



**Ahmed & 3 others v Guardian Bank Ltd (being the succession
of First National Finance Bank Ltd (Civil Case 1129 of 1997)
[2022] KEHC 16257 (KLR) (Commercial and Tax) (15 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 1129 OF 1997
DO CHEPKWONY, J
NOVEMBER 15, 2022**

BETWEEN

**RUBINA AHMED 1ST PLAINTIFF
AHMED AFTAB 2ND PLAINTIFF
TEXTILE INVESTMENT LTD 3RD PLAINTIFF
MAVIN MEHTA 4TH PLAINTIFF**

AND

**GUARDIAN BANK LTD (BEING THE SUCCESSION OF FIRST NATIONAL
FINANCE BANK LTD DEFENDANT**

RULING

1. Before this court for determination is the applicant's application dated September 9, 2021 seeking for orders that:-
 - a. Time be extended for the plaintiffs to file a notice of appeal;
 - b. Costs of this application abide by the outcome of the intended appeal.
2. The application is premised on the grounds on its face and reiterated in the supporting affidavit of Ahmed Aftab sworn on September 9, 2022. It is stated therein that a judgment was delivered herein on December 2, 2020 by the Honourable Lady Justice MW Muigai, granting a number of orders but disallowing a number of the prayers sought by the Plaintiff. That the Plaintiffs are absolutely aggrieved by the whole of the said decision and desire to file an appeal against the same. According to the Plaintiffs, they only learnt of the decision recently after they saw the said decision online in the



eKLR portal. It is averred that the Judgment was initially scheduled to be delivered on August 28, 2020 but it was not delivered and the parties were advised that the same would be delivered on Notice. That the Court failed to issue any notice to the parties and by the time the Plaintiffs learnt of the decision, the time for filing of the Notice of Appeal had already lapsed. It is the Plaintiffs' plea that the mistakes of the court should not be visited upon them and they should be allowed to challenge the decision on merit. The Plaintiffs depose that they have a strong Appeal with high chances of success and that there is no prejudice that will be suffered by the Defendant.

3. The Application is opposed vide the Replying Affidavit of Edna Mokaya sworn on April 28, 2022, wherein she has deposed that:-
 - a. An Application for extension of time is never granted as a matter of course but at the discretion of a court. The Court may exercise its discretion to grant an extension of time where an Applicant demonstrates that the intended appeal is arguable; the Application has not been made without unreasonable and unjustifiable delay, and that the Respondent will not suffer any prejudice if the Application is granted.
 - b. The Judgment was originally scheduled for delivery on August 28, 2020 but the same was not ready and was rescheduled to be delivered on September 7, 2020, on which date the Court was not sitting. The Judgment was then rescheduled to be delivered on Notice to the parties. It is the Respondent's contention that even though the Court did not issue any Notice to Counsel for both parties, of the delivery of Judgment, the Plaintiffs ought to have been diligent enough to make follow ups with the Court Registry to confirm the delivery of the Judgment.
 - c. There is no evidence in support of the alleged inquiries or correspondence with the Court registry to confirm the loss of the Court file as alleged hence there is no proof that the Plaintiffs made any efforts to follow up with the Court Registry on the Judgment of the Court.
 - d. The Applicants have not given any explanation for their delay in filing this Application for nearly two (2) years since the Judgment was delivered on December 2, 2020 thus they are not entitled to benefit from the exercise of this Honourable Court's discretion.
 - e. The Applicants have not stated the date when they knew of the delivery of the Judgment by this Honourable Court hence this confirms that they knew of the Judgment much earlier but are trying to hood wink this Honourable Court by being vague about when they knew of the delivery of the Judgment.
 - f. On May 17, 2021, one Mr Kenvine Ouma, Advocate, while searching for another case on Kenya Law Website: <http://kenyalaw.org>, chanced upon the Judgment which had been delivered on December 2, 2020 and he immediately brought this to the attention of the Respondent and also informed the Plaintiffs' Advocate herein, Mr Thuita Guandaru.
 - g. Mr Kenvine Ouma, Advocate, accept as correct that on 1May 7, 2021, he enquired from Mr Thuita Guandaru, Advocate whether he was aware that the Judgment had been delivered on December 2, 2020 to which the said Mr Guandaru confirmed that he was not aware and had not received any notice from the Court.
 - h. In the circumstances, the Plaintiffs herein became aware of the delivery of the Judgment on May 17, 2021 but waited until September 9, 2021 to lodge the present Application for extension of time consequently, there is an inordinate and unexplained delay from the Plaintiffs herein which disentitles them to benefit from the discretion of this Honourable Court.



