



APA Insurance Limited v Britind Industries Limited (Civil Application E690 of 2023) [2024] KECA 171 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 171 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E690 OF 2023
F TUIYOTT, JA
FEBRUARY 23, 2024**

BETWEEN

APA INSURANCE LIMITED APPLICANT

AND

BRITIND INDUSTRIES LIMITED RESPONDENT

(Being an application for extension of time to serve an appeal out of time from the judgment of the High Court of Kenya at Nairobi (Alfred Mabeya, J) delivered on 17th February 2023 In Civil Case No. 183 of 2016)

RULING

1. By a notice of motion dated 27th September, 2023, this Court is asked to extend the period for service of the appeal upon the respondent. An alternative prayer is to validate the service done on 15th September, 2023 and deem it as proper service.
2. Annexed to an affidavit sworn on 27th September, 2023 by Zehrabanu Janmohamed, learned Senior Counsel for the applicant, in support of the application are; a notice of appeal dated and filed on 23rd February, 2023; a notice of address for service dated 2nd March 2023 by John Ogada & Company, advocates for the respondent; three cover pages of a record of appeal said to have been filed on 28th August, 2023 and served upon the advocates for the respondent on 15th September, 2023. Service of the memorandum of appeal and record of appeal is the problem as they were served upon the respondent’s advocates outside seven (7) days of lodging (Rule 92(1) of the *Court of Appeal Rules*, 2022).
3. Learned Senior Counsel explains the lateness. She deposes that at the material time she was away on leave and had no knowledge or information that the memorandum of appeal and the record of appeal were not served upon the respondent. The delay was an inadvertent error and not deliberate and as soon as the said error was discovered, service was effected on 15th September, 2023. She further deposes



that no prejudice will be suffered by the respondent if the application is allowed as the respondent was always aware of the intended appeal by virtue of the notice of appeal.

4. In rebuttal, the respondent *vide* a replying affidavit sworn on 30th October, 2023 by Santosh Kumar Singh, a director in the respondent company, asserts that the current application was not filed timeously and is an afterthought and should be dismissed with costs. He contends that the memorandum of appeal and the record of appeal were served upon the respondent on 15th September, 2023, almost twelve (12) days out of time and without leave of Court. He contends, further, that the applicant was woken from its slumber by the respondent's application dated 18th September, 2023 seeking to strike out the appeal for late service. In his view the delay of another twelve (12) days, from the date of late service to the date of the application before Court, is inordinate and the reason advanced by the applicant is not plausible, is self-serving and does not merit favourable exercise of discretion by this Court. He avers that no evidence has been offered by the applicant to support the assertions made on why service was delayed. On the question of possible prejudice to be suffered by the respondent if the application were to be granted, he deposes that its business is unable to operate and it continues to incur losses.
5. I have reflected on the application, the response and submissions filed in support and against the application.
6. The unfettered discretion granted to this Court under Rule 4 on extension of time is guided by the well settled considerations restated in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR to be, inter alia:-

“The period of delay, the reason for the delay, (possibly) 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 factors...”

7. It is not disputed that the notice of appeal, memorandum of appeal and record of appeal were all filed within the time prescribed by the *Rules* of this Court. The breach by the applicant was late service of the memorandum and the record, infringing Rule 92(1);
 92. Service of memorandum and record of appeal
 - (1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 81.
8. The memorandum of appeal was lodged on 25th August, 2023 and the record of appeal on 28th August, 2023 and ought to have been served on or before 1st September, 2023 and 4th September, 2023, respectively. Having effected service of both on 15th September, 2023, there was delay of about fourteen (14) days or so for the memorandum and eleven (11) days for the record. The present application dated 27th September, 2023 is brought another twelve (12) after the date of late service.
9. The explanation offered by the applicant is that there was a mistake on the part of its advocates. While to err is human, not all mistakes of counsel can be excused or pardoned and there will be circumstances when inadvertence of counsel will have to be borne by the client (*Itute Ingu & another v Isumael Mwakavi Mwendu* [1994]eKLR). How does this matter fare in that regard? Although the two documents were served on 15th September 2023, albeit late, they were served before the respondent had mounted the striking out motion. It is nevertheless true that the applicant only filed the current



application to make amends after its counsel had been served with the striking out motion and the respondents contention that it is the striking out motion that jolted the applicant into action is not without basis. I see inattention of counsel for the applicant on two occasions; failure to serve the two documents on time; and eventually serving them without either realizing that time had lapsed or bothering to obtain leave to serve out of time. On these, the application does not score well.

10. That said, the cumulative delay occasioned by these two errors is just about 27 days, a delay which cannot in the circumstances of this matter be said to be inordinate. In addition, the applicant had diligently filed and served a notice of appeal on time, and further filed the memorandum of appeal and the record of appeal on time. This evinced a serious intention on its part to challenge the decision that aggrieves it and does not portray it or its counsel as routinely careless. For these reasons, I will accept the explanation offered by the applicant and pardon the short delay. In doing so, the Court has considered that the respondent, although alleging that it will suffer prejudice if the application is granted, failed to provide evidence to back the contention. Refusal to grant the extension sought could impinge on the applicant's right to fair hearing and if the basis for the refusal is that to grant it would hurt the respondent, then the respondent needed to provide credible evidence of the possible prejudice.
11. The upshot is that Notice of Motion dated 27th September, 2023 is allowed in the alternative prayer. For clarity, the memorandum of appeal filed on 25th August, 2023 and the record of appeal filed on 28th August, 2023, both served on 15th September, 2023 are hereby deemed as properly served. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

F. TUIYOTT

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JUDGE OF APPEAL

I certify this is a true copy of the original.

Signed

DEPUTY REGISTRAR

