



**Mang Hotel & another v Mose & 13 others (Civil Application E019 of 2023) [2023] KECA 831 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 831 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E019 OF 2023  
HM OKWENGU, JA  
JULY 7, 2023**

**BETWEEN**

**MANG HOTEL ..... 1<sup>ST</sup> APPLICANT**

**TIMOTHY KINUTHIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PETER KIMEU MOSE & 13 OTHERS ..... RESPONDENT**

*(An application for extension of time to file notice of appeal and to deem as duly filed with leave of Court, the record of appeal against the Ruling and Order of the Employment & Labour Relations Court at Nairobi (Wasilwa, J) delivered on 27th February 2020. in ELRC Cause No. 267 of 2014)*

**RULING**

1. Mang Hotel and Timothy Kinuthia, the 1<sup>st</sup> and 2<sup>nd</sup> applicants herein, moved this Court under Article 159 (2)(d) of the Constitution and Rule 4 of the Court of Appeal Rules for orders:
  - i. That leave be granted to the applicants to file and serve notice of appeal against the Ruling and Orders of Hon. Lady Justice Hellen Wasilwa dated February 27, 2020 out of time.
  - ii. That the consolidated record of appeal in Civil Appeal No E880 of 2022 in respect of impugned ruling of the Hon.Lady Justice Hellen Wasilwa, dated February 27, 2020 be deemed as properly duly filed with the leave of court.
  - iii. That upon grant of leave to file notice of appeal out of time, and already filed and served record of appeal duly admitted, the said orders do form part of the supplementary record of appeal in Civil Appeal No E880 of 2022.
  - iv. That costs of this application do abide the outcome of Civil Appeal No E880 of 2022.



2. The application is supported by an affidavit sworn by the 2<sup>nd</sup> applicant and grounds stated on the face of the motion. In brief, following the judgment of the Employment and Labour Relations Court (ELRC), dated January 19, 2016 that awarded the respondents a total sum of Kshs 4,417,422.15, the applicants through their advocates agreed on a compromise with the respondents' advocate to settle the matter for an amount of Kshs 2,352,000, which compromise was reduced to a consent dated January 27, 2016 and this amount was paid to the respondents through their then advocates, Wangari Ndirangu & Co. Advocates, as final settlement of the court decree.
3. Three years later, the applicants were surprised when the respondents made a demand for the balance of the decretal sum through a different firm of advocates, Lucy Njiru & Co. Advocates.  

This caused the applicants to file an application in the ELRC seeking inter alia, to have the consent dated January 27, 2016, and filed on January 28, 2016 deemed as adopted by the court. The application was heard by Wasilwa, J who delivered the ruling on February 27, 2020 in which she found that the consent filed in court on 28<sup>th</sup> January 2016, was not adopted by the court, and therefore remained a consent between the two parties as the court had not been moved to adopt it. The learned Judge issued a stay pending the filing of an application in relation to the consent and the joining of the respondents' former advocate Wangari Ndirangu & Co. Advocates.
4. Subsequently the respondents filed an application dated January 27, 2022 seeking orders that the firm of Wangari Ndirangu & Co. advocates be joined in the suit to enable the court determine the issues, and that the court be pleased to expunge the consent dated January 27, 2016 since the same was not adopted by the court. That application was heard by Mbaru, J who delivered a ruling in which she ruled that the original court judgment of January 19, 2016 was still subsisting, and that the consent signed by the parties was not an order of the court, the order of the court being for payment of Kshs 4,417,422. She directed the applicants to pay the balance due after taking into account the 2 million that they had already paid.
5. This is what led to the applicants filing Civil Appeal No E880 of 2022 against the rulings of Wasilwa J. and Mbaru J. They maintained that they have an arguable appeal and have listed several grounds on their memorandum of appeal. They explain that the delay was due to the revival of the matter three years after they believed a settlement had been reached. They therefore urge the Court to extend time for the filing of a notice of appeal in regard to the Ruling of February 27, 2020, and deem the consolidated memorandum of appeal duly filed, so that they can have an opportunity to ventilate their appeal.
6. The applicants filed written submissions in which they reiterated the circumstances leading to the delay in filing the appeal, and urged that the Rulings by Wasilwa, J and Mbaru, J were intertwined as they revolved around the same consent judgment, and it was therefore prudent to address them in one appeal instead of having separate appeals over similar issues. They maintained that the appeal raises weighty issues of law and that the respondents will not in any way be prejudiced if the application is granted.
7. The respondents did not file any affidavit in response to the motion, but filed written submissions opposing the motion on three grounds. First, that there was inordinate and inexcusable delay for which no plausible reason has been given, and that the circumstances indicate that the delay was caused by ignorance on the part of the applicants who believed that the consent/agreement was an order of the court. Secondly, that there was no consent adopted as an order of the court and the applicants having realized this fatal error, lodged the current application. Thirdly, that the consent/agreement that was signed by the respondents' previous advocate Ms. Wangari Ndirangu & Co. Advocates and



