



**Michira & 41 others v Aegis Kenya Limited t/a Leopard Beach Hotel (Civil Application E034 of 2024) [2024] KECA 1285 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1285 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E034 OF 2024  
JW LESSIT, JA  
SEPTEMBER 27, 2024**

**BETWEEN**

**ELIJAH ISABOKE MICHIRA & 41 OTHERS & 41 OTHERS & 41 OTHERS & 41 OTHERS ..... APPLICANT**

**AND**

**AEGIS KENYA LIMITED T/A LEOPARD BEACH HOTEL ..... RESPONDENT**

*(Being an application for extension of time to file a Record of Appeal against the Ruling and Order of the Employment and Labour Relations Court of Kenya at Mombasa (Mbaru, J.) delivered on 19th October 2023 in ELRC Cause No. 088 of 2023)*

**RULING**

1. Before this Court is a Notice of Motion dated 9<sup>th</sup> April 2024 brought pursuant to, inter alia, rule 4 and 44 of the Court of Appeal Rules, 2022. Elijah Isaboke Michira & 41 Others, the applicants' herein seek orders for extension of time to file and service their memorandum of appeal and record of appeal against the decision of the Employment and Labour Relation Court at Mombasa delivered on 19<sup>th</sup> October 2023 in ELRC No. E088 of 2023; leave to file and serve the memorandum of appeal and record of appeal within thirty (30) days from the date of this order; and costs of this application abide with the result of the appeal.
2. The application is supported by the grounds on the face of the application and those found in the supporting affidavits sworn on the even date by Elijah Isaboke Michira with the authority of the co-applicants, and Hamisi Kityeke Mgandi, previous advocate in conduct of this matter on behalf of the applicants and further affidavit sworn on 3<sup>rd</sup> July 2024 by the said advocate.
3. The applicants avers that the ruling the subject of this application was made on 19<sup>th</sup> October 2023 and that they promptly filed a notice of appeal together with a letter requesting for certified copies of court



proceedings on 25<sup>th</sup> October 2023 and that the said proceedings became ready and were delivered to their previous advocates, Messrs H. M. Lugogo & Company Advocates, on 29<sup>th</sup> November 2023.

4. The applicants attribute their failure to file the memorandum of appeal and record of appeal within the stipulated time on the part of their previous advocates, and further on the size of the group of the applicants which, it is stated is big thus getting instructions was very difficult as most could not be reached on phone. It is averred that despite being furnished with instructions on 14<sup>th</sup> February 2024, the advocate nevertheless delayed in their filing. Further, that there was also a delay in obtaining the signed certificate of delay from court. That although the letter requesting the proceedings being lodged on 15<sup>th</sup> February 2024, it was however delivered to their previous advocate on 20<sup>th</sup> February 2024 with one day to go before the lapse of time to file the memorandum of appeal and record of appeal.
5. The applicants further aver that with everything ready, Mr. Mgandi, left instructions with his assistant for preparation and filing of the record by the deadline on 21<sup>st</sup> February 2024. That unfortunately, the deadline was missed and the applicants only came to realize the failure on or about 18<sup>th</sup> March 2024 when Mr. Michira called the advocate for a follow up, and that is when they made a decision to instruct their current advocate on record, the firm of Wanjiku Mohamed Advocates LLP, to take over conduct of the matter from H M Lugogo & Company Advocates.
6. The applicant contends that their current advocates were instructed on 22<sup>nd</sup> March 2024 and their file was forwarded to them on 28<sup>th</sup> March 2024 whereupon it was apparent that there was a necessity for this application to be filed which the same was prepared timeously and the same filed without inordinate delay.
7. In conclusion, the applicants aver that there is no prejudice that the respondent stands to suffer if time is extended for filing and serving the memorandum of appeal and record of appeal as compared to the applicants who stand to summarily lose their gratuity and other terminal benefits for over twenty- six (26) years of continued service with the respondent; that they have come to court with clean hands as their application is not intended to overreach or frustrate the fair administration of justice; and the draft memorandum of appeal raises arguable issues which have serious impact on the applicants that if not heard, they will end up missing their lifetime benefits summarily.
8. The respondent opposes the application through a replying affidavit of Mwanaisha Suleiman Nizamdin, Human Resource Manager for the respondent sworn on 2<sup>nd</sup> July 2024. The respondent contends that it has not been served with a notice of appeal either within the time prescribed under the Rules or at all and there is presently no application for extension of time seeking leave of court to do so. Further, it is averred that the applicants did not apply for copy of proceedings in the ELRC court within 30days after the date of the decision and that a copy of the application must have been served upon the respondent. The respondent contends that up to now there is no application for extension of time seeking leave to do so.
9. The respondent argues that the application is fatally and incurably defective and that the certificate of delay obtained by them covering the period between 25.10.2023 to 29.11.2023 cannot come to its aid.
10. Lastly, the respondent avers that lodging an appeal out of time is not a procedural technicality that can be cured by the court invoking the overriding principle but rather, it is a substantive one that goes to the core of ensuring that the respondent is accorded reasonable time to prepare for an appeal. In addition, that the inability or unwillingness of the applicants to comply with mandatory provisions of the Rules of this Court renders their present application vexatious and an abuse of this Court's process hence the respondent prays that the applicants' application be dismissed with costs.



