



REPUBLIC OF KENYA



Mara Concord Game Lodge t/a Leo Investment Limited & another v Haji (Civil Application E091 of 2022) [2023] KECA 591 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KECA 591 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E091 OF 2022**

LA ACHODE, JA

MAY 26, 2023

BETWEEN

**MARA CONCORD GAME LODGE T/A LEO INVESTMENT
LIMITED 1ST APPLICANT**

RAHIM CHATUR 2ND APPLICANT

AND

MWINYI AHMED MWINYI HAJI RESPONDENT

(Application for extension of time to file and serve a Notice of Appeal and Memorandum of Appeal in an appeal against the judgment and order of the Employment and Labour Relation Court at Nakuru (Wasilwa. J) dated 11th November, 2021 In ELRC Cause No. 52 of 2019)

RULING

1. The applicants, Mara Concord Game Lodge t/a Leo Investment Limited and Rahim Chatur filed a Notice of Motion dated November 15, 2022 under section 3A and 3B of the [Appellant Jurisdiction Act](#) and Rule 4 and 5(2)(b) of this [Court's Rules](#), for orders:
 - a. ... spent
 - b. That this Court be pleased to issue an order granting leave to the applicants to file an appeal against the judgment and orders of Hon Wasilwa J of November 11, 2021, in ELRC Cause No 52 of 2019, and corresponding leave to serve the Notice and Record of Appeal, out of time;
 - c. That this Court be pleased to issue an order extending time within which the performance bond would be issued to the respondent herein in accordance with this Court's direction issued on the June 13, 2022 regarding stay execution;



- d. That this Court be pleased to grant a stay of execution of the Judgment delivered on the November 11, 2021 by Hon Wasilwa J and the Decree thereof, pending the hearing and determination of the intended appeal; and
 - e. the cost of this application to be provided.
2. Mwinyi Ahmed Mwinyi Haji is the respondent.
 3. This matter arose from a claim that the respondent filed in the Employment and Labour Relation Court against the applicants, on the grounds that they had wrongfully dismissed him from employment. The matter was heard and the learned Judge entered judgment in favour of the applicant in the sum of Kshs 1,147,125/= on the November 11, 2021.
 4. The present application is premised on the grounds on its face and supporting affidavit sworn on November 15, 2022 by Rahim Chatur, the 2nd applicant, a director of the 1st applicant. The said grounds are that the applicants uploaded on the online platform of the Superior Court the Notice of Appeal and Memorandum of Appeal both dated November 16, 2021 within the prescribed time. However, they realized that the email address that they used no longer works and the uploaded document was not responded to. They realized that they had not filed the Notice of Appeal within the time frame provided by the law. It was averred that this is an honest mistake, and they urged this Court to accommodate them.
 5. Learned Counsel for the applicants and the Learned Counsel for the respondent were duly served with a Hearing Notice by way of email on December 28, 2022. However, the respondent did not file a replying affidavit and/or written submissions. On the other hand, the applicants, after filing the application and supporting affidavit, did not file written submissions.
 6. Be that as it may, I shall consider the application and affidavit on record. The present application urges this Court to grant orders for extension of time to file the Notice of Appeal, and stay of execution of orders granted by the Superior Court. As a single Judge, by dint of Rule 55(1) of this Court's Rules, I have the mandate to determine the application for extension of time. However, the hearing of the application for stay of execution is within the mandate of a full bench as provided for by Rule 55(2) (b) of this Court's Rules.
 7. Having said that, I have considered the application and the supporting affidavit before me in regard to extension of time for filing of the Notice of Appeal. Rule 4 of this Court's Rules gives the Court the unfettered discretion to extend time otherwise limited by this Rules, or decision of this Court, or Superior Court. The said Rule stipulates thus:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
 8. The principles that guide this Court in the exercise of its mandate under the mentioned Rule have been crystallized by case law. I am guided by this Court's decision in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* Nairobi CA No 255 of 1997 where it was stated that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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.”

9. In *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others* (2018) eKLR, this Court had the following to say concerning the possibility of the appeal to succeed:

“In taking into account the last consideration, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

10. This Court has noted that in the present application the judgment sought to be appealed against has not been attached to the application. However, as stated earlier, the applicants deposed that the judgment was delivered on the November 11, 2021. Rule 75 (1) and (2) of this *Court’s Rules* requires that a Notice of Appeal be filed within 14 days from the date when the decision wished to be challenged is delivered, and the said Notice to be served on the respondent within the next 7 days.

11. In paragraph 14 and 15 of the applicants’ supporting affidavit, the applicants explained why they failed to file the Notice of Appeal and Memorandum of Appeal within the prescribed time as follows:

14. That the same was uploaded on the online platform of the lower court, however, we realized that the email address we used no longer works and the uploaded document was not responded to.

15. That towards this end, it became apparent to us that we did not file the Notice of Appeal within the time frame provided for by the law”

12. They attached the said Notice of Appeal and Memorandum of Appeal dated November 16, 2021 to support their statement. The present application is dated November 15, 2022, a year and one month from the date of the Notice of Appeal and the Memorandum of appeal attached to the application.

13. As much as there is no maximum or minimum period of delay set out in the Rules, the reasons for the delay have to be plausible. This Court in *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* (2018) eKLR stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

14. The applicants have not told this Court when they discovered that their Notice of Motion and Memorandum of Appeal both dated November 16, 2021 had not been filed. They have not also told this court why they waited for a period of a whole year to make the instant application. I therefore, find that the applicants have not given a sufficient and satisfactory explanation for the delay in filing the present application.

15. For the foregoing reasons, I decline to exercise my discretion to extend time to file and serve the Notice of Appeal. Accordingly, the Notice of Motion dated November 15, 2022 be and is hereby dismissed with costs.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF MAY, 2023.

L. ACHODE



.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

