



Trustees of the Lutheran World Federation v Latimer Ruguru Gacanja t/a Zoea Transporters Ltd (Civil Application E054 of 2021) [2022] KECA 1165 (KLR) (28 October 2022) (Ruling)

Neutral citation: [2022] KECA 1165 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E054 OF 2021
JM MATIVO, JA
OCTOBER 28, 2022**

BETWEEN

TRUSTEES OF THE LUTHERAN WORLD FEDERATION APPLICANT

AND

**LATIMER RUGURU GACANJA T/A ZOEAL TRANSPORTERS
LTD RESPONDENT**

(n application for leave to lodge a Notice of Appeal out of time and for stay of execution of the judgment and decree in Nairobi High Court Civil Suit No. 668 of 2001 delivered on 15th December 2021, (Sergon J)inHCC No. 668 of 2001)

RULING

1. *Vide* its application dated April 3, 2022, the applicant seeks leave to lodge the Notice of Appeal dated February 28, 2022 out of time against the judgment and decree delivered in High Court Civil Suit No 668 of 2001 on December 15, 2021 (Sergon J). It also prays for stay of execution of the said judgment/decree pending the hearing and determination of its intended appeal by this court. Lastly, it prays that the costs of the application abide by the outcome of the appeal.
2. The grounds in support of the application are that:- (a) judgment was delivered virtually on December 15, 2021 in favour of the Respondent; (b) even though the judgment shows an advocate held brief for the applicant's advocate, the record does not show whether the parties were present; (c) the applicant's advocate learnt about the judgment in February 2022 at the registry, hence the failure to file a Notice of Appeal; (d) the applicant is aggrieved by the judgment and desires to exercise its right of appeal; (e) if stay is not granted, the applicant will be prejudiced; (f) the applicant is willing to deposit security; (g) the stay is necessary to preserve the subject matter of the suit.
3. The Respondent did not file a reply to the application nor has he filed submissions. I note from the e-file that there is a letter written by the respondent's advocate claiming that he had not been served



with the applicant's submissions. There is also a letter from the applicant's counsel claiming that service was done. When this matter came up before me on September 21, 2022, I noted that the respondent was yet to file a response or submissions and I directed that parties be notified to comply and reserved the ruling date. As at the time of writing this ruling, the Respondent's reply and submissions had not been filed, so I wrote this ruling without the benefit of the respondent's reply and submissions.

4. The applicant argued that it has provided sufficient reasons for the failure to file the Notice of Appeal. (Citing *Visbastone Suppliers Ltd v RSR Stone (2006) Limited* [2020] e KLR; *Stanley K. Mwenda v Cyprian Kubai* [200] e KLR, *Sndrew Kiplangat Chmaringo v Paul Kipkorir* [2018] e KLR and *Athuman Nusura Juma v AfwaMohamed Ramadhan* [2016] e KLR. It argued that it had demonstrated that it has an arguable appeal and that unless the stay is granted, its appeal will be rendered nugatory.
5. Rule 4 of the *Court of Appeal Rules*, 2022 provides as follows: -

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.
6. The principles that guide the exercise of jurisdiction under the above Rule are 4 are well settled. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* {2014} e KLR summed up the applicable considerations as follows: -
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
7. An applicant for extension of time to file a Notice of Appeal out of time must show good reasons for the delay, and, *prima facie* good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.
8. The word "may" is deployed in Rule 4 is merely permissive and intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of *bona fide* is imputable. There can be instances where the court should tolerate a delay. Equally there would be cases where the court must exercise its discretion against an applicant for want of any of the required ingredients or where it does not reflect "good cause" as understood in law. The phrase means adequate



enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men.

9. The “good cause” should be such as it would persuade the court, in exercise of its judicial discretion, to treat the delay as an excusable one. Rule 4 gives the court enough power and discretion to apply the law in a meaningful manner, while assuring that the purpose of enacting such a law is not frustrated. The test is whether or not a cause is good enough that it could not have been avoided by the person by the exercise of due care and attention.
10. Filing an appeal or a Notice of appeal within the prescribed period is the rule and condonation of delay is an exception. While condoning the delay, the courts must be cautious and only on genuine reasons, the courts are empowered to condone the delay. The power of discretion to condone the delay is to be exercised judiciously. The main reason offered by the applicant is that his advocate was not aware of the date the judgment was delivered and only learnt about its delivery in February this year. However, in the judgment, an advocate is shown to have held brief for the applicant’s counsel. This being the position, I am not satisfied that the delay has been sufficiently explained.
11. Prayer (1) having failed, I find no reason to address the prayer for stay. The upshot is that I hereby dismiss the applicant’s application dated March 3, 2022 with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

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J. MATIVO

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

