



Southend Motors Ltd v Amalgamated Union of Kenya Metal Workers (Civil Appeal E627 of 2021) [2022] KECA 449 (KLR) (18 March 2022) (Ruling)

Neutral citation: [2022] KECA 449 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E627 OF 2021
K M'INOTI, JA
MARCH 18, 2022**

BETWEEN

SOUTHEND MOTORS LTD APPLICANT

AND

AMALGAMATED UNION OF KENYA METAL WORKERS RESPONDENT

(Application for extension of time to file Record of Appeal out of time from the Judgement and Decree of the Employment and Labour Relations Court (Onyango, J.) date 11th December 2020 in ELRC Petition No. 2232 of 2017)

RULING

1. Although the heading of the application before me indicates that it seeks stay of execution of the judgement and decree of the Employment and Labour Relations Court dated 11th December 2020, the body of the application indicates that it seeks extension of time to file a notice of appeal from the same judgment. Of the grounds set out on the face of the application in support of the prayer for extension of time, the only relevant ground states that:

3. The said non-compliance with the Rules aforesaid was due to a delay caused by circumstances beyond the control of the applicant or its advocates.”

In trying to decipher the circumstances that are said to have been beyond the applicant or its advocates, I turned to the 15- paragraph supporting affidavit sworn on 19th October 2021 by Marie Atieno Luseno, the managing director of the applicant. The entire affidavit is a lament of why and how the impugned judgment is wrong and says absolutely nothing on why the applicant did not file the notice of appeal within the prescribed time.



2. The only place one finds a semblance of an explanation is in the submissions, where it is casually stated:

“In summary the appellant’s submissions is that the appellant is aggrieved with the judgment of the trial court, an instructed counsel to lodge an appeal against the said judgment but I inadvertently failed to file the notice of appeal and memorandum of appeal prompting the filing of the application under consideration.” (Emphasis added).

3. It is not readily apparent who the “I” in the above paragraph is, because the submissions are signed corporately by Kasamani & Associates Advocates. The explanation for delay should be in an affidavit, that is to say, a solemn statement made under oath. It cannot be in submissions by an unidentified person purporting to take responsibility for inadvertence. The rest of the submissions dwell on the principles that guide the court, which are not in doubt.

4. The respondent opposed the application vide a replying affidavit sworn on 12th November 2021 by Rose Ouma Omamo who states that the application is based on irrelevances which do not explain the reason for the delay in filing the notice of appeal. In its written submissions, the respondent point out that the intended appeal is against a default judgment which the applicant unsuccessfully challenged by way of review. It is the respondent’s view that having failed in the application for review, the applicant has no automatic right of appeal against the same judgment. The respondent adds that in any event, the applicant has not given any explanation for delay.

5. I have considered this application. It is trite that the discretion of the Court in extending time is wide and unfettered, although it must be exercised judiciously rather than whimsically. In *Fakir Mohamed v. Joseph Mugambi & 2 Others, CA No. Nai. 332 of 2004* the approach of the Court in the exercise of discretion to extend time was explained as follows:

“The exercise of this Court’s discretion under rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors ...”

6. Turning to the application before me, the judgment that the applicant seeks to appeal was delivered on 11th December 2020. The application for extension of time to file a notice was made on 19th October 2021, after the lapse of a period of 10 months. In my view, that is inordinate delay, granted that the rule 75(2) of the *Court of Appeal Rules* requires the notice of appeal to be filed within 14 days from the date of the decision challenged. Again, it must be emphasised that drawing and filing a notice of appeal is not a complex exercise. The notice of appeal is normally a one-page document.

7. Be that as it may, delay alone will not disentitle the applicant to the remedy of extension of time, so long as it is explained. In *Abdulkadir Atbman Salim Elkindy v Dpp & Another, Civil Application No. 198 of 2017*, it was stated:

“...extension of time is not a right of a party. It is a discretionary remedy that is only available to a deserving party. The applicant is therefore obliged to place before the court some plausible material explaining the reason for failure to comply with the rules and for any delay occasioned, not the least because expeditious resolution of dispute is a constitutional



value and principle which would otherwise be undermined by unexplained or inexcusable dilatoriness.”

On this score, I am afraid there is no explanation. In *Rajesh Rughani v. Fifty Investment Ltd & Another [2005] eKLR*, the Court reiterated that if the advocate is simply guilty of inaction, that is not excusable mistake which the Court may consider with some sympathy. To make matters worse in this case, the advocate whose inadvertence is relied upon is neither disclosed, nor has he sworn an affidavit to explain the delay. All that is presented are bare and fleeting statements in submissions, which are not depositions.

8. In the event, I am satisfied that the inordinate delay is not explained. I find no merit in this application and the same is dismissed with costs to the respondent. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF MARCH 2022.

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

