



REPUBLIC OF KENYA



KENYA LAW
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**Korich v Fairview Hotel Limited (Civil Appeal (Application)
E190 of 2023) [2023] KECA 825 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 825 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E190 OF 2023
HM OKWENGU, JA
JULY 7, 2023**

BETWEEN

MOHSINE KORICH APPLICANT

AND

FAIRVIEW HOTEL LIMITED RESPONDENT

(Being an application brought under Article 164 of the Constitution Rule 4 & 47 of the Court of Appeal Rules 2010 seeking extension of time to file and serve notice of appeal out of time against the judgment of the Employment and Labour Relations Court at Nairobi (Rika, J) delivered on 28th February 2023 in ELRC No. 594 of 2018)

RULING

1. On February 28, 2023, the Employment and Labour Relations Court (ELRC) (Rika, J), declined a claim which had been filed by Mossine Korich (applicant) against his employer, Fairview Hotel Limited (respondent). The applicant contended that his services were unfairly terminated and claimed 12 months' salary as compensation, as well as exemplary damages.
2. Following the dismissal of his claim, the applicant filed a Notice of Motion dated May 8, 2023, in which he sought extension of time to file and serve a notice of appeal from the ELRC judgment, and the letter requesting for typed proceedings out of time. The applicant contends that he has an arguable appeal, as the judgment was issued in total disregard of the evidence adduced, the prevailing law, and regulations.
3. The applicant urged that the delay to file the notice of appeal was neither intentional nor deliberate, but was due to an inadvertent error. In an affidavit sworn on May 8, 2023, the applicant stated that the intended appeal is arguable and has high chances of success and that the same will be rendered nugatory unless extension of time to file a notice of appeal out of time is granted. He explains that his inability to file the notice of appeal in time was caused by his poor health due to medical challenges. He has annexed a letter from Palm Beach Hospital Limited, Diani.



4. The respondent has opposed the applicant's motion through grounds of opposition, contending that: the motion has not met the legal threshold for the grant of the orders sought; the application has been brought after inordinate delay which delay has not been sufficiently explained; the excuse of indisposition on the part of the applicant, even if proven cannot be a ground for moving the Court to exercise its discretion in favour of the applicant; and the application is fatally defective and is expressed to have been brought under the repealed rules of the Court.
5. The respondent has also filed written submissions in which it has identified three issues for determination. That is: whether the applicant has shown sufficient cause for grant of orders for extension of time; whether the application has been brought without unreasonable delay; and whether the applicant has demonstrated an arguable appeal.
6. The respondent submitted that the reasons advanced by the applicant alleging illness do not constitute a sufficient reason for the delay in filing the notice of appeal, because the applicant was aware of the delivery of the judgment; that the documents supporting the allegation of poor health merely indicates that he was treated for vertigo and dizziness sometime in November 2022, more than 3 months before the judgment was delivered; that nowhere in the letter is it alleged that the applicant's mental state or decision making abilities were impaired so as to prevent him from issuing appropriate instructions to his advocate; nor is it alleged that the advocate made any attempts to reach him for instructions and found that he was unavailable as a result of his indisposition.
7. The respondent relied on [*Mathew Muthoga Gikonyo v Peter Ndung'u Ndirangu*](#) [1999] eKLR, where this Court stated:

“Lodgment of a notice of appeal is a matter of course. A careful advocate would lodge the same ex abundanti cautela. In this case, the advocate did not say that they advised filing of an appeal. It was the insurers who thought an appeal ought to be filed. They took nearly two months to decide that.”
8. Further, the respondent argued that the delay of two and half months had not been satisfactorily explained and that the applicant having failed to account for every single day of the two and half month's delay, is not entitled to the reliefs sought. Finally, on the issue of arguability, the respondent pointed out that the applicant did not annex a draft memorandum of appeal or set out the intended grounds in the body of the application.
9. Relying on [*Joreth Limited v Mbugua & 3 others*](#) (Civil Application No E219 of 2021) [2022] KECA 163 KLR, the respondent urged that the applicant's failure to demonstrate an arguable appeal renders the application a nonstarter. The Court was therefore urged to dismiss the applicant's motion.
10. I have considered the applicant's motion. Applications for extension of time fall under Rule 4 of the [*Court of Appeal Rules*](#), which gives the Court the discretion to extend time for the doing of any act authorized or required by the Rules.
11. The applicant's motion relates to extension of time for filing of a notice of appeal. Under Rule 77 (2) of the [*Court of Appeal Rules 2022*](#), a notice of appeal should be filed within 14 days from the date of the decision intended to be appealed against. The applicant intends to appeal against a judgment which was delivered on February 28, 2023. Therefore, the notice of appeal should have been filed on or before March 14, 2023.
12. The applicant has not filed any notice of appeal and therefore seeks to have time extended to enable him to file and serve the notice of appeal, and the letter requesting for typed proceedings to enable him to appeal against the judgment delivered on February 28, 2023.



13. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR, has stated the principles to be considered in exercising discretion to extend time as follows:

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to the 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 ought to 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 which ought to 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;
7. Whether in certain cases like election petition, public interest ought to be a consideration for extending time.”

14. Therefore, in order for the applicant to succeed in his motion, he must lay a basis upon which this Court can exercise its discretion in his favour, by showing first, that the delay is not inordinate, secondly, that there was a good reason for the delay, and thirdly, that the application for extension of time has been made without unnecessary delay. The Court must also be satisfied that the respondent will not suffer any prejudice, or that the prejudice to be suffered can be ameliorated.

15. The applicant moved the Court on May 8, 2023. That means that his application for extension of time was brought 54 days after time for filing the notice of appeal had expired. In the grounds stated on the face of the motion, the applicant has not given any reason for the delay but has stated that there was an inadvertent error to lodge the notice of appeal in time, “which was not inordinate”. That ground does not give any reason for the delay as the inadvertent error has not been stated nor explained in the affidavit nor has the applicant explained why the delay of 54 days is not inordinate.

16. In his affidavit sworn on May 8, 2023, and wrongly indicated as sworn in support of urgency, the applicant has stated that his inability to file the notice of appeal in time was caused by his poor health as he was experiencing serious medical challenges. He has annexed a letter from Palm Beach Hospital Limited in Diani. According to the letter, the applicant was seen at the facility in December 2022, where he was treated for vertigo and dizziness. He was later seen by a consultant, a Dr. Ndegwa. That letter does not reveal how many times the applicant was attended to in the facility, nor does it indicate what disability, if any, he was under.

17. We agree with the respondent’s counsel that all the applicant was required to do, was to inform his counsel that he wished to appeal and the rest was to be done by counsel. The letter from Palm Beach Hospital Limited, Diani does not support the applicant’s contention that he was experiencing serious medical challenges.

18. In the circumstances, I am not persuaded that the applicant had a satisfactory reason for failing to file the notice of appeal within time. The applicant having failed to lay the basis for this Court to exercise its discretion in his favour, his application fails. It is accordingly dismissed with costs.



DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

