



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Wildlife Service v Sea Star Malindi Limited (Civil Application
E043 of 2021) [2022] KECA 513 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KECA 513 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E043 OF 2021**

P NYAMWEYA, JA

MAY 6, 2022

BETWEEN

KENYA WILDLIFE SERVICE APPLICANT

AND

SEA STAR MALINDI LIMITED RESPONDENT

*((An application for extension of time to file a Record of Appeal
against the judgment in the Environment and Land Court at Malindi
(Olola J) delivered on 31st July 2018 in ELC Case No. 56 of 2016))*

RULING

1. The application before this Court is a Notice of Motion dated 25th May 2021, which is filed by Kenya Wildlife Service (“the Applicant”) under Rule 4 of the *Court of Appeal Rules 2010*. The Applicant seeks extension of time for a period 30 days from the date of the order given by this Court, to file an appeal against the judgment delivered in *Sea Star Malindi Limited vs Kenya Wildlife Service - Malindi ELC Case No 56 of 2016*. The application is supported by an affidavit sworn on 25th May 2021 by Benta Musima, the Applicant’s Legal officer.
2. The Applicant’s grounds for the application are that the time of filing the Notice of Appeal was extended on 8th October 2019 by an order of the Environment and Land Court (ELC), which deemed the Notice of Appeal filed on 28th December 2018 to have been filed within time. The Applicant thereafter requested for and followed up on the certified typed proceedings from the ELC by letters dated 5th November 2018 and 30th April 2021, but has not been successful in obtaining the said proceedings, despite offering to type the handwritten proceedings. Further, that the decretal sum of Kshs 2,147,383,922.40 is a colossal sum, and if the Respondent commences execution, it will cripple the Applicant’s functions of conservation and management of parks which are funded by the Kenyan taxpayer.



3. The Applicant concluded that it would therefore suffer grave prejudice if it is not allowed to pursue its right to appeal. The Applicant annexed copies of the impugned judgment delivered by the ELC (Olola J.) on 31st July 2018, the decree issued therein on 9th November 2018, the ruling dated 8th October 2019 by Olola J. extending time for lodging of the Notice of Appeal, the letters dated 5th November 2018 and 30th April 2021, and of the draft Memorandum of Appeal.
4. The Respondent, Sea Star Malindi Ltd, filed a replying affidavit in response to the application, sworn on 31st of January 2022 by its Director, Michele Marchioro. According to the Respondent, no plausible reason has been given by the Applicant as to why, two years since the granting of leave to file the Notice of Appeal out of time, it had not steps taken to move the appeal forward. Further, that the letters dated 5th November 2018 and 30th April 2021 were in contravention of Rule 82 (2) of the Court of Appeal Rules, as they were neither copied nor served on the Respondent. The Respondent disputed the accuracy of figures cited by the Applicant as the decretal sum, and averred that the it continued to be denied the just fruits of the judgment since the Applicant had not offered to deposit the decretal sum as a sign of its good faith.
5. Thus, that the instant application was a delaying tactic, especially in light of the fact that two of the Respondent's three directors were octogenarians and the Applicant's intention is therefore to permanently deny them justice. Lastly, that this matter had been in the High Court for over 20 years and the Respondent had suffered substantial financial loss in litigating the case, and shall suffer great prejudice if the application is allowed, as it will amount to rewarding the unjust conduct of the Applicant.
6. The hearing of the application was held on 9th of February 2022, and learned senior counsel Mr. Kiragu Kimani and learned counsel Mr. Titus Mugambi appeared for the Applicant, while learned counsel Mr Kevin Anami and Mr Njenga represented the Respondent. While relying on submissions dated 4th February 2022, counsel for the Applicant made reference to the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commissions & 7 others* [2014] eKLR for the principles that the Court should consider in exercise of its discretion to extend time under Rule 4 of the Court of Appeal Rules, and urged that the Applicant had met the test for the grant of the order sought. The reasons cited were that the Applicant did not receive the notice of delivery of the judgment and continued to follow up the release of the proceedings after obtaining the extension of time to lodge its Notice of Appeal; that the instant application was made without delay once this oversight came to light; that no prejudice would be suffered by the Respondent if time was extended; and that the Respondent had not applied to strike out the Notice of Appeal.
7. The counsel pointed out that the Notice of Appeal was admitted by the High Court on 28th December 2018, and the request for typed proceedings was made in time on 5th November 2018 before the filing of the Notice of Appeal, which proceedings have not been supplied. In addition, that the failure to serve the Respondent with the letter requesting for proceedings was an excusable mistake on the part of the counsel previously on record for the Applicant that should not be suffered by the client, and reliance was placed on the case of *Philip Kepto Chemwolo & another vs Augustine Kubende* [1986] eKLR for this submission.
8. Consequently, that the Applicant has complied with the prerequisites of instituting an appeal save for service of the request for proceedings on the Respondent; had exhibited a draft memorandum of appeal to demonstrate the arguability of its appeal challenging the award made by the ELC; and was deserving of the exercise of court's decision in its favour. Mr. Kiragu urged that the new dispensation of the Court is to give every party its day in court despite any mistakes made, so long as it did not prejudice the other party.



