



REPUBLIC OF KENYA



KENYA LAW

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**Kalakacha v Mini Bakeries (N) Limited (Civil Application
E162 of 2021) [2022] KECA 735 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 735 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E162 OF 2021**

F TUIYOTT, JA

APRIL 28, 2022

BETWEEN

WCLIFFE INGOSI KALAKACHA APPLICANT

AND

MINI BAKERIES (N) LIMITED RESPONDENT

*(Being an appeal from the judgment & decree of the High Court of Kenya at Eldoret,
(Abuodha Jorum Nelson, J) in ELRC Cause No. 89 delivered on 14th May, 2020)*

RULING

1. In an application dated 26th November, 2021 and said to be brought under [Rules](#) 1 (2), 4 of the Rules of this Court and Article 159 (2) of [the Constitution](#),
I am asked to extend the period limited for filing and serving a Memorandum of Appeal.
2. Hon. Justice Abuodho Joram Nelson delivered a judgment on 14th May, 2021 in Eldoret ELRC Court Cause No. 89 of 2017. Wycliffe Ingosi Kalakacha, the applicant, is aggrieved by that judgment. It is not disputed that his advocates on record in the superior court, Lusinde Khayo & Co. Advocates filed a Notice of Appeal and lodged a copy of it at the ELRC Registry at Eldoret on 27th May, 2020. Five days earlier, on 22nd May, 2020, the same advocates had written to the Deputy Registrar of that Court seeking the supply of signed and certified copies of proceedings and judgment for appeal purposes.
3. In an affidavit sworn on 26th November, 2021 and in support of the motion, the applicant alludes to efforts made by his advocates in following up the copies of proceedings. He states that at the time, the Court file could not be traced. Attached to his affidavit are copies of written communication in which the advocates seek to know the progress of proceedings, the last being that of 19th October, 2021.
4. The applicant states that it was only on 22nd November, 2021 that his advocate received a call from the registry informing her that the file had been traced and typed proceedings were ready for collection.



5. Reacting to the application, the respondent, through Thomas W. Mwaura, head of legal, compliance and administration, takes the view that the application is unmerited because even the Notice of Appeal and letter requesting for proceedings were served out of time. Further that, although the applicants wrote to the court inquiring on the progress of the proceedings certain periods are not explained; 16th July, 2020 to 12th November, 2020, 12th November, 2020 to 5th May, 2021, 5th May, 2021 to 19th October, 2021. The respondent adds that there is no evidence that the said proceedings were only made available on 23rd November, 2021.
6. I have read the rival arguments made by counsel for the parties.
7. The power to extend time granted to this Court by Rule 4 of the Rules of this Court is discretionary and although wide and unfettered, should always be exercised judiciously. To guide that discretion are certain considerations which a judge ought to bear in mind. These include; the length of delay, the reasons for delay, the prejudice, if any, the respondent may suffer if leave is granted and, possibly, the chances of success of the intended appeal.
8. I must start by observing that in the motion before court, the applicant seeks expansion of time for the filing of the memorandum of appeal and record of appeal. He does not seek any other order. Yet, even if I was to grant orders sought, something still haunts him.
9. Desirous of appealing against the decision of the ELRC, the applicant gave notice in writing and lodged a copy of it with the superior court on 27th May, 2020. Rule 77 is on service of a Notice of Appeal on all persons affected by it and 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.
 2. Where any person required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the Superior Court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on him at that address, notwithstanding that it may be that of an advocate who has not been retained ore the purpose of an appeal.”
10. It is common ground that the Notice of Appeal was served on counsel for the respondent on 9th June, 2020, out of time as the deadline was on 3rd June, 2020. No application has been made by the applicant to remedy that breach notwithstanding the clearest indication from counsel for the respondent, as early as the date of service, that the late service was protested (See copy of letter of 9th June, 2020 from counsel of Respondent to counsel of Applicant).
11. Returning to the specific request before court, the applicant explains the delay in filing the memorandum of Appeal and record of appeal on his advocates’ inability to timeously obtain copies of proceedings. The applicant blames the court registry for that delay, including its inability, at some point to trace the court file.
12. The applicant then depones that it was not until 22nd November, 2020 that the court registry got in touch with his advocates through a call, presumably a telephone call, informing her that the



proceedings were now ready for collection. Never mind that it is curious that the advocate herself did not swear an affidavit in respect to such a crucial matter. The point, however, is that having, in writing, sought copies of those proceedings within the time stipulated by Rule 82 (1) and having served a copy of that request on counsel for the respondent as required by Rule 82 (2), then the applicant should have obtained the certificate of delay contemplated by Rule 82 (1).

13. Rule 82 on institution of appeal reads: -

“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 as 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.”

14. If indeed the delay in obtaining a copy of proceedings was attributable to the ELRC, then the Registrar of that Court should have issued the certificate contemplated by Rule 82 (1) and the time said to have been consumed in preparing the recording, including tracing the file, would have been excluded from the computation of the time within which the appeal is to be instituted. The applicant does not explain why, if it is true that proceedings were ready for collection only on 22nd November, 2021, he did not seek and obtain the certificate of delay.

15. Absent that explanation, I am unable to find merit in the motion before me which may very well have been stillborn as the Notice of Appeal was not served as required by the rules of this Court. The application of 26th November, 2021 is hereby dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

