



REPUBLIC OF KENYA



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Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi (Civil Application E032 of 2022) [2023] KECA 381 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KECA 381 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E032 OF 2022
WK KORIR, JA
MARCH 31, 2023

BETWEEN

SOKORO SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD APPLICANT

AND

ABEID MWAMBURI RESPONDENT

(Being an application for extension of time to file an appeal out of time in respect to the decision of the Employment and Labour Relations Court at Nakuru (H. Wasilwa, J.) dated 21st April 2022) In ELRC Case No. 471 of 2017)

RULING

1. Sokoro Savings & Credit Co-operative Society Ltd (the applicant) has brought this application pursuant to article 59 of the [Constitution](#), sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#), and rules 4, 31, 39(b), 41, 42, 43, 47 and 53 of the [Court of Appeal Rules](#) 2010 (“the rules”). The applicant seeks the following orders:
 - “(a) Spent,
 - (b) This honourable court be pleased to grant leave to file the appeal as well as the application to stay execution of judgment and decree out of time against Nakuru Employment and Labour Relations Court Case No 471 of 2017.
 - (c) This honourable court be pleased to extend time for filing the appeal against Nakuru Employment and Labour Relations Court Case No 471 of 2017.
 - (d) Upon granting prayers b and c above, provide timelines for filing the application and appeal.



(e) Costs of and incidental to this application be borne by the respondents.”

2. From the grounds on the face of the application and the supporting affidavit of Walter Ogada, the chairman of the applicant society, the applicant’s case is that judgment in Nakuru Employment and Labour Relations Court Case No 471 of 2017 was delivered on April 21, 2022 in the presence of the advocates for the applicant and the respondent. That immediately after delivery of the judgment, counsel in conduct of the matter went on leave and inadvertently failed to update the case register, file a notice of appeal or file an application for stay of execution. That on June 7, 2022, the applicant sought to know the status of the matter from the advocates and that is when it became apparent that the judgment in the matter had been delivered. By this time, time for filing a notice of appeal had lapsed. The applicant being dissatisfied with the judgment of the superior court wishes to challenge that judgment on appeal and has a genuine interest in pursuing the appeal. It is the applicant’s averment that they have also written to the registrar of the superior court seeking typed and certified proceedings.

3. The applicant attributes the delay in filing the notice of appeal to omission on the part of their advocates and prays that such error should not prejudice their right to appeal. It is the applicant’s assertion that the intended appeal raises substantial issues that need to be heard and determined. The applicant prays that the application be allowed and leave granted for the filing of the notice of appeal and the record of appeal within timelines as the court may set.

4. The respondent, Abeid Mwamburi, in a replying affidavit sworn on July 15, 2022 avers that when the superior court delivered its judgment, counsel for the applicant orally sought stay of execution for 30 days and the prayer was declined. The applicant’s counsel was required to file a formal application in that regard, which option was not pursued. The respondent disputes the applicant’s averment that the advocate in conduct of the matter went on leave for two months.

According to the respondent the applicant was represented by its officials during the delivery of the judgment and the delay occasioned is unexplained and inordinate in the circumstances. The respondent therefore prays for the dismissal of the application.

5. Both parties filed written submissions in this matter. For the applicant, counsel submits that this court has judicial discretion to extend time under rule 4 of the *rules*. The applicant contends that they had sustained a diligent quest for justice and that they had relied on communication from their advocates. That it is that reliance on communication from counsel which resulted in the oversight leading to lapse of time. The applicant is of the view that a mistake on the part of their advocates should not be visited upon them and that they should be allowed time to file the notice of appeal. Reliance is placed on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, among others, to reiterate the principles that guide the courts when dealing with applications for extension of time. The applicant also urges that the intended appeal has merit and an explanation for the delay in the filing of the notice of appeal has been offered.

6. The applicant also submits that the intended appeal is arguable as it seeks to challenge the manner in which the trial court arrived at its judgment. Counsel also contends that the appeal may be rendered nugatory since the respondent has already filed a bill of costs in the matter and may proceed to execute the decree. The applicant states willingness to deposit security and asserts that no prejudice will be visited on the respondent if the orders for stay are granted. To this end, the applicant relies on *JMM v PM* [2018] eKLR, among other cases.