- i. The grounds in the annexed Memorandum of Appeal do not demonstrate an arguable appeal for the Plaintiffs failed to prove their case to the required standard and cannot therefore blame this Honourable Court for not granting the remedies sought by them.
 - j. The Applicants are keen to continue engaging the Courts in a futile exercise by pursuing causes of action which lack any inherent merit in an abuse of the Court process and to the prejudice of the Defendant herein.
4. In a rejoinder, the Applicant filed a further Affidavit sworn by Ahmed Aftab on September 21, 2022 which is majorly a reiteration of what is in the Application and the Supporting Affidavit safe that it is further stated that the Application was made 9 months after the Judgment and immediately after the Plaintiffs learnt of it and not 2 years as is claimed by the Respondent. Also, that the Plaintiff's Advocate was never informed of the fact that judgment had been delivered and that in any case the email correspondence annexed as EM-001 is between the Defendant and its advocate and nowhere in the email relates to him.

Determination

5. I have considered the Notice of Motion application dated September 9, 2021, alongside the grounds upon which the same is premised in the Supporting Affidavit sworn by Ahmed Aftab, the Replying Affidavit sworn by Edna Mukaya and the submissions filed by respective parties together with the cited authorities. From the said pleadings, what arises for determination is:-
- a. Whether time can be extended for the Plaintiffs to file a Notice of Appeal.
 - b. Who bears costs of this application.
6. On the issue of whether time can be extended for the Plaintiff to file a Notice of Appeal out of time, the guiding legal provision for this begin with Section 79G of the [Civil Procedure Act](#) which provides for the right and period within which to appeal as follows:
- 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.
7. Section 95 of [Civil Procedure Act](#) thereof provides:-
- ' Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired'.
8. The power to enlarge time is then provided for under Order 50 Rule 6 of the [Civil Procedure Rules](#) as follows:-
- ' Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:



Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

9. Clearly, from the aforesaid provisions, it is important to note that the power to extend time within which to file an appeal is an equitable relief, which power is exercised at the discretion of a court. The same is not granted as a matter of course as it is not an automatic right for a party but available to a deserving party upon sufficient reasons being given to the satisfaction of a court.
10. The Court of Appeal in *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others [2018] eKLR*, stated that –

' Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.'
11. The Supreme Court of Kenya on the other hand has laid down the principles to be considered in granting a litigant leave to file his or her appeal out of time. One such case is the case of *Nicholas Kiptoo Korir Arap Salat -vs- Independent Electoral & Boundaries Commission & 7 Others [2014]eKLR*, where it set out the following principles:-
 - 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 by 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
 - g. Whether in certain cases, like the election petitions, public interest should be a consideration for extending time.
12. It is admitted by both parties that neither party was served with the notice of Judgment and both parties came to learn of the said Judgment at the Kenya Law Website. The Applicant has not told us when they learnt of the Judgment for this court to calculate the delay. The Respondent has also not provided proof that they notified the Applicant of the Judgment when they learnt about it sometime in May, 2021. The only evidence I see is communication between the Respondent and his Advocate.



13. This Application was filed on September 9, 2021 whereas the Judgment, subject of the intended Appeal, was delivered on December 2, 2020 only 9 months apart. According to the Applicants, they came to learn of the Judgment sometime in 2021 although the court is not told when this was. However, I do not find the Applicant to blame for the delay since they were not aware of the delivery of the Judgment and this mistake is attributed on the part of the court.
14. As for whether the Appeal is arguable, this is to be found in the Memorandum of Appeal. I have perused the Draft Memorandum of Appeal annexed and marked as AA2 and note that the Applicant has cited eleven (11) Grounds of Appeal and thereof question is the validity of the debenture in question, its execution and its adherence to the requirements of the law. In my view, these are pertinent issues to be addressed by the Court of Appeal. For this reason, I find the intended Appeal arguable.
15. On the issue of prejudice, I find that the Respondent has not demonstrated any prejudice it is likely to suffer in the event this Application is allowed and time extended for Plaintiff to file Notice of Appeal save for the fact that this matter has been in court for the last 22 years which delay has been instigated by the Applicant. In view of the issues that need to be resolved conclusively as between the parties, I do not find this as greater prejudice than driving the Applicant away from the seat of justice especially on account of delay in filing an appeal as of right, which delay was not within their control. For this reason, I do not find any prejudice likely to be suffered by the Respondent.
16. The upshot of the foregoing is that the Application dated September 9, 2021 succeeds and is allowed in the following terms:-
 - a. The Plaintiffs/Applicants be and are hereby granted extension of time within which to file a Notice of Appeal.
 - b. The Applicants/Plaintiffs to file the Notice of Appeal within thirty (30) days from the date hereof.
 - c. Costs to be in the cause of the Appeal.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Kiiru holding brief for Mr. Thuita for Plaintiffs

Mr. Kividyho holding brief for Mr. Ouma for Defendant/Respondent

Court Assistant - Sakina

