

**IN THE COURT OF APPEAL
AT KISUMU**

**(CORAM: OMONDI, JA, (IN
CHAMBERS)) CIVIL APPLICATION NO.**

E141 OF 2022 BETWEEN

MATTAN ISSA RESTAURANT.....APPLICANT

AND

**KENYA HOTELS & ALLIED
WORKERS UNION.....RESPONDENT**

*(Being an application for leave to serve Record of Appeal
out of time from the Judgment and Decree of the
Employment and Labour Relations Court at Kisumu,
(Radido, J.) dated 6th October, 2021*

in

ELRC Cause No. 208 of 2018)

RULING

1. Mattan Issa Restaurant, the applicant herein was dissatisfied with the outcome of the decision emanating from the judgement and decree of the Employment and Labour Relations Court at Kisumu (Radido, J.) dated 6 October, 2021 in ELRC No. 208 Of 2018. The record of appeal was prepared and is dated 13th June, 2022 and despite having filed the Record of Appeal on the 21st June, 2022, the same was not served on the respondent.

2. The applicant thus filed the Notice of Motion dated 27th June 2023 seeking orders that time be enlarged for the applicant to serve the record of appeal upon the respondent; and thereafter the same be deemed as duly served and properly on record. The said application is anchored to rule 4 of the Court of Appeal Rules, 2022; and the applicant explains that it was not able to serve the same due to pressure of work; and only realized the failure to serve on 7th June 2023, long after the statutory period or service had lapsed.
3. The applicant elaborates that the delay was necessitated by an oversight on the part of its counsel, due to pressure of work and prays for the court's indulgence by extension of time. Referring to the case of **Godfrey Kinuu Maingi & 4 others vs. Nthimbiri Farmers Co-op. Society Ltd & another [2008] eKLR and Kenya Bankers Cooperative & another vs. George Arunga Sino [2010] eKLR;** where the applicant in a similar application stated that the applicant had been cited honest oversight, honest omission and an inadvertent mistake on its part, this court is urged to exercise similar discretion and grant the orders sought on grounds that there is no prejudice that will be occasioned to

the respondents.

4. Citing the case of **Fakir Mohammed vs. Joseph Mugambi & 2 Others [2005] eKLR** where the court rendered itself thus:

"The exercise of this Court's discretion under Rule

4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factor."

5. In the instant case the applicant filed its Record of Appeal is sometime in April, 2022 but forgot to serve the same upon the respondent, but eventually did so on 7th June 2023 – that is slightly over a year's delay. It is the applicant's contention that the said delay is not inordinate and is well explained; that in any event, the mistake of the counsel should not be visited upon the client.
6. As to whether prejudice will be occasioned to the respondent in the event that the application is allowed, the applicant urges this Court to balance the conflicting

interests of parties in this case, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondents in granting

an extension. It is argued that the applicant is likely to suffer more prejudice in the event that the extension is not allowed, as there is already an order of stay of execution; and the existence of a proper appeal hence denying the instant application would mean denying the applicant a right to be heard; that the respondent on the other hand stands to suffer no prejudice and certainly cannot be greater than that of the applicant if any.

7. The application is opposed by the respondent who contends that the applicant purports to have filed the notice of appeal timeously on 12th October, 2021, received typed proceedings in mid-April, 2022 and filed her record of appeal on 21st June 2022. The respondent denies being served with the record of appeal on 7th June, 2023, or even as at the time of filing this application; and submits that the reasons for failure to serve the record within the stipulated time are not valid, are without explanation; and therefore, it would be unreasonable to grant the orders sought and should be dismissed with cost.
8. Drawing from the provisions of rule 90 (1) of the Appellate Jurisdiction Act, the respondent submits that this provision is mandatory and deserves strict observation; that the

applicants' advocates being officers of this court are seized
of

this rule; and their allegation that they were hampered in complying with the timelines rule due to pressure of work without an explanation cannot be termed as reasonable fact.

9. The respondent further submits that as the applicant deliberately and unreasonably continues with delays, the grievant rights to enjoy the fruits of his judgment continues to be prejudiced.
10. The grant of the orders sought here is purely discretionary.

Rule 4 of the Court of Appeal Rules provides that:

The Court may, on such terms as may be 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.

Clearly, under Rule 4, this Court has unfettered discretion to extend time for any step intended to be done within the period stipulated by the Rules. This was aptly set out in

Paul Wanjohi Mathane vs. Duncan Gichare Mathenge

[2013] eKLR this Court held thus:

“The discretion under Rule 4 is unfettered, but it has to be exercised judiciously, not on whim,

sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this

Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”

10. So, in this instance, what was the period of delay? Over 12 months from the date the decision was delivered. What was the reason for the delay? The applicant says it was inadvertence, referring to work pressure for a period of almost 12 months by her legal team. As rightly pointed out by the respondent, there is no maximum or minimum period of delay set out under the law, but the reason for the delay must be reasonable and plausible as was stated in **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR** as cited by the applicant, this Court stated:

"The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. 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."

11. Although the applicant alludes to work pressure as a reason for the delay no circumstances have been explained as to how work pressure deterred her legal team to serve the respondent with the record of appeal. The pressure remains

an amorphous

term, not clarifying whether it was due to a long protracted litigation, in which court, on what dates, how long it took; and this court is left to guess what constituted this pressure.

12. The length of the delay, the reason for the delay do not predispose the applicant to a favourable outcome. I am disinclined to exercise discretion in favour of the applicant; and the application is dismissed with costs to the respondent.

Dated and delivered at Kisumu this 30th day of January, 2026.

H.A. OMONDI

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JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed
DEPUTY REGISTRAR