



REPUBLIC OF KENYA



Corrugated Sheets Limited v Kimwwoya & another (Civil Application E045 of 2023) [2024] KECA 175 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 175 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E045 OF 2023
KI LAIBUTA, JA
FEBRUARY 23, 2024**

BETWEEN

CORRUGATED SHEETS LIMITED APPLICANT

AND

JOHN MAKUU 1ST RESPONDENT

VINCENT OUMA KIMWWOYA 2ND RESPONDENT

(Being an application for extension of time to file the Record of Appeal out of time from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Mombasa (Agnes Kitiku Nzai, J.) delivered on 28th April 2022 in ELRC Cause No 228 of 2016 (Consolidated with Cause No 229 of 2016))

RULING

1. Before me is the applicant's notice of motion dated May 26, 2023 filed pursuant to rule 4 of the [Court of Appeal Rules](#) seeking extension of time to file its record of appeal out of time; and orders that the costs of the application be in the appeal.
2. The applicant's motion is supported by the annexed affidavit of Evans Muigai, the applicant's Human Resource Officer, sworn on May 30, 2023 essentially deposing to the grounds on which it is anchored, namely: that the impugned judgment was delivered on April 28, 2022; that the applicant lodged its notice of appeal dated May 13, 2022 on May 18, 2022; that they requested for a copy of the proceedings *vide* a letter dated June 9, 2022; that certified copies of the proceedings were ready for collection on May 16, 2023, and were collected on the same date; and that the certificate of delay was issued on May 17, 2023.
3. In addition, learned counsel for the applicant, M/s. Onyony & Company, filed written submissions, a list of authorities and a case digest dated November 27, 2023 in support of the applicant's motion. Counsel cited the cases of [Muringa Company Limited v Archdiocese of Nairobi Registered Trustees](#)



- [2020] eKLR for the proposition that the court has the discretion to extend time limited under the Court of Appeal Rules; *Njoroge v Kimani* [2022] KECA 1188 (KLR) where the court observed that an application for extension of time must be filed without delay or as soon as the applicant becomes aware of the need to do so; *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR for the proposition that the right to appeal is constitutionally underpinned, and that the same should not be taken away based on procedural technicalities; and, finally, *David Chege Kiarri v Cooperative Bank of Kenya Limited* [2021] eKLR where the Court set out the principles guiding the court in the determination of applications for enlargement of time pursuant to rule 4 of the *Court's Rules*.
4. In reply to the applicant's motion, the 1st respondent filed his replying affidavit sworn on January 31, 2024 stating that the applicant's letter bespeaking the proceedings was never served on counsel for the respondent; that the said letter was filed more than 30 days from the date of judgment; that the delay in filing the motion herein and the record of appeal is not only inordinate but also unjustifiable; and that, in the event that the court should grant the orders sought, it should order the applicant to furnish security for costs. The respondent also contends that the applicant's intended appeal is not arguable and, accordingly, its application should be dismissed with costs.
 5. Learned counsel for the respondent filed written submissions and a case digest dated December 5, 2023 citing 6 judicial authorities, namely: *Tharaka Nithi County Government & another v Gaichu & 129 others* [2022] eKLR; and *General Daudi Tonje & another v John Tonje* [2020] eKLR, where the court held that an applicant who fails to comply with rule 82 (now 84) of the *Court of Appeal Rules* cannot benefit from the proviso thereto; *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR, submitting that this court has the discretion to deny extension of time where there is no valid explanation for the delay, or where procedural lapses in late service of the letter bespeaking proceedings exist; *Abdulaziz Ngoma v Mungai Muthoya* [1976] eKLR, submitting that the court's discretion to extend time comes into existence after sufficient cause has been established; and *Patrick Njuguna Kariuki v Del Monte Kenya Limited* [2020] eKLR, submitting that article 159 of the *Constitution* cannot be invoked where there has been a deliberate misstep on the part of an applicant despite clear provisions and rules.
 6. Rule 84(1) of the *Rules* of this Court required an appeal to be instituted within 60 days after the date when the notice of appeal was lodged: provided that where an application for a copy of the proceedings in the superior court has been made in accordance with subrule (2) within 30 days after the date of the decision against which it is desired to appeal there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery of the appellant with such copy.
 7. Rule 84(2) provides in no unclear terms that "an appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent."
 8. It is common ground that the applicant's letter bespeaking the proceedings was filed 46 days after the date of judgment. Neither was it served on the respondent or his counsel. Accordingly, rule 84 shuts the door on the applicant's face and disentitles it to the court's discretion to extend time to file its record of appeal.
 9. In addition to the glaring procedural infractions aforesaid, counsel for the applicant continue to sit still, taking no steps to file the record of appeal for a period exceeding eight (8) months since they collected them together with the requisite certificate of delay on May 16, 2023. Yet, counsel offer no explanation for their inaction which is, in any event, inexcusable.



10. Having carefully considered the applicant's Motion, the grounds on which it is anchored, the affidavits filed in support thereof and in reply thereto, the rival submissions of learned counsel for the applicant and for the respondent, the cited authorities and the law, I reach the inescapable conclusion that the applicant's motion has no merit and is hereby dismissed with costs to the respondent. Orders accordingly.

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

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

