



Makokha & 2 others v Center Star Company Limited (Miscellaneous Civil Application E059 of 2021) [2022] KECA 744 (KLR) (10 June 2022) (Ruling)

Neutral citation: [2022] KECA 744 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E059 OF 2021
A MBOGHOLI-MSAGHA, JA
JUNE 10, 2022**

BETWEEN

BENARD MAKOKHA 1ST APPLICANT

CLEMENT PENJO 2ND APPLICANT

DANIEL MIGIRE 3RD APPLICANT

AND

CENTER STAR COMPANY LIMITED RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court at Nairobi by (Mbaru J.) in Cause No. 2177 of 2016)

RULING

1. By an application dated 23rd February, 2021 the applicants have moved the court under Rule 4 of the Court of Appeal Rules and Article 159 (2) (d) of the Constitution for an order that leave be granted to file their memorandum of appeal out of time and the same be deemed to be properly on record.
2. The application is supported by the affidavit of Clement Penjo, the 2nd applicant. There are also submissions filed on behalf of the applicants. There is no reply either by way of replying affidavit or submissions on behalf of the respondent despite a notice served by the court on 18th May, 2022. The applicants filed their submissions dated 21st May, 2022 in compliance with that notice. There is an obvious typographical error in the 1st paragraph of the said submissions in that the decision of the Superior Court was delivered on 23rd October, 2019 and not 2021.
3. Thereafter the applicants, who were then acting in person, lodged a notice of appeal dated 6th November, 2019. A copy of that notice annexed to the application shows that it was served upon the advocates for the respondent on 11th November, 2019. However, no record of appeal was filed thereafter hence this application.



4. There is no evidence that the applicants applied for proceedings and judgment of the Superior Court, at least from the documents annexed to this application. Had this been done, a copy of the letter would be part of the documents filed herein. There is also no certificate of delay issued by the Registrar as would be the case where proceedings are delayed.
5. The court is bound to consider the length of delay, the reasons for such delay, whether or not there will be any prejudice to the other party, and if there is an arguable appeal. -see *Leo Sila Mutiso vs. Hellen Wangari Mwangi* (1999) 2 EA 231.
6. In the case of *Andrew Kiplangat Chemaringo vs. Paul Kipkorir Kibet* (2018) e KLR, the court addressed the subject of delay and observed that the law does not set out what is minimum or maximum period of delay, provided that any delay should be satisfactorily explained. The court's discretion is hinged on plausible and satisfactory explanation. Reasons for any delay should be valid and clear to justify a favourable exercise of such discretion.
7. The present application was filed after one year and four months from the date the Superior Court judgment was delivered. From the affidavit in support of the application, the applicants blame the restrictions imposed following the onset of the Covid 19 pandemic. It is their case also that, they were unable to raise funds in good time to prosecute the appeal.
8. Granted, the pandemic disrupted lives in many ways. However, the applicants have not explained how this impacted upon them in such away that they could not pursue their rights. They also have not mentioned what efforts they applied to raise funds or at least contact a lawyer all that while. The delay of one year and four months was inordinate and has not been satisfactorily explained.
9. Having said so, I do not wish to address the issue of whether or not the appeal is arguable.
10. The application has failed the threshold required and therefore the same is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

