



**East African Portland Cement Company v Kenya Chemical & Allied Workers Union & 3 others
(Civil Appeal (Application) 532 of 2023) [2024] KECA 1317 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1317 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 532 OF 2023
JW LESSIT, JA
SEPTEMBER 27, 2024**

BETWEEN

EAST AFRICAN PORTLAND CEMENT COMPANY APPLICANT

AND

KENYA CHEMICAL & ALLIED WORKERS UNION 1ST RESPONDENT

JULIET CHEPCHUMBA TUWOT & 227 OTHERS 2ND RESPONDENT

JOSEPH KARITHI MITHIKA & 219 OTHERS 3RD RESPONDENT

MORRIS MUTETI KAWINZI 4TH RESPONDENT

(An application for extension of time for filing and serving of the Record of Appeal out of time in an appeal against the whole Ruling and Orders the Employment and Labour Relations Court at Nairobi (Anna Ngibuini Mwaure, J.) delivered on 11th July 2023 in E.L.R.C Cause No. 2119 of 2014)

RULING

1. East African Portland Cement Company, hereinafter the applicant, in this Notice of Motion dated 10th November 2023 brought pursuant to sections 3A and 3B of the *Appellate Jurisdiction Act* and rule 4 of the Court of Appeal Rules, 2022 (hereinafter the Rules) and all other enabling provisions of the law seeks, inter alia, orders that:
 - i. That this honourable Court be pleased to grant the applicant extension of time to file and serve its record of appeal out of time against the ruling and orders of the Employment and Labour Relations Court at Nairobi (A. Mwaure, J.) delivered on 11th July 2023 in ELRC Cause No. 2119 of 2014;



- ii. That the record of appeal lodged on 18th September 2023 be deemed duly filed and this Court's registry be directed to issue a case number for the appeal;
 - iii. That flowing from number 2 above, the record of appeal be served upon the respondents within seven (7) days from the orders issued for filing;
 - iv. That, in the alternative to ii and iii above, the applicant do re-lodge and file its record of appeal and the same be deemed to be duly filed;
 - v. That flowing from order iii and iv above, the record of appeal be served upon the respondents within 7 days of the order issued under prayer iv;
 - vi. That the costs of the application be in the appeal.
2. The application is supported by grounds on the face of the application and the supporting affidavits sworn by Simon Peter, legal counsel at the applicant's company and Victor Mungai; an advocate in conduct of the applicant's case respectively both dated 10th November 2023. The applicant avers that it filed its notice of appeal in time but attributes the delay in filing its record of appeal to the encountered technical challenges with the e-filing system. The applicant states that whereas the record of appeal was uploaded on the e-filing portal on 18th September 2023 which was the last day for filing its records of appeal, at 8.09 a.m. and invoices automatically generated for Kshs.3,100/- in respect of the record of appeal and Kshs.6,000/- in respect of security deposit, the e-filing system nevertheless declined to accept payment on indicating "the transaction file; the format of your account number is incorrect; please check and try again with the correct format of your account number." Further, that upon re-uploading the documents as advised by the e-filing technical team so as to generate a new and fresh invoice which would now allow receipt of the applicant's payment, the payment reflected a different date and time from when it initially lodged the record of appeal.
 3. The documents are annexed to the affidavit sworn by Simon Peter as SM 1 to 6, and a certification of the SMS in compliance with the Evidence Act as SM7.
 4. The applicant avers that the resultant delay was inadvertent and unintended and was not attributable to commission and/or omission of the applicant. It also avers that its appeal is not frivolous as it raises substantial issues of both law and fact with high chance of success as demonstrated in their memorandum of appeal dated 18th September 2023 and which this Court needs to adjudicate on; and lastly, that the applicant stands to suffer irreparable prejudice and/or substantial loss if the orders sought are to be denied.
 5. The application is opposed by the 1st respondent in an affidavit sworn by Peter Ouko Onyango dated 12th March 2024. It is disposed that because the attached documents in the supporting affidavit shows the filing of the record of appeal was done on 18th September 2023 and the attempt to pay for the filing were dated next day, then the applicant was lying and should not be believed. The other ground urged is fact the Court of Appeal dismissed an application for stay pending appeal in a ruling dated 24th November 2023 and that therefore the applicant has no arguable appeal.
 6. I have considered this application, the grounds for the same on the face of the application, the supporting affidavits and the replying affidavit in opposition thereof. The submissions are also considered.
 7. The factors that guide the Court in determining an application of this nature are well settled. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v independent Eiectoral and Boundaries*



Commission & 7 Others [2014] eKLR laid down the principles that govern the exercise of discretion in applications of extension of time as follows:

- “ 1. 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.
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 4. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted.
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.”
8. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. The appellant has demonstrated the reasons why it was only able to upload the record of appeal on the e-filing system of the Court, but not the payment. It claims that it was due to a technical hitch, which is not uncommon. He was unable to make payment within the same day, but did so the next day. I am satisfied that indeed the applicant uploaded the record of appeal on the last day of filing. The delay involved is only one day. This is neither inordinate nor unreasonable. The explanation offered is itself plausible.
- As to whether the applicant has an arguable appeal, I have perused the Memorandum of appeal attached by the respondents. I note that some of the issues raised are that the superior court did not base its decision on the facts and evidence presented before it, but was moved by sympathy and extraneous matter. The other ground raised is a complaint the court framed its own issues which had not been framed by the parties. I am guided that an applicant need not raise a multiplicity of grounds, just one arguable ground is sufficient.
- Neither must the arguable ground be one that must succeed on appeal. See *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR.
9. As to whether there will be any prejudice suffered by the respondents if the extension is granted, the only prejudice is delay. However, the applicant has a constitutionally underpinned right of appeal. Weighing both interests, I find that the applicant’s right should not be denied or curtailed.
10. I have also considered the ground raised by the respondents that the applicant had applied for a stay of execution of the superior court’s judgment and the same was declined and thus they had no arguable ground of appeal. I have seen the ruling of this Court dated 24th November 2023. It was in response to the applicant’s application for stay of execution of the superior court’s ruling and order delivered on 16th May 2023.
11. The application before us is supported by a notice of appeal dated 18th July 2023 against the ruling of the superior court delivered on 11th July 2023. The ruling of this Court cited by the respondents is different from the one that is the subject matter of this application. The instant application is



not seeking similar orders, There is no relationship between the cited application and the instant application. The ruling declining a stay of orders made prior to the application under consideration in this matter cannot be a bar to right to appeal a ruling made subsequently.

12. In conclusion I am satisfied that the applicant has established that he deserves the exercise of this Court's discretion in its favour and make the following orders:
- i. The application dated 10th November 2023 be and is hereby allowed;
 - ii. That the record of appeal lodged on 18th September 2023 be deemed to be duly filed;
 - iii. The applicant do serve the record of appeal upon the respondents within twenty one (21) days from the date of this ruling;
 - iv. The costs of this application be in the appeal.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

