHC 1640 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E063 OF 2023  
FG MUGAMBI, J  
FEBRUARY 23, 2024**

**BETWEEN**

**TACTAF INTERNATIONAL LIMITED ..... APPELLANT**

**AND**

**GMC INVESTMENTS LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. The applicant filed the Notice of Motion application dated 3<sup>rd</sup> April 2023, under Article 159 of *the Constitution* of Kenya, Sections 1A, 1B, 3A, 79G, 95 of the *Civil Procedure Act* and Order 50 rule 6 and Order 51 of the *Civil Procedure Rules* and rule 16 & 17 of the *High Court (Organization and Administration) (General) Rules*, 2016. The application seeks leave to file an appeal from the judgment and decree delivered on 4<sup>th</sup> December 2019 by the Honourable A. Obura - SPM in Nairobi in Chief Magistrates Civil Case No. 1631 of 2017, out of time and for stay of proceedings in the said matter pending hearing and determination of this Application.
2. The application is supported by the supporting and further affidavits sworn by Charles Kamanda Ndegwa, a director of the applicant, on 3<sup>rd</sup> April 2023 and 30<sup>th</sup> June 2023 respectively. It is opposed vide the grounds of opposition dated 30<sup>th</sup> May 2023 and a replying affidavit sworn on even date by Kenneth N. Mungai, the respondent's company secretary. Pursuant to the directions of this Court the application was canvassed by way of written submissions. The applicant's submissions are dated 30<sup>th</sup> June 2023 while the respondent's submissions are dated 14<sup>th</sup> July 2023.
3. It is not controverted that the dispute between the parties emanated from a rental debt founded on a lease agreement in respect of the respondent's premises located in Kimathi Street within the Central Business District (CBD). The respondent filed a suit and obtained a judgment on 4<sup>th</sup> December 2019.



This is after the Magistrates Court found that the respondent had proved its counterclaim and ordered the applicant to pay to the respondent the sum of Kshs. 10,559,082/= together with costs.

4. The applicants were dissatisfied with the judgment and decree of the Court but according to the applicant, they were misguided regarding a possible appeal and none was thus filed. The applicants contend that they fully relied upon their advocates' legal advice based on the confidence that they had in them. It is not until November 2022 when they received an application seeking to lift the applicant's corporate veil that they instructed their Counsel now on record to file this application which they contend has been filed at the earliest opportunity.
5. The applicant contends that their intended appeal is arguable and it raises triable issues worthy of determination by this Court. They submit that the failure to file their Memorandum of Appeal in time was unintended and inadvertent. The applicant implores the Court not to visit the mistake of their previous Counsel upon them as to disentitle them from the opportunity to prosecute their appeal and hinder their access to justice.
6. The applicant relies on the authority of *Belinda Murai & 9 Others v Amos Wainaina*, Civil Appln No. Nai 9 of 1978 for the proposition that advocates' mistakes should not be visited upon their clients to ensure that the door of justice is not closed. They rely also on the decision of *Philip Chemwolo & Another v Augustine Kubede*, (1982-88) KAR 103 on the broad equity approach to be taken where there is a mistake by Counsel which is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs.
7. The applicants further submit that none of the parties will be prejudiced by this Court granting leave to file the Memorandum of Appeal out of time and the stay orders.
8. The respondent opposes the application on the grounds that the same is brought after an inordinate delay of four (4) years since the judgment was delivered, with the full knowledge of the applicant. The respondent further contends that no reasons have been given for the inordinate delay. They decry the frustration caused by the applicant in the execution of the judgment and decree of the Court since 2018. The respondent report that this frustration is evidenced by the continued hiding and keeping away of all properties that can be attached, withdrawal of funds from the applicant's bank accounts, refusal by the directors to execute personal guarantees and refusal by the applicant to pay the judgment debt to date.
9. The respondent further averred that the applicant is no longer in business and that the respondent has approached this Court with unclean hands as they have failed to make a full and frank disclosure of its books of account for examination as required.
10. Contrary to the averment by the applicant, the respondent contends that it will be heavily prejudiced by any orders issued in favour of the applicant as its premises on which the applicant defaulted in paying rent has an onerous loan to be repaid with heavier consequences that cannot be satisfied even by the accrual of interest on the judgment debt. It is averred that even the costs of the previous proceedings and these ones are not secured. As a result, the respondents continue to suffer economic and financial oppression

## Analysis

11. I have carefully considered the pleadings, submissions and authorities referred to by rival parties. In my view, the following two issues arise for determination:
  - i. Whether the Court should grant leave to appeal out of time.



- ii. Whether the Court should grant stay of proceedings of the Chief Magistrate Court in Civil Case No. 1631 of 2017 pending the hearing and determination of the intended appeal.
12. Section 79G of the *Civil Procedure Act* stipulates 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.”
13. Besides the statute, the principles for consideration in determining whether or not to grant an extension of time were enunciated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*, [2014] eKLR, as follows:
- “This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
- i. 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;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
14. I observe that although the applicant faults its erstwhile advocates for an error of judgment regarding the possibility of an appeal, I consider this an invalid justification for the applicant's more than three-year period of inactivity until prompted by the respondents' efforts to enforce their decree. The applicants were only awakened after receiving the application dated 14<sup>th</sup> April 2021 seeking to lift the corporate veil for purposes of execution. It is clear to me that the decision to file this application was solely initiated by the said application of 14<sup>th</sup> April 2021 and that the appeal is an afterthought.
15. I further observe that the applicants had the option to seek alternative legal advice and instruct new Counsel if they believed that an appeal was necessary. However, they delayed taking any action for over three years following the judgment. Moreover, it is insufficient for the applicants to attribute fault to their erstwhile Counsel without presenting concrete evidence to substantiate their claims. Furthermore, suggesting that such delay could be remedied through the imposition of costs is



inappropriate and reckless, as it misuses judicial resources and contributes to the accumulation of unresolved cases by encouraging disregard for legally established deadlines.

16. The argument that the delay was also caused by the process of changing representation is untenable. Similarly, claims of delays in securing necessary documents, like the judgment needed to proceed with an appeal, lack any substantiated evidence or documentation of attempts to address such delays.

17. I concur with the sentiments of the Court in *Habo Agencies Limited v Wilfred Odhiambo Musingo* (Civil Appeal (Application) No. 124 of 2004), [2015] eKLR, that:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

18. In light of these judicial pronouncements and the evidence on record, I am not convinced that a case has been made for the extension of time. Not only do I read a deliberate lack of diligence on the applicant, I might add that the facts and evidence point to this application coming as an afterthought. I am satisfied by the explanation by the respondent of the prejudice that it stands to suffer if the extension is granted.

19. Having so found, the prayer for stay of execution pending appeal has been rendered moot.

#### **Determination**

20. In the end, I find and hold that the applicant’s Notice of Motion application dated 3<sup>rd</sup> April 2023 is without merit and it is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