7. On his part, the respondent holds the view that the delay in filing the notice of appeal was deliberate on the part of the applicant. This, he argues, was because counsel for the applicant was aware of the judgment and the applicant was also represented by its officials during the delivery of the judgment. The respondent reiterates that the applicant deliberately failed to file the notice of appeal in time and that no sufficient reasons have been offered for the delay in filing the application for extension of time. As to whether the respondent will be prejudiced by a stay order, it was submitted that the respondent was dismissed from employment by the applicant and allowing the application would delay his enjoyment of the fruits of judgment and subject him to continued suffering. The respondent relied on this court's decision in *Edith Gichugu v Stephen Njangi Thoitbi* [2014] eKLR to buttress this argument.
8. I have given due consideration to the pleadings and submissions filed in this application. The issue for determination is whether the applicant's prayer for extension of time should be granted. The mandate is derived from rule 4 of the *rules* which allows the court, for sufficient reasons, to extend the timelines in the rules.
9. The factors to be considered when determining an application for extension of time are found in various judicial pronouncements of the courts. In *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR this court discussed those factors as follows:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”
10. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for 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 a 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 a consideration for extending time.”



11. I have considered the application in light of the principles that guide this court in the exercise of its discretionary jurisdiction when determining an application for extension of time. The first question to be answered is whether the applicant has tendered a satisfactory explanation for the delay in filing the notice of appeal. The judgment which the applicant intends to appeal against was delivered on April 21, 2022. The period for filing the notice of appeal lapsed on or about May 2, 2022. The period of delay is therefore approximately 43 days. The explanation tendered by the applicant is that despite the advocate in conduct of the matter being present during the delivery of the judgment, the fact of the delivery of the judgment was not documented in the law firm and the matter only came to light when the applicant's representative went to follow up on the issue in the office of their advocates.
12. On mistakes allegedly arising out of the inaction of a party's advocate, this court in *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR stated as follows:

“In *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR this court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In *Mwangi v Kariuki* (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude.”
13. In the case at hand, the applicant's officials cannot be said to have been indolent because they followed up the matter with their advocate to find out the status of their case. It would have been different had the officials taken a long period of time before following up the matter with their advocate. Mere allegation of counsel's indolence is not enough to warrant grant of extension of time. It must also be seen that parties on their part were not careless. The applicant herein moved within reasonable time to follow up on the matter and instructed counsel to file the instant application without unreasonable delay. The delay cannot therefore be said to be inordinate in the circumstances. In my view, the explanation tendered by the applicant is plausible and sufficient considering the delay period was only 43 days. Additionally, I note that the delay occasioned was as a fault of the advocate in the conduct of the matter and the applicant cannot be blamed for the delay. Without evidence to the contrary, I am unable to find carelessness in the actions of the applicant hence the explanation offered for the delay is sufficient.
14. The next question is whether there will be any prejudice suffered by the respondent if the orders are granted. Whereas the applicant is of the view that no prejudice will be suffered by the respondent, it is the respondent's submission that he will continue to languish in poverty considering that the fruits of his judgment will be deferred yet he is out of employment on account of the applicant's actions. The respondent's averment may indeed be true. However, the interest of justice demands that a party is accorded every reasonable and available opportunity to ventilate their grievances within the available ranks of our judicial system. That is what the applicant seeks to do. As for deferring the enjoyment of the fruits of the judgment by the respondent, it is my view that nothing bars the respondent from realizing his decree if no orders of stay are issued. The availability of this avenue to the respondent therefore cures the prejudice that might be visited on him through an elongated period of languish in poverty, as he puts it. It therefore follows that the application for extension of time has merit and is for allowing.
15. Before I conclude, I note that the applicant also sought extension of time to file an application to stay the execution of judgment pending appeal. In my view, once leave to appeal out of time is granted, the applicant is at liberty to bring any other application that he is entitled to file as a result of the filing of the



notice of appeal. The orders of extension of time that I am going to grant will, once the notice of appeal is filed, enable the applicant to invoke the entire spectrum of this court's jurisdiction. At the moment there is no notice of appeal that has been filed. this explains why i have not bought the enticement by the applicant, albeit through submissions, that I grant stay pending appeal for the reason that it is only after the filing of the notice of appeal that the applicant can invoke the court's jurisdiction. In any event an order staying execution pending appeal cannot be issued by a single judge.

16. In light of what has been stated in this ruling, the applicant is hereby granted leave to file and serve a notice of appeal within 7 days from the date of the delivery of this ruling. Upon filing the notice of appeal the applicant will have 60 days within which to file and serve the record of appeal. The costs of this application shall abide the final outcome of the appeal.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

