

IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: ACHODE, JA (IN CHAMBERS)]

CIVIL APPEAL (APPLICATION) NO. 592 OF 2019

BETWEEN

ATHI RIVER STEEL PLANT LIMITED.....APPLICANT

AND

PONANGIPALLI VENKATA RAMANA RAO.....1ST RESPONDENT

COMMERCIAL BANK OF AFRICA LIMITED.....2ND RESPONDENT

KCB BANK OF KENYA LIMITED.....3RD RESPONDENT

BANK OF AFRICA LIMITED.....4TH RESPONDENT

I & M BANK LIMITED.....5TH RESPONDENT

(Being an application for leave to appeal to the Supreme Court and certification that the matters arising therefrom are of general public importance in respect of a judgment of the Court of Appeal at Nairobi (Warsame, Kantai & Gachoka J.J.A) dated 24th May, 2024

in

Civil Appeal No. 592 of 2019

RULING

1. **Athi River Steel Plant Limited** the applicant herein, filed an application dated **27th November, 2024** seeking an extension of time in which to file an application seeking leave to appeal to the Supreme Court. In the same application the applicant is seeking leave to appeal to the Supreme Court and for

certification that the matters arising therefrom are of general public importance.

2. The application is brought under **Article 163(4)(b) of the Constitution of Kenya, 2010, Sections 15B of the Supreme Court Act, Rule 33 of the Supreme Court Rules, Section 3A & 3B of the Appellate Jurisdiction Act, Rule 1(2), 4, 12, 41(3) & 42 of the Court of Appeal Rules, 2022.** There are therefore in effect, three applications before me.
3. The first part of the application which seeks for extension of time to file the application for leave to appeal and for certification is heard and determined before a single Judge. The other portion of the application for certification that the matters arising therefrom are of general public importance and for leave to appeal to the Supreme Court against the judgment of this Court rendered on 24th May, 2024, are heard by a bench of 3 Judges.
4. The matter is listed before me as a single judge and for that reason, I will only address the first aspect on extension of time to file the application.
5. The application is supported by the affidavit dated 27th November 2024 sworn by Harit Sheth, the advocate who has conducted this matter for the appellant. The supporting affidavit however, dwells on the merits of the application for certification and leave to file the appeal in the Supreme Court.

It is lean on the reasons supporting the extension of time as sought.

6. Submissions were filed on 27th November, 2024 through the firm of **M/s Harit Sheth Advocates**. Once again, in the submissions the applicant dwells largely on the justification for certification of the matter to the Supreme Court.
7. On the justification for extension of time, counsel concedes that this application was filed outside the stipulated timelines. He attributes this to inadvertent error and misunderstanding of procedural requirements by counsel. That the delay arose from the complexity of the legal issues requiring extensive research and consultation.
8. Additionally, counsel states that he initially misunderstood the Supreme Court rules, believing that they did not prescribe the specific timelines for filing an application for certification. That upon realising this oversight, he acted promptly to rectify the situation. Further, that the lack of opposition from the respondent, confirms that no prejudice has been caused and reinforces the appropriateness of granting the orders for extension of time.
9. Counsel asserts that denying the applicant access to justice, based on procedural error would contravene the principal of fairness and equity that underpins the Kenya legal system. He

implores the Court to exercise its discretion and grant the orders sought in the interest of justice.

10. In response, the firm of **M/s Oraro & Co. Advocates** filed submissions dated 20th January 2025 for the respondent. Counsel submits that judgment by the Court of Appeal was delivered on 25th May, 2024, but it was not until 27th November 2024, more than 6 months later, that the applicant filed the instant application seeking *inter alia*, extension of time and leave to apply for certification. That a period of 6 months amounts to inordinate delay and no proper justification has been given by the applicant to explain this inordinate delay. That the applicant blames the delay on a host of things including, misapprehension of the law by the firm on record, summer holidays and the difficulty to consult all the necessary legal experts within the stipulated timeframe.
11. Counsel asserts that extension of time is an equitable remedy which involves the exercise of judicial discretion and equity and that equity aids the vigilant and not the indolent. He contends that it is inconceivable that the applicant would lodge a notice of appeal on 5th June, 2024, yet wait another 5 months before arriving at a decision to pursue an appeal to the Supreme Court by way of certification. That the concept of timelines and timeliness is a vital ingredients in the quest for sufficient and effective governance under the Constitution which must be adhered to.

12. Counsel submits that this Court in the case of **Belinda Mulai and 9 others vs Amos Wainaina civil App. No. Nai. 9 of 1978**, (relied upon by the applicant), stated that errors or misapprehensions of the law by counsel alone do not warrant time extension. That it is inconceivable that despite the numerous authorities on the subject of certification and the clear provision of the Court of Appeal Rules, the applicant can be heard to say that the firm on record believed that there were no strict timelines provided. In any case, Section 58 of the IGPA provides that where no time is prescribed, or allowed, within which anything shall be done, that thing shall be done without reasonable delay. That a delay of 6 months is by all standards unreasonable.
13. I have considered the application, and the rival submissions before me. Under **Rule 4** of this Court's Rules the discretion of this Court to extend time otherwise limited by these Rules, or decision of this Court, or Superior Court is unfettered. The said Rule stipulates thus:
- “The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”***

14. The principles that guide this Court in the exercise of its mandate under the mentioned Rule have been crystallized by case law. In this Court's decision of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Nairobi CA No. 255 of 1997** 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.”

15. The impugned judgment of the Court of Appeal was delivered on 25th May, 2024. According to **Rule 36(1)** of the **Supreme Court Rules 2020**, a person who intends to make an appeal to the Court has to file a Notice of Appeal within 14 days from the date of the decision that is the subject of the appeal. The instant application was filed on 27th November 2024, more than 6 months (more than 180 days later).

16. The law does not set out any minimum or maximum period in the determination of delay. The law merely states that any delay should be explained satisfactorily. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. (See this

Court's decision in **Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet (2018) eKLR**).

17. 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. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court: that discretion should be exercised to extend time, and this consideration is to be made on a case-to-case basis; whether there is a reasonable reason for the delay, it should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondents if the extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petition, public interest should be a consideration for extending time. See - **Nicholas Kiptoo Arap Korir Sarat vs IEBC & 7 others, Supreme Court of Kenya Application No. 16 of 2014**).
18. In considering whether the intended application has merit, I bear in mind that it is not the role of the single Judge to determine definitively the merits of the intended application. That is for the full Court if and when it is ultimately presented with the application. See- **Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others (2018) eKLR**.
19. On the justification for the delay the applicant was aware of the delivery of the impugned judgment. The only reason offered by

counsel on behalf of the applicants for the delay is, inadvertent error and misunderstanding of procedural requirements by counsel and the complexity of the legal issues requiring extensive research and consultation.

20. In my considered view, misapprehension of the law by the firm on record and complexity of legal issues in a case they handled all the way from the superior court to the Court of Appeal, are not sufficient reasons to excuse the inordinate delay.

21. For the foregoing reasons, the application dated 27th November, 2024 is found to be devoid of merit and is hereby dismissed.

Costs are awarded to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 7th day of February, 2025.

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original,

Signed

DEPUTY REGISTRAR.