



**Amarnath Enterprises Limited v Rahans Investment Limited & another (Civil Application E034 of 2022) [2022] KECA 1103 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1103 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E034 OF 2022**

**JW LESSIT, JA**

**OCTOBER 7, 2022**

**BETWEEN**

**AMARNATH ENTERPRISES LIMITED ..... APPLICANT**

**AND**

**RAHANS INVESTMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY .... 2<sup>ND</sup>  
RESPONDENT**

*(An application for leave to appeal out of time against the judgment of the Environment and Land Court at Mombasa (Yano, J) delivered on 15th July 2020 in ELC No. 164 of 2009)*

**RULING**

1. By way of a Notice of Motion dated 8<sup>th</sup> July 2019 brought under Rule 4 of the [Court of Appeal Rules](#), section 3A and 3B of the [Appellate Jurisdiction Act](#), the applicant, Amarnath Enterprises Limited seeks Orders that:
  1. The time limited for filing and serving the Memorandum and Record of Appeal be appropriately extended.
  2. That the Memorandum and Record of Appeal be deemed to have been filed within such extended time.
  3. That the costs of this application be provided for.
2. The dispute leading to the suit before the Environment and Land Court [hereinafter ELC] in case No. 164 of 2009 emanated from rahans investments limited the 1<sup>st</sup> respondent herein, who instituted a suit against the applicant for trespass. The 1<sup>st</sup> respondent claimed to be the registered owner of the parcel of land known as Mombasa/block XXII/I85 the suit property while the applicant claimed that it was



a legal tenant of the 2<sup>nd</sup> respondent, Kenya National Chamber Of Commerce & Industry and that at the time of filing the suit, the applicant was not in possession of the suit property. The trial court found that the claim for trespass was proved and allowed the 1<sup>st</sup> respondent's case on the basis it had demonstrated to the court that it was the valid registered owner of the suit property. Those findings aggrieved the applicant.

3. The grounds for the application are on the face of the motion and in the supporting affidavit sworn by Gorave Amarnath dated 8/4/2022. The applicant has explained that the delay in filing the appeal was occasioned by the fact that the copies of the proceedings and judgment took time to be availed to the applicant and that the same were only availed on 24/3/2022. The applicant explains further that it also filed an application for stay before the superior court which took time to be heard and determined and for the ruling thereof to be supplied.
4. He said the applicant deposed that its advocate on record apply for copies of proceedings and judgment for purposes of preparing the records of appeal and purported to annex the letter requesting for the proceedings as an exchange GA2. It is also deposed that the proceedings were availed on the 24/3/2022 and to have annexed a copy of the stamped last page of the certified copy of proceedings and GA3. It is also averred that the intended appeal is arguable.
4. The 1<sup>st</sup> respondent opposed the application through a replying affidavit sworn by Reuben Haria a director of the 1<sup>st</sup> respondent. He raises technical issues in his replying affidavit. He contends that the notice of appeal and the record of appeal were not served within the 7 days and 30 days respectively required by this courts' rules. The record was served 1 and half months late and it contended that it is without an explanation. In the submissions by the 1<sup>st</sup> respondent the court is urged to refuse to grant extension of time and as cited in the case of *Andrew Kiplagat Chemaringo V. Paul Kipkorir Kibet* [2018]eKLR on the principles which are applied to the application.
4. The 2<sup>nd</sup> respondent has filed submissions in which the application is opposed. It raises issue with the fact that the judgement intended to be challenged on appeal was entered on 15/7/2020 and that the application seeking to extend time to file and serve the memorandum and record of appeal was brought on 8/4/2022.
5. This Court observed in *Njeri Njoroge v. Joseph Maina Gichubi & another* (2018) eKLR that there is no limit to the number of factors that a court may consider in an application brought under Rule 4 of the Court's Rules, so long as they are relevant. The matters which this Court bears in mind generally include the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; fourthly, the degree of prejudice to the respondent if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.
6. In addition from the findings in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and *Abdul Aziz Ngoma v Mungai Mathayo & another* [1976] eKLR this Court's position on parameters considered in satisfying itself on reasons for delay observed that the law does not set out any minimum or maximum period of delay. Any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. Hence this Court's discretion to extend time under Rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.



4. That said and in view of the evidence on record, the issues for determination is whether the applicant has shown sufficient reason in filing the intended appeal and whether the delay in accessing the copy of proceedings and the judgment from the trial court is justifiable to warrant the orders to file the intended appeal out of time. The delay involved in this matter is 485 days. The explanation given is that there was a delay in the supply of the proceedings. Under Rule 84(1) of the Court of Appeal Rules it is provided as follows:

“subject to Rule 118, an appeal shall be instituted by lodging in appropriate registry, within 60 days after the date when the notice of appeal lodged... below provided that where an application for a copy of the proceedings in the superior court has been made in accordance with (2) within 30 days after 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 court.

4. It is clear from the above provision that a party should lodge its appeal within 60 days from the date the notice of appeal was lodged. The notice of appeal in this matter was lodged on the 12/8/2020. The memorandum and the record of appeal should have been lodged within 60 days which should have been by 12/10/2020. However, the memorandum and record of appeal were filed 485 days later. Under the proviso to Rule 84(1) in order to rely on the delay in the supply of proceedings by the superior court one requires a certificate by the registrar of the superior court excluding the time required for the preparation and delivery of the proceedings to the appellant from computation of time. The applicant has not annex a certificate of delay from the registrar of the superior court and therefore cannot benefit from that provision.

4. The conclusion is that the applicant has not given a reasonable explanation for the delay in lodging the memorandum and record of appeal in any event the delay of 485 days is unreasonable and inordinate. I find that the applicant is undeserving of the exercise of discretion sought in this application. The application has no merit and is accordingly dismissed.

**DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF OCTOBER, 2022.**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

