



REPUBLIC OF KENYA



**Foam Plastics Limited & 2 others v Companies & 2 others (Civil Application
E452 of 2023) [2023] KECA 1677 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1677 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E452 OF 2023
DK MUSINGA, JA
DECEMBER 15, 2023**

BETWEEN

**FOAM PLASTICS LIMITED 1ST APPLICANT
PREMJI VALJI PINDORIA 2ND APPLICANT
JITENDRA VALJI MULJI 3RD APPLICANT**

AND

**REGISTRAR OF COMPANIES 1ST RESPONDENT
SULEIMAN CONSULT LIMITED 2ND RESPONDENT
HON ATTORNEY GENERAL 3RD RESPONDENT**

(Being an application for extension of time to lodge and serve the notice of appeal, memorandum of appeal and the record of appeal from the judgment and decree of the Environment and Land Court at Nairobi (Oguttu, J.) dated 9th March 2023 in ELC Case No. E284 of 2021)

RULING

1. By way of a Notice of Motion dated 27th September 2023, the applicants invoke the provisions of rule 4 and 5(2)(b) of the Rules of this Court, seeking, in principal, orders for extension of time to lodge and serve the notice of appeal, the memorandum of appeal and the record of appeal from the judgment and decree of the Environment and Land Court at Nairobi (Oguttu, J.) dated 9th March 2023 in ELC Case No. E284 of 2021.
2. The grounds in support of the application are borne on the face thereof and in the affidavit in support sworn by Anthony Okulo, the Managing Partner of Okulo & Co. Advocates, who are on record for the applicants. It is contended that this firm of advocates came on record for the applicants vide a Notice of Changes of Advocates dated 8th March 2023. The suit before the trial court came up for hearing on 9th



March 2023 when the trial court declined to grant an oral application for adjournment that had been made by the applicants' former advocate. The trial court directed that the suit proceeds to hearing at noon on the same day in open court, but the advocate for the applicants says that he understood that the hearing was to proceed virtually. When the applicants' advocate failed to show up at the appointed time, the trial court dismissed the applicants' suit for want of prosecution.

3. The applicants vide an application dated 17th March 2023 sought orders to set aside the dismissal orders. The trial court vide a ruling dated 6th July 2023 dismissed the said application with costs.
4. Upon dismissal of their application, the applicants filed a notice of appeal dated 11th July 2023 which was lodged on the same date.

They equally requested for certified copies of typed proceedings vide an email of the even date as the notice of appeal.

5. The reason for the delay in filing the notice of appeal, the memorandum of appeal and the record of appeal is that the court process only came to an end on 6th July 2023 when the application to set aside the dismissal orders was declined. It is important to point out that whereas the applicants are desirous of appealing against the orders of the trial court dated 9th March 2023, the notice of appeal on record is against the decision of the trial court dated 6th July 2023.
6. It is contended that the intended appeal raises substantive points of law and has high chances of success. However, a draft memorandum of appeal has not been annexed to the affidavit in support of the application. A further averment is that no prejudice will befall the respondents if the application is allowed.
7. As per the affidavit of service sworn by Angelo Njue Nthia on 13th October 2023, all the respondents were served with this application on 12th October 2023. However, none of the respondents has put in a reply and therefore the application is unopposed.
8. The applicants have through their written submissions dated 9th November 2023 reiterated that they have good and plausible reasons for seeking leave to appeal out of time; that their intended appeal is arguable and has high chances of success; that the respondents stand to suffer no prejudice if the application is allowed; and that in any case, they can be compensated in damages.
9. I have given due consideration to the pleadings and submissions filed in this application. The issue for determination is whether the applicants' prayer for extension of time should be granted. The mandate is derived from rule 4 of the Rules of this Court which allows this Court, for sufficient reasons, to extend the timelines in the Rules.
10. The factors to be considered when determining an application for extension of time have been enunciated in numerous decisions of this Court such as *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2 EA 23), *Fakir Mohamed vs. Joseph Mugambi & 2 Others* [2005] eKLR; *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees* [2020] eKLR; *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR and *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan* [2016] eKLR. In *Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge* [2013] eKLR, this Court stated:

“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...”

11. The decision which the applicants intend to appeal against was delivered on 9th March 2023. Pursuant to the provisions of rule 77

(2) of the Rules of this Court, the period for filing the notice of appeal (14 days) lapsed on or about 22nd March 2023. As it stands, although the applicants intend to appeal against the decision of the trial court that was delivered on 9th March 2023, the notice of appeal on record is against the decision of the trial court dated 6th July 2023. In essence therefore, there is no competent notice of appeal on record. The explanation given for the delay in filing the notice of appeal, the memorandum of appeal and the record of appeal within the stipulated timeline is that the court process only came to an end upon the delivery of the ruling by the trial court in an application to have the suit reinstated. This is an erroneous interpretation of the law on the part of the applicants. Rule 77 provides expressly in part that:

“(1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

(2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.” [Emphasis added]

12. The fourteen days’ period within which a notice of appeal should be lodged is from the date of the decision from which an appeal is intended, and not from the date against which proceedings before the trial court are concluded. There was nothing to stop the applicants from filing their notice of appeal from the decision dated 9th March 2023 and thereafter proceed to file and prosecute their desired application before the trial court. They instead elected to file an application for reinstatement of their suit as opposed to initiating the appeal process. I am not convinced that the reasons advanced by the applicants for their delay in lodging their notice of appeal, the memorandum of appeal and record of appeal are plausible. By electing to file an application for reinstatement of the suit as opposed to initiating the appeal process, the applicants were in essence making their bed, they now must lie on it.

13. In *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“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 favor. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”

14. As the reason for the delay has not been satisfactorily explained by the applicants, it would be superfluous for me to apply my mind to the other factors to be considered in applications of this nature. In the result, I decline to exercise my discretion to grant the prayer for extension of time. Accordingly, I dismiss the application dated 27th September 2023. Since no response has been made to the application, I shall make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