9. On his part, Mr Anami relied on written submissions dated 4th February 2022, and with regards to the issue of delay in filing and lodging of the appeal, placed reliance on the cases of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and *Imperial Bank Limited (In receivership) & another v Alnashir Popat & 18 others* [2018] eKLR for the position that any delay should be satisfactorily explained in light of the considerations to be taken into account in the exercise of the Court's discretion.. It was his submissions that the Applicant had not offered a plausible, coherent and satisfactory explanation for the delay in filing and lodging the appeal, and had not demonstrated the steps it had taken in preparing for the appeal from November 2018, or indicated whether the Record of Appeal was ready for filling.
10. Therefore, that the extraneous facts about the importance of the Applicant's work in wildlife management and conservation could not cure the misconduct in prosecuting any cause of action before this Court. In addition, that the Applicant failed to comply with the mandatory provisions of Rule 82 (2) of the Court's Rules, and cannot therefore rely on Rule 82 (1) as an anchor and lifeline as held in *County Government of Mombasa vs Kooba Kenya Limited* [2019] eKLR .
11. Mr. Anami referred to various parts of the impugned judgment of the ELC which he submitted adequately answered the grounds raised in the Applicant's intended appeal, and submitted that nothing was more prejudicial than the possibility of the Respondent's directors dying before to enjoying the fruits of their judgment. He concluded that the Applicants were uninterested in the case and hoped to outrun the Respondents.
12. In reply, Mr Kiragu submitted that the Respondent was a limited liability company and the age of the directors was not a matter before the Court. In addition, that the contest on quantum of the decretal sum and the interim measures to address the prejudice likely to be suffered by the Respondent cannot be considered in application for extension of time.
13. I have considered the arguments put forth by the counsel for the Applicant and Respondent, and the principles governing the exercise of discretion in application for extension of time under Rule 4 of the Court of Appeal Rules, which were well stated in the case of *Leo Sila Mutiso v Rose Hellen Wangare Mwangi* Civil Application No Nai 255 of 1997 (ur) as follows:

“It is now well stated that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are:

First, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted”
14. I have also considered the context of the application, which arises from a suit by filed by the Respondent in the ELC seeking to restrain the Applicant from interfering with the Respondent's construction of an intended hotel or the use of its property being LR No 3170 Malindi, and damages arising from the stoppage by the Applicants of ongoing construction on the property. The Applicant on the other hand claimed that the said property was public land, and that it was justified to stop construction thereon which was being undertaken on a legally protected area that is adjacent to the area designated as Malindi Marine National Reserve and Park.
15. The trial Judge found that some of the prayers sought and question of the Applicant's liability had been dealt with in an earlier suit filed by the Respondent in Nairobi HCCC Misc. Application No 982 of 1997 - *Sea Star Malindi Ltd vs Kenya Wildlife Service*, in which the decision of the Applicant restraining



the Respondent from constructing the hotel on the suit land had been quashed. While noting that Respondent was the registered owner of the property, and that the only outstanding question before it was that of quantum of damages, the trial Judge awarded the Respondent Kshs 90,000,000/= being the cost of the reconstructions of the hotel and general damages of Kshs 30,000,000/= with interest at commercial bank rates until payment in full and costs of the suit.

