



REPUBLIC OF KENYA



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Gwashe & 32 others v Pride Inn Hotels and Investment Limited (Civil Application E105 of 2024) [2024] KECA 1284 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KECA 1284 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E105 OF 2024**

JW LESSIT, JA

SEPTEMBER 27, 2024

BETWEEN

OMAR GWASHE & 32 OTHERS & 32 OTHERS & 32 OTHERS & 32 OTHERS & 32 OTHERS & 32 OTHERS APPLICANT

AND

PRIDE INN HOTELS AND INVESTMENT LIMITED RESPONDENT

(Being an application for extension of time to file and serve record of appeal against the Judgment and Decree of the Employment and Labour Relations Court at Mombasa (Mbaru, J.) delivered on 8th February 2024 in ELRC Cause No. E004 of 2022.)

RULING

1. The applicants have brought an application dated 22nd May 2024 pursuant to, inter alia, rule 4 of the [Court of Appeal Rules](#). The applicants seek extension of time to file and serve the record of appeal out of time against the judgment of the Employment & Labour Relations Court at Mombasa (Mbaru, J.) in ELRC No. E004 of 2022; and the record of appeal be deemed as properly filed.
2. The application is supported by the grounds on the face of the application and amplified in a joint supporting affidavit of one Omar Gwashe and Festus Joto Gilbert sworn on the even date on behalf of the applicants.
3. The applicants aver that they lodged a notice of appeal dated 21st February 2024 at the superior court on 22nd February 2024. The applicants attribute the delay in lodging their record of appeal and serving upon the respondents to the registry at the Employment and Labour Relations Court at Mombasa. They argue that the registry delayed in supplying their advocate with certified copies of the typed proceedings for lodging a record of appeal in this Court despite having requested for them in due time since 21st February 2024. Further, that by the time their advocate was supplied with them on 14th May



2024, the 60 days statutory period for lodging an appeal in this Court had lapsed necessitating the advocate to request for a certificate of delay which was issued on the same date.

4. The applicants state that they are confident that the reasons leading to the delay in filing the appeal in this Court have been satisfactorily explained and that the delay is not inordinate; that they have an arguable appeal against the impugned judgment and decree as demonstrated in their memorandum of appeal; and that no prejudice will be occasioned on the respondent if their application is allowed.
5. The applicants emphasize that unless their application is allowed, their intended appeal shall be rendered nugatory causing the applicants unconscionable losses which is not the purport of the Court.
6. In opposing the application, the respondent filed its grounds of opposition dated 3rd July 2024 challenging the application on grounds that it is misleading and misconstrued; that the orders sought are not tenable; and that the application is bad in law and fatally incurably defective.
7. When the matter came up for hearing virtually on 4th July 2024 learned counsel Ms. Juaje appeared for the applicants whereas learned counsel Mr. Ondimu appeared for the respondent.
8. Ms. Juaje's submission was a repetition of the applicants' case as discussed herein above, and I do not wish to rehash them. Mr. Ondimu submitted that the issue at hand is not one for delay but on the procedure which the applicants' counsel employed in obtaining the certificate of delay. He argued that rule 84(2) of this Court's Rules is clear that the applicants ought to serve upon the respondent with the letter bespeaking of proceedings which procedure was ignored by the applicants. For reason therefore, it was submitted that the certificate of delay lacked merit and that the record of appeal together with the notice of appeal are inexcusably filed out of time and thus defective and therefore the applicants' application is for dismissal.
9. In rejoinder, Ms. Juaje acknowledged that she might have overlooked the service of the letter requesting proceedings. She implored the Court to consider the application and be guided by Article 159 of the Constitution and overlook the technicality which, she argued does not go to the substance of the application and the intended appeal. Moreover, counsel argued the respondent was well aware of the intended appeal as it was served with a notice of appeal.
10. I have carefully considered the application and the affidavits in support, the grounds of opposition, both the written and oral submissions by the parties, the authorities relied upon by parties and the law. It is clear from the proceedings that the issue for determination is whether the applicants are deserving of the order for extension of time as sought.
11. The power of this Court to extend time is founded on rule 4 of this Court's Rules. The same is a discretion exercised on behalf of the Court by a single Judge. Although the discretion of the Court is unfettered, and is wide, it ought to be exercised judicially, not whimsically, arbitrarily, capriciously, or sentiment. It ought to be granted only where the applicant has satisfied this Court that he is deserving the order sought. See Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA. No 14 of 2013.
12. The principles upon which this Court considers an application such as this one is well settled. Among the considerations include the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See Leo Sila Mutiso v. Rose Hellen Wangari Mwangi [1999] 2 EA 231; Fakir Mohammed v. Joseph Mugambi & 2 Others [2015] eKLR; and Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees [2020] eKLR.



