



REPUBLIC OF KENYA



KENYA LAW
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**Aturkan Hotel Ltd & another v Anyanje (Civil Application
E013 of 2023) [2023] KECA 1337 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1337 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION E013 OF 2023
WK KORIR, JA
NOVEMBER 10, 2023**

BETWEEN

ATURKAN HOTEL LTD 1ST APPLICANT

ANTHONY MUNENE KIBETU 2ND APPLICANT

AND

STEPHEN JOMO ANYANJE RESPONDENT

(Being an application for extension of time to file and serve a notice of appeal out of time to the decision of Employment and Labour Relations Court at Eldoret (J.N. Abuodha, J.) dated 21st November 2022 in ELRC Case No. 64 of 2017)

RULING

1. The application dated 16th March 2023 is brought under sections 3, 3A and 3B of the Civil Procedure Rules and Rule 4 of the Court of Appeal Rules. The application seeks stay of execution of the trial court's judgment pending the hearing of the application as well as extension of time for filing an appeal. The applicants, Aturkan Hotel Ltd and Anthony Munene Kibetu, also pray that the costs of the application be provided for. The only prayer that I can address in the application as a single judge is the one for extension of time for filing an appeal. I will therefore limit this ruling to that prayer.
2. The application is supported by the affidavit of the 2nd applicant.
The application is premised on the grounds that the applicants were not aware of the delivery of the judgment up and until when the respondent served them with a bill of costs dated 9th February 2023. The applicants also contended that no prejudice will be suffered by the respondents if the application is allowed and that the intended appeal is arguable.
3. The respondent, Stephen Jomo Anyanje, did not file any response to the application.



4. The law firm of Apollo Ambutsi & Company Advocates filed submissions dated 19th April 2023 on behalf of the applicants. Through the submissions, counsel asserted that the impugned judgment was delivered without notice to the applicants and they were therefore not aware of the existence of the judgment until 9th February 2023 when they were served with the respondent's bill of costs. Counsel urged that the delay was caused by factors beyond the applicants' control and that they have moved the Court without delay. Counsel also submitted that if time is not extended, the applicants will suffer prejudice as the intended appeal will be rendered nugatory.
5. An application for extension of time made before this Court is premised on Rule 4 of the [Court of Appeal Rules](#), 2022 which provides for extension of time as follows:

“The Court may, on such terms as may be 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.”
6. My discretion under Rule 4 above is unfettered. The objective of the discretion is to give a deserving applicant, whose intended appeal has been overtaken by time, an opportunity to file the notice of appeal and or the record of appeal in order to eventually have his day before the Court. The discretion is exercised judiciously for good reason and not arbitrarily, capriciously, on whim, or sentiment. The Supreme Court in [Nicholas Kiptoo Arap Korir Salat vs. 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.”
7. The stated principles are not exhaustive, and as was stated in [Margaret Muthoni Muchiga vs. Esther Kamori Gichobi](#) [2010] eKLR Margaret Muthoni Muchiga vs. Esther Kamori Gichobi [2010] eKLR, not all the principles are to be applied to each and every application as the discretion extends to deciding the principles applicable to the circumstances of a given case.
8. A perusal of the applicants' pleadings and submissions show that the only issue for determination is whether they have satisfactorily explained the delay in filing the notice of appeal.



9. The judgment which is the subject of the intended appeal was delivered on 21st November 2022 while the present application is dated 16th March 2023. The notice of appeal in this matter ought therefore to have been filed by 5th December 2022. The reason advanced by the applicants for the delay is that they were not aware that the judgment had been delivered. In my view, this explanation portrays the applicants as indolent litigants. Even if it is true, as indicated in the submissions, that the judgment was due for delivery on 2nd July 2019 and was not delivered, for the applicants to go to slumber until 9th February 2023 is nothing else but indolence. They have not shown the action they took to follow up on a judgment that had allegedly been pending delivery for over three years. Therefore, there is no satisfactory explanation placed before me by the applicants. I therefore associate myself with the statement of Makhandia, JA in *Mohamed Shally Sese (Shah Sese) vs. Fulson Company Ltd & another*, Civil Application No. 26 of 2016 that:

“ A litigant must be vigilant in the conduct of his affairs and the applicant should have made efforts to find out the progress of his case from his advocate. After all, extension of time is essentially equitable ... and equity aids the vigilant and not the indolent.”

10. The applicants contend that they were not aware of the existence of judgment until 9th February 2023 when they were served with the respondent’s bill of costs. Even thereafter, it took the applicants about 35 days to lodge this application. No explanation whatsoever has been tendered for this further delay.

As was held by the Supreme Court in *County Executive of Kisumu vs. County Government of Kisumu & 8 others* [2017] eKLR, the whole period of delay should be declared and sufficiently explained. The applicants having failed to tender any explanation, their application cannot succeed as they have not established a basis upon which the discretion to extend time can be exercised.

11. In the end, I find this application is without merit and I dismiss it. As the respondent did not reply to the application, I will make no order as to costs.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF NOVEMBER, 2023

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