11. When the matter came up for hearing virtually on 4<sup>th</sup> July 2024 learned counsel Mr. Mohammed Karega appeared for the applicants whereas learned counsel Mr. Wachira appeared for the respondent. Mr. Mohammed's submissions were a reiteration of the applicant's case as set out herein above, and I need not rehash them.
12. Mr. Wachira on his part, in addition to standing his ground that the applicants have not demonstrated sufficient cause of the delay in filing their memorandum of appeal and record of appeal, he confirmed that indeed the respondent was served with a notice of appeal on time as well as the typed proceedings of the trial court. Further, that even through the delay in filing these documents was solely attributed to the previous counsel that nothing has been shown to demonstrate the efforts the applicants themselves made in ensuring that the record of appeal was filed within the strict timelines. In addition, counsel also contended that the close to two (2) months' delay in the collection of the certificate of delay still remains unexplained. In conclusion, counsel submitted that in the absence of a plausible explanation for the delay then the applicants' application ought to be dismissed with costs.
13. In rejoinder Mr. Karega submitted that the delay in obtaining the certificate of delay was not in control of the applicants as the same are administrative matters which normally in the usual course of the practice involve the law firm and the registry. Counsel added that whereas the respondent's position as seen in its written submissions and replying affidavit are premised on erroneous position that the notice of appeal and letter seeking proceedings were never served, the oral submissions by Mr. Wachira were not in line with those averments. He urged that submissions are not pleadings, and that without a replying affidavit raising those issues, Mr. Wachira could not make oral submissions that are not founded on a document that has been filed. In conclusion, Mr. Karega submitted that the delay is excusable, it has been explained, and there is no prejudice that the respondent would suffer.
14. I have considered the application, the supporting affidavits and the further affidavit, the replying affidavit, written submissions both date 3<sup>rd</sup> July 2024 and oral submissions by the parties, the relied authorities as well as the law. The principles upon which this Court determines an application for extension of time under Rule 4 are well settled. This Court needs to consider 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 vs. Rose Hellen Wangari Mwangi* [1999] 2 EA 231 and *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees*, Civil Application [\*No. 190 of 2019\*](#).
15. Further in *Njuguna vs. Magichu & 73 Others* [2003] KLR 507, Waki, JA. expressed himself thus:

“The discretion exercisable under Rule 4 of this Court's Rules is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless, discretion has to be exercised judicially, that is on sound factual and legal basis.”
16. From the case as laid out by the parties, it is not in contention that the applicants filed and served their notice of appeal within the stipulated timelines and also served the respondent with a letter requesting copies of typed proceedings. I therefore move to determine whether the applicants have satisfied this Court to warrant the Court grant the orders of extension of time to file and serve their memorandum of appeal and record of appeal as prayed for.
17. The trial court delivered judgment in this matter on 19<sup>th</sup> October 2023; the notice of appeal was filed on 25<sup>th</sup> October 2023 and served upon the respondent on 1<sup>st</sup> November 2023 well within the timelines. This therefore means that the respondent had sixty (60) days to file their record of appeal. I note that certified proceedings were issued to the applicants on 29<sup>th</sup> November 2023, hence the applicants had