13. It is not in dispute that the notice of appeal was filed and served upon the respondent within the required timelines. The only contention is whether the applicant is deserving of the extension of time sought to file and serve the record of appeal dated 21st May 2024 and filed on 27th May 2024 out of time, on grounds they did not serve the respondent with the letter bespeaking the proceedings.
14. The applicant is required to explain the reasons for the delay, which explanation should be reasonable and plausible. However, first of all is to determine the length of the delay before we consider the reasons advanced. The delay involved is of 19 days from 22nd February 2024 when the notice of appeal was filed, to 27th May 2024 when the record of appeal was filed. Are 19 days inordinate? I am of the view that that length of time is long. However, that consideration alone is not enough.
15. As to the explanation advanced, the applicant explained that the delay was occasioned by the fact that the registry delayed in supplying them with certified copies of proceedings and impugned judgment. They further urged that whereas they requested for proceedings on 21st February 2024, the same were only ready for collection on 9th May 2024 by which time the period for filing the appeal had already lapsed. It is explained that the applicant applied for a certificate of delay and the same was issued on 14th May 2024.
16. The respondent has in its submissions made it clear that it they were not challenging the delay but rather, the procedure adopted by the applicants to obtain the certificate of delay. It was its submission that as the letter bespeaking the proceedings was never served on the respondent as required by rule 84(2) the applicants cannot rely on the certificate of delay. Counsel for the respondent relied on the case of *Mistry Premji Ganji (Investment) Ltd v. Kenya National Highways Authority* [2019] eKLR for the proposition the record of appeal was inexcusably filed out of time without leave, that thus the notice of appeal is defective, and the record of appeal is equally defective and thus the application should be dismissed.
17. In response, counsel for the applicants admitted the omission but urged the Court to invoke Article 159 of the *Constitution* and allow the application.
18. I have considered the respondent's arguments concerning the documents filed by the applicants. The notice of appeal was filed and served upon the respondent on 22nd February 2024, which was within the prescribed time. That being the case, the notice of appeal is not defective as suggested by the respondent.
19. The applicants admit that they did not serve the letter bespeaking the proceedings, meaning that, as rule 84 provides, the applicants are barred from relying on it in computation of the time within which the record of appeal should have been brought. Thus the computation of time started running from the date the notice of appeal was filed, meaning that at the time the record of appeal was filed, the length of delay was 19 days.
20. In my view a person who runs/falls afoul of the law ought to speedily take remedial measures before the other party takes action to have the process nullified. The applicants in this case took remedial action, which was the step to seek extension of time to file their record of appeal. That was in recognition of the fact they were out of time by the time the record was filed. Having done so, the respondent cannot be heard to say that the record of appeal was defective, as that was the very basis upon which the applicants sought to have the time to file the said record extended.
21. Can the respondent argue that the record of appeal is defective? It was open for the respondent to file an application to have the record of appeal struck out under rule 86 for being incompetent, which application should be made within 30 days of service of the record. No such an application was filed.



Not to mention that such an application can only be heard by the full bench.

22. Turning to the issue of the chances of success of the intended appeal. I have perused the memorandum of appeal dated 19th April 2024. I find that the grounds set therein are neither frivolous nor idle and are deserving of determination by this Court.
23. On the degree of prejudice, the applicants have argued that no prejudice would be occasioned to the respondent if their application is granted, unlike them who would suffer unconscionable loss if the application is denied. Taking into consideration the dispute between the parties, it is my view that the degree of prejudice the applicants will suffer if their application is not allowed outweighs that of the respondent.
24. I have come to the conclusion that the applicants are deserving of the order sought and accordingly I order:
 - i. The application dated 22nd May 2024 be and is hereby allowed;
 - ii. An order be and is hereby made extending the time to file and serve the record of appeal dated 23rd May 2024 and filed on 27th May 2024;
 - iii. The applicants should file the record of appeal within 21 days of the date hereof, and serve the same on the respondent within 7 days from the date of service;
 - iv. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA 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