the applicants on January 27, 2016 and filed on January 28, 2016 was not a proper consent as it was not adopted as an order of the court.

8. I have considered the application, the affidavit and the contending submissions. This being an application under Rule 4 of the Court of Appeal Rules, this Court has discretion to extend time, but it must be satisfied that the delay in filing the appeal or notice of appeal was not inordinate and that there are plausible reasons for the delay (see *Leo Sila Mutiso vs Hellen Wangari Mwangi* [1999] 2EA 231; and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR).
9. The applicant's motion for extension of time was filed on January 25, 2023 (going by the date of swearing the affidavit as the motion is undated). There was no notice of appeal filed in regard to the Ruling of February 27, 2020, hence the prayer for extension of time. What has been exhibited is a memorandum of appeal filed in Civil Appeal No E880 of 2022, which is an appeal from the Ruling of Mbaru, J delivered on October 27, 2022 and the Ruling of Hellen Wasilwa, J. delivered on February 27, 2020. That memorandum is dated December 16, 2022. Therefore, the memorandum was filed less than 60 days after the ruling of October 27, 2022 but about 2 years and 10 months after the ruling of February 27, 2020.
10. The applicants are seeking leave to file and serve a notice of appeal against the ruling of February 27, 2020. As the notice ought to have been filed within 14 days from the date of the Ruling, there is a delay of over 2 years and 9 months. The explanation given for the delay, which is that the applicant believed that the matter had been settled, may have been plausible in regard to the original judgment of 19<sup>th</sup> January 2016 as no appeal appears to have been lodged. The applicants did in fact file an application which was subject of the ruling of February 27, 2020. In that application, the applicants were seeking to stay execution of the original judgment and to have the consent signed on January 27, 2016, deemed as adopted by the Court.
11. In her ruling the learned Judge ordered that a fresh application be filed in relation to the consent after having the firm of Wangari Ndirangu & Co. Advocates who were representing the respondents when the consent was signed, joined in the application. The court was magnanimous in granting an order of stay pending the filing of a fresh application. The applicant has not given any explanation as to why it did not comply with that ruling or file a notice of appeal if it was not satisfied with the ruling.
12. Two years later, the respondents filed an application dated January 27, 2022 in which it sought to have its previous advocates, Wangari Ndirangu Advocates joined as a respondent and also sought to have the consent dated January 27, 2016 expunged. This application is the one which was subject of the Ruling of October 27, 2022 in which Mbaru, J. ruled that the consent of January 28, 2016 was not an order of the court and therefore the judgment of January 19, 2016 was still subsisting.
13. It is evident that although the applicants have exhibited an interest in pursuing the appeal, they have not translated this interest into action. Much as they indicate a wish to appeal the ruling of February 27, 2020, they do not seem to have any grievance against the Ruling. This explains why they did not take any action to appeal the Ruling. The explanation relating to the consent cannot hold as the Ruling was made after the problems relating to the consent had been unearthed. Moreover, no plausible reason has been given for failing to file the notice of appeal against the Ruling of February 27, 2020 or the delay in filing the motion for extension of time. Secondly, the attempt to have a consolidated memorandum and record of appeal in regard to the Ruling of February 27, 2020 and October 27, 2022, cannot pass muster, as these two Rulings were delivered on different dates by different judges. Consolidation can only arise for the purposes of hearing, after proper filing of appeals in regard to each ruling.



14. For these reasons, I find that this is not an appropriate case in which I should exercise my discretion in the applicants' favour. The motion is accordingly rejected. In the circumstances of this case I do not find it appropriate to award costs. Each party shall therefore meet their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> 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**