- up to 21<sup>st</sup> February 2023 to file their memorandum of appeal and record of appeal. The applicants have explained the reason for the delay and they attribute it to failure on the part of their previous advocate on record. It is argued that although the advocates were issued with instructions on 14<sup>th</sup> February 2024, they nevertheless failed to proceed as required and that the applicants only came to realize this on 18<sup>th</sup> March 2024 when they did a follow-up. I also note that a certificate of delay was issued on 20<sup>th</sup> February 2024.
18. The applicants further explained that when they realized that their advocate had not filed their documents, they appointed their current advocate on record on 22<sup>nd</sup> March 2024 and issued them with instructions, and that it was until not 28<sup>th</sup> March 2024 that their previous advocate handed over their file to their current advocate.
  19. The instant application was filed on 9<sup>th</sup> April 2024. If I am to compute from the last date the applicants were to file their appeal that is on 21<sup>st</sup> February 2024 to the date this application was filed on 9<sup>th</sup> April 2024, and considering the time that the current advocate for the applicants required to review the applicants file and move this court for orders of extension of time, and bearing in mind that they received the applicants' file from their previous advocate on 28<sup>th</sup> March 2024, it is my view that the delay of forty-two (42) days is inordinate.
  20. I must also say, that it is not enough that the applicants put blame on their advocates, they must also explain the action taken by them to show that they did not condone or conspire in the delay. Although I note the delay to be inordinate, I am however satisfied that the applicants have satisfactorily explained the reason for the delay. The negligence or failure of the previous advocates should not be visited upon their clients.
  21. This Court in *Rajesh Rughani vs. Fifty Investments Limited Another* [2016] eKLR held that:

“Our re-evaluation of record lead us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay.”
  22. Further in the Supreme Court case in *Karinga Gaciani & 11 Others vs. Ndege Kabibi Kimanga & Another, Civil Application No. E004 of 2023* the Court opined as follows:
    - i. Whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence, the applicants have not demonstrated any efforts or due diligence, through evidence or correspondence of the follow up with the advocates or to pursue their rights as we found in *George Kang'ethe Waruhiu v Esther Nyamweru Munene & another Civil Application No. 18 of 2020* (2021) eKLR. It is not enough for a party to simply blame the advocates on record for all manner of transgression. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not...”
  23. The applicants issued instruction to their previous advocate on 14<sup>th</sup> February 2024 and thereafter on 18<sup>th</sup> March 2024 Mr. Michira did a follow up on the matter by calling Mr. Mgandi advocate. This clearly shows that the applicants were aware of their matter and equally were interested in its prosecution. Further, the applicant's also changed advocates once they realized that their advocate had



not acted as instructed. This is evidence enough that they were in touch with their matter and wanted to see it to its conclusion.

24. In addition, considering the date the applicants' current advocate on record received instructions from them and the applicants' file from their previous advocate, and the time they took to review the applicants' case, it is my opinion that the instant application has been brought without undue delay, and the delay if any has adequately been explained.
25. On the next issue, that of the success of the intended appeal, I must mention it is not my role at this juncture to determine its merit but the mandate of a full bench when it is ultimately presented before it. I am guided by the case of Athuman Nusura Juma vs. Afwa Mohamed Ramadhan [2016] eKLR where this Court held as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court had prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”
26. By a cursory perusal of the memorandum of appeal dated 15<sup>th</sup> February 2024 and an annexure to this application, the applicants faults the learned judge that she erred in law and fact by, inter alia, failing to appreciate that from the pleadings the applicants had sought a declaration that their employment terminated as at the date of filing of the cause hence to hold that the cause of action arose on 30<sup>th</sup> April 2020 amounted to a premature determination of the matter without hearing it on merits; holding that time does not stop running when the dispute is the subject of an ongoing statutory conciliation; and misconstruing the pleadings that had been placed before him, thereby arrived at factual conclusions that were materially erroneous and which became the basis of an unjust and erroneous decision. It is my opinion that the applicants have raised bona fide issues which ought to be heard on merit by way of an appeal, hence the applicants' appeal arguable.
27. Lastly, on the issue of prejudice to be occasioned to the respondent if the application is allowed, the applicants argue that no prejudice will be suffered on the respondent instead, the applicants stand to suffer great prejudice if not given a chance to argue their case before the Court as they stand to summarily lose their gratuity and other lifetime benefits which they have worked for over twenty-six (26) years with the respondent. The respondent on the other hand have not demonstrated or argued what prejudice will befall it if the application is to be allowed. It is therefore my opinion that the applicants stand to suffer prejudice if their application is not allowed unlike the respondent if the application is allowed.
28. Consequently, I find merit in the application and order as follows:
  - i. The Notice of Motion application dated 9<sup>th</sup> April 2024 be and is hereby allowed;
  - ii. The time for the filing of the memorandum of appeal and the record of appeal be and is hereby extended;
  - iii. The applicant do file the memorandum of appeal and the record of appeal within 21 days of the date of this ruling and serve both upon the respondent within 14 days from the date of filing thereof;
  - iv. The costs of the application shall abide the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> 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**

