



Mereka & Co. Advocates v New Cooperative Kenya Creameries Limited (Civil Appeal (Application) E034 of 2021) [2022] KECA 1150 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1150 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E034 OF 2021
AK MURGOR, JA
OCTOBER 21, 2022**

BETWEEN

MEREKA & CO. ADVOCATES APPLICANT

AND

NEW COOPERATIVE KENYA CREAMERIES LIMITED RESPONDENT

(An application for leave to extend time to file an appeal against the ruling and orders of High Court at Nairobi (Njuguna, J.) delivered on 22nd November 2018 in Makueni ELC No.1 of 2019)

RULING

1. By a Notice of Motion dated 8th January 2021, brought pursuant to sections 3A and 7 of the [Appellate Jurisdiction Act](#), rule 4 of this Court's rules and Article 48 of [the Constitution](#), the applicant, Mereka & Company Advocates, seek (i) leave for time to be extended for filing of a memorandum and record of appeal out of time. The motion is premised on the grounds on its face and the supporting affidavit of David Mukii Mereka sworn on even date where it was contended that, the applicant filed a notice of appeal dated 3rd December 2018 against the ruling of the High Court delivered on 22nd November 2018; that it applied for and obtained the certified copies of the proceedings and was provided with a Certificate of delay dated 9th August 2019.
2. The applicant contended that it was unable to find a record of appeal within the 60 day period from the date of the certificate of delay firstly, due to absence from the office for medical reasons in the years 2019 and 2020; that in this regard, the deponent relied on two letters dated 24th October 2020 from Park Eye Centre and from the Urology Centre dated 15th January 2021 where it was deposed that he underwent a prolonged medical procedure and only resumed on 2nd February 2021; that secondly, his assisting counsel, Mr. Ian Mwititi went to South Africa for further studies between January 2019 and December 2019, and that thirdly, the onset of the Covid 19 pandemic from March 2020 to present day kept senior persons with pre-existing conditions, like the deponent, out of the office, which was



then temporarily closed. It was further contended that the intended appeal was arguable with a high probability of success, and that it was only fair and just that leave is granted to enable it to prosecute his appeal.

3. Though served with the hearing notice, there was no appearance from the respondent, and neither did they file any written submissions.
4. Under rule 4 of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if the extension was not grant. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997*.
5. On the period of delay and the reason for delay, the ruling was delivered on 22nd November 2018 and this motion was filed on 18th January 2021. The delay would therefore be computed as a period of 24 months.
6. Has the delay been explained? The applicant stated that after the decision was rendered, it sought for and obtained the certified proceedings together with a Certificate of delay dated 9th August 2019 specifying a period of 237 days from 4th December 2018 to 29th July 2019, which would explain the delay for that period. Therefore, from 29th July 2019 to 18th January 2021 when this motion was filed, there is a further 536 days delay that the applicant will be required to explain.
7. To begin with, it was explained that the deponent was absent from the office for medical reasons in the years 2019 and 2020. Though the letter from the Urology Centre dated 15th January 2021 was not attached, the letter from Park Eye Centre indicated that the deponent was advised to take sick off from work until the end of October 2020, by which time he would have fully recovered. The deponent did not resume work until February 2021 and no reasons were provided for the failure to file the record of appeal after October 2020.
8. Secondly, another reason for the delay was that Mr. Ian Mwiti, assisting counsel had proceeded to South Africa between January 2019 and December 2019 for further studies. No evidence was supplied in support of this explanation.
9. Finally, it was contended that the delay was occasioned by the onset of the COVID-19 pandemic in March 2020 that disrupted its office operations, and kept seniors such as the deponent away from the office. Indeed, the Covid pandemic disrupted court and other operations countrywide. However, the former Chief Justice issued practice directions on electronic case management on 4th April 2020 which provided for e-filing and e-service system to be adopted by courts. As a senior advocate, it would have been possible for the applicant to file the record of appeal through the e-filing system anytime therefrom, and yet, the record has yet to be filed.
10. In the case of *County Executive of Kisumu vs County Government of Kisumu & 8 Other* [2017] eKLR it was held that;

“...it is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court.”
11. In view of the above, I find that the delay of 24 months has not been adequately explained.
12. With respect to the likelihood of success of the intended appeal, the applicant has stated that there are weighty issues of law that require to be ventilated before this Court. It is evident from the ruling that



the applicant intends to appeal against the High Court's decision that concerned the applicant's Bill of Costs. But despite indicating that a draft memorandum of appeal was attached, it was not included amongst the attachments. As a consequence, I am unable to ascertain one way or the other whether the intended appeal will succeed.

13. Concerning possible prejudice to the respondent, it is evident that since the ruling was rendered, a greater part of the period of delay has not been explained. Without any plausible explanation, my view is that the delay has been inordinate and will occasion the respondent undue prejudice.
14. In sum, I decline to exercise my discretion to grant the orders sought in the Notice of Motion dated 8th January 2021. Since the respondent did not participate in the proceedings, I make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