16. Aggrieved, the Applicant thereupon lodged its Notice of Appeal, and the instant application. The applicable legal provision as regards the timeline for filing of the record of appeal is Rule 82(1) of the Court of Appeal Rules, under which the record ought to have been filed within 60 days from on 28th December 2018 when the Applicant lodged his Notice of Appeal. There is however a proviso to Rule 82(1) which states 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". Sub-rule (2) requires the application to be in writing and served upon the respondent.
17. The Applicant has in this respect provided copies of the letters requesting for typed proceedings 5th November 2018 and 30th April 2021, and also annexed a copy of the ruling dated 8th October 2019 extending time to file their Notice of Appeal which was lodged on 28th December 2018 as evidence of the steps it has taken in prosecuting its appeal. The material delay in this regard is therefore in three respects. Firstly, the delay in requesting for the typed proceedings between 31st July 2018, which was the date of delivery of the impugned judgment, and 5th November 2018, when the first request was sent to the ELC by the Applicant. The Applicant has pleaded that they did not have notice of the date of delivery of the impugned judgment, which is not disputed by the Respondents.
18. Secondly, is the delay between 5th November 2018 and 30th April 2021 respectively and the date of the instant application in serving the Respondent with a copies of the letters requesting for proceedings. The Applicant concedes to the lack of service and while seeking the Court's indulgence, attributes the mistake to its previous advocates. However, according to the Respondent, service is a mandatory requirement and non-compliance disentitles the Applicant from the exercise of this Court's discretion. Lastly is the delay in the lodging the record of appeal between 28th December 2018 when the Notice of appeal was lodged, and the date of the instant application, which the Applicant attributes to the non-availability of the typed proceedings, which fact is not disputed by the Respondent. The Respondent however assails the Applicant for its indolence.
19. On the whole I find that the reasons have been proffered by the Applicant for the various delays which are reasonable, and the Applicant has demonstrated the steps it has taken in moving its appeal. The delay is therefore excusable and not inordinate. In addition, the effect of the delays and lapses in the request for proceedings and service on the Respondent under Rule 82 is in my view not fatal, and can be addressed and remedied by this Court taking into account the wide powers and discretion granted under Rule 4 as to the terms on which an extension of time can be granted, and the overriding objectives in Article 159 of the Constitution of substantive justice, and in section 3A of the Appellate Jurisdiction Act of the just, expeditious, proportionate and affordable resolution of disputes.
20. On the chances of the intended appeal succeeding, the counsel for the Applicant listed the arguable points of its intended appeal in the draft memorandum of appeal that was annexed to the application as being whether the trial Court could wholly rely on the decision in Nairobi HCCC Misc. Application No 982 of 1997 - *Sea Star Malindi Ltd vs Kenya Wildlife Service* to make a finding on the Applicant's liability; whether the claim for the cost of reconstruction was in the nature of general damages or were



special damages which required to be specifically pleaded and strictly proved; whether the headings of loss of profit and out of pocket expenses could be awarded as general damages; whether the award of Kshs 30,000,000/ as general damages was excessive; and whether there was legal basis for the award of interest.

21. Mr. Anami made a spirited effort to discount the cogency of the said grounds of appeal, but this Court cannot at this stage make any findings one way or another as regards the sufficiency of the said grounds. All I need to be persuaded on in this application is that the Applicant has demonstrated the existence of plausible grounds of appeal, and I am of the view that the grounds it has posited reasonably arise from the impugned judgement.
22. Lastly, the Respondent has pointed out the prejudice it has suffered in the delay in resolving the dispute between it and the Applicant, and in realising the benefits of its judgment. It is my view that there are interventions that are available to mitigate and address any prejudice in this regard during the pendency of an appeal, and that this is the more appropriate course of action in balancing the interests of both parties and in the interests of substantive justice in the circumstances.
23. I therefore find that the Applicant merits the exercise of this Court's discretion in its favour for the above stated reasons. I accordingly allow the Applicant's Notice of Motion dated 25th May 2021, and grant the Applicant extension of time to file and lodge its record of appeal on the following terms:
 - a. The time for requesting for proceedings is hereby extended and the letters requesting for proceedings dated 5th November 2018 and 30th April 2021 are deemed to be properly on record.
 - b. The Applicant shall serve the Respondent with the letters requesting for proceedings dated 5th November 2018 and 30th April 2021 within 30 days from the date of this ruling.
 - c. The Applicant shall file and serve its record of appeal within 30 days from the date of this ruling.
 - d. The Applicant shall meet the costs of this application.
24. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

