



Uzuri Foods Limited v Ngwenze & 169 others (Civil Application E429 of 2023) [2024] KECA 278 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 278 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E429 OF 2023
S OLE KANTAI, JA
MARCH 8, 2024**

BETWEEN

UZURI FOODS LIMITED APPLICANT

AND

BENARD MUSYOKA NGWENZE & 169 OTHERS RESPONDENT

(Being an application for extension of time within which to file and serve the Record of Appeal against the Judgment of the Employment and Labour Relations Court (Hellen Wasilwa, J.) dated 11th November, 2020 in ELRC Cause No. 1830 of 2015)

RULING

1. The applicant, Uzuri Foods Limited, has by motion brought under section 3(1) of the *Appellate Jurisdiction Act*, Rules 4, 41, 42 and 49 of the *Court of Appeal Rules, 2010* (these have since been replaced by the *Court of Appeal Rules, 2022*) moved the Court to grant leave to the applicant to file and serve record of appeal out of time against the judgment of the Employment and Labour Relations Court (Wasilwa, J.) delivered on 11th November, 2021 in ELRC Cause No. 1830 of 2015. The application is supported by grounds on its face and by a supporting affidavit of Joy Mbaka, the applicant's Human Resource Manager. It is stated that after delivery of judgment the applicant lodged a notice of appeal on time but that a record of appeal was not filed within time or at all because its lawyers M/S J.A. Guserwa & Company Advocates moved their offices from 5th Avenue Office Suites to their current location at Zamani Business Park in Karen and that in the course of that process the relevant file was misplaced and a record of appeal was not filed within the stipulated time. It is said that the applicant has good grounds of appeal and would be prejudiced if the application is not granted.
2. In a replying affidavit Hudson Mwenda Kiambi, one of the claimants at ELRC, opposes the application stating that it is fatally defective and is an abuse of the process of the court as the applicant has not, according to the deponent, explained sufficiently why it did not file record of appeal on time. He says that there is no explanation why it took a year for the application to be made; that the applicant



was informed by letter on 29th August, 2022 that proceedings were ready for collection upon payment of court fees but that it did not do so; that the appeal was deemed as abandoned; that the delay in filing record of appeal is unreasonable; that litigation should come to an end; that execution of judgment of ELRC is at an advanced stage.

3. I have seen written submissions by both sides. The applicant submits that the Courts' power to extend time under the relevant rule is not fettered and that there is no limit on what the court may consider in an application for extension of time as long as they are relevant and justifiable. The applicant says that it filed notice of appeal on time, proceedings, and judgment were available on 29th August, 2022 but that the relevant file was misplaced when its lawyers moved their office from a former location to their current location; that failure to file record of appeal on time was due to a mistake or omission on the part of its lawyers which mistake should not be visited on the applicant. It is submitted that the intended appeal raises reasonable arguable points; that the motion is not brought with unreasonable delay. The case of *Vishva Stone Suppliers Company Limited vs. RSR Stone* (Civil Application No. 55 of 2020 (unreported)) is cited in support of the proposition that mistakes of counsel should not be visited on the client.
4. The respondents written submissions are a rehash of what is stated in replying affidavit it being added that the application was brought more than 360 days after the applicant was notified that proceedings were ready for collection. The cases of *Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge [2013]* eKLR and *Nicholas Kiptor Arap Korir vs. Independent Electoral Boundaries Commission & 7 Others [2014]* eKLR are cited on factors to be considered in application for extension of time. It is submitted that the respondent will be prejudiced if I allow the application as the respondents would be kept away from the fruits of their judgment while they have been out of employment.
5. The factors to consider in application of this nature were fully discussed in *Paul Wanjohi Mathenge* (supra) and *Nicholas Kiptor Arap Korir* (supra). In the earlier case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2 EA 231* those factors were summarized to be:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well stated 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."
6. I am told here by the applicant that after judgment had been delivered by ELRC in favour of claimants in that case a notice of appeal was filed immediately and the applicant applied for copies of typed proceedings and judgment to enable it to appeal. I am further told that as the applicants counsel was notified that proceedings and judgment were ready for collection upon payment of Court fees the applicants' counsel was in the process of relocating their law firm from a former location to the current location; that in that process the relevant file was misplaced and record of appeal was not filed on time. I am further told that the intended appeal is meritorious with chances of success.
7. I note that judgment of ELRC was delivered on 11th November, 2020. A notice of appeal was filed the same day and a letter bespeaking proceedings was filed the next day 12th November, 2020. The applicants' counsel says that they relocated their offices in September, 2022; that proceedings, and judgment were ready for collection as indicated by a letter from ELRC dated 29th August, 2022. I note that the motion before me is dated 29th August, 2023.



8. I have considered the whole motion, the reasons given for the delay and the opposition to the application by the respondent. I found the reason given by the applicant for delay to be a reasonable one. The applicants' lawyer took steps to appeal the judgment of ELRC but in the process they relocated their offices and they say that the relevant file was misplaced during that exercise. Misplacing a file can very well happen during movement of offices from one location to another. I do not think that the application was brought with unreasonable delay in those circumstances. The applicant says that the appeal has reasonable grounds of appeal. I am in those circumstances prepared to exercise my discretion in the applicants' favour. I allow the motion. Let record of appeal be filed within ten (10) days of today. Costs of the motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

