



Seventh Day Adventist Limited v Muslim Mosque Committee & 2 others (Civil Application E138 of 2021) [2022] KECA 100 (KLR) (11 February 2022) (Ruling)

Neutral citation: [2022] KECA 100 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E138 OF 2021
F TUIYOTT, JA
FEBRUARY 11, 2022**

BETWEEN

SEVENTH DAY ADVENTIST LIMITED APPELLANT

AND

MUSLIM MOSQUE COMMITTEE 1ST RESPONDENT

KISUMU MUSLIM ASSOCIATION 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

(Being an application for extension of time to lodge and serve Notice of Appeal & Record of Appeal from the judgment of the Environment & Land Court of Kenya at Kisumu (A. O. Ombwayo, J) dated 23rd October, 2020 in Kisumu Environment and Land Case No. 25 of 2018)

RULING

1. On 23rd October, 2020 the Hon. Justice Ombwayo of the Environment and Labour Court delivered a judgment in Kisumu ELC Case No. 25 of 2018 Kaloleni Muslim Mosque Committee & Another vs Seventh Day Adventist Limited & Another.
2. Dissatisfied with that decision, Seventh Day Adventist Limited (The Applicant) filed a notice of appeal dated 26th October 2022 under rule 75 of the *Court of Appeal Rules* (the rules) and which was received on the same day by the Environment and Land Court at Kisumu. Thereafter, the applicant filed an application for stay of that decision before the same Court.
3. It is now clear that the applicant did not take certain essential steps towards instituting the appeal and now moves this Court through a Notice of Motion dated 5th October, 2021 for grant of extension of time to lodge and serve a Notice of Appeal and Record of Appeal from the said judgment.



4. It is explained for the applicant, in affidavit sworn on 1st October, 2021 by Titus Apindi, that its previous advocates advised it that it needed to first apply for stay of execution before filing of a record of appeal. That it acted on this advice and so it still awaits the outcome of the application for stay of execution.
5. It is further averred that since the filing of the application for stay of execution and the Notice of Appeal, the applicant has lost touch with the advocates on record and that attempts to have them file the appeal has been futile. The applicant alludes to a strained relationship between it and its previous associates and breakdown of communication on the status of the Appeal. It now has other counsel, messers Okumu, Miyawa and Wamwara Advocates. The applicant states that the delay in lodging the Notice and Record of Appeal was caused by lack of communication by previous advocates in extracting and informing them of the judgment.
6. The Court is told that thousands of members of the applicant's community will be greatly impacted if the extension is not granted.
7. The 1st respondent resists the application and contends that the delay is inordinate and not properly explained. The respondent also makes various arguments in the non-arguability of the intended appeal. I need not rehash those arguments for reasons that become apparent shortly.
8. Rule 75 requires that any person who desires to appeal to this Court from the decision of a superior court to give notice of such intention in writing and which notice shall be lodged in duplicate with the registrar of the superior court. Rule 75 (2) provides: -

“Every such notice shall subject to rules 84 and 97, be so lodged within fourteen (14) days of the date of the decision against which it is desired to appeal.”
9. The judgment sought to be appealed against was delivered on 23rd October, 2020. Shown to this Court is a Notice of Appeal lodged just three days later, on 26th October 2020, with the Environment and Land Court Kisumu. I am unable to see an infringement of rule 75 (2) and it is unclear why an extension is sought for lodging of the Notice of Appeal.
10. Regarding when the Notice of Appeal ought to be served on persons affected rule 77 (1) reads:

“(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:
Provided that the Court may on application, which may be made ex parte, within seven days after lodging the notice of appeal, direct that service need not be effected on any person who took no part in the proceedings in the superior court.”
11. Again it is unclear whether the applicant failed to keep this timeline. There is therefore a degree of confusion in the application. What I am able to glean from it, however, is that the applicant has breached the period within which a record of appeal ought to be filed.
12. Rule 82 makes provision for institution of appeals and reads: -

“(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

 - (a) a memorandum of appeal, in quadruplicate;



- (b) the record of appeal, in quadruplicate;
- (c) the prescribed fee; and
- (d) security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time s may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.
- (3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.”

13. The length of the delay; reason for the delay; the degree of prejudice to the respondent if the application is granted and, possibly, the chances of the intended appeal are some of the considerations that the Court must bear in mind in determining an application for extension of time under rule 4. See, for example, *Fakir Mohamend vs. Joseph Mugambi & 2 Others* [2005]eKLR

14. For the reason that the applicant does not state, or at least prove that it bespoke proceedings within thirty days of the decision as contemplated by rule 82 (1), it would have been required to institute the appeal within sixty days of the lodging of the Notice of Appeal. As the Notice of Appeal was lodged on 26th October, 2020, the Appeal ought to have been instituted on or before 4th January, 2021 (this period has been reckoned by excluding the christmas vacation as required under rule 3). It is about 9 months from that date to the date of the filing of the application. On the face of it this delay is lengthy. Whether it is inordinate depends on the explanation given for the delay. The only reason advanced or attributed for this is the,

“... lack of communication by previous advocate in extracting and informing them of the judgment and is in no way negligent nor intentional.”

15. But as correctly submitted by counsel for the 1st respondent, both the applicant and its counsel had a soft copy of the judgment which was annexed to the application for stay dated 23rd October, 2020. The applicant was well aware of its content. Second, it has not been demonstrated that it made any attempts to inquire about the progress of the intended appeal from its advocates. The applicant must share the blame for any lethargy or inaction in the institution of the appeal by its advocates. I find no merit in the application and need not consider the other principles applicable in the grant or refusal for extension of time. The application of 5th October, 2021 is hereby dismissed with costs.

DATED AND DELIVERED IN KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

F. TUIYOTT

.....
JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

