



**Kenya Marine and Fisheries Limited (KMFRI) v Union of National Research Institute Staff of Kenya (Civil Application 32 of 2020) [2022] KECA 1068 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1068 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 32 OF 2020  
JW LESSIT, JA  
OCTOBER 7, 2022**

**BETWEEN**

**KENYA MARINE AND FISHERIES LIMITED (KMFRI) ..... APPLICANT**

**AND**

**UNION OF NATIONAL RESEARCH INSTITUTE STAFF OF  
KENYA ..... RESPONDENT**

*(An application for leave to file notice and record of appeal out of time from the judgement of the Employment and Labour Relations Court at Mombasa (Rika, J) delivered on 13th December, 2019 in ELRC Cause No. 186 of 2016)*

**RULING**

1. The Notice of Motion dated May 27, 2020 and premised on section 3, 3A & 3B of the *Appellate Jurisdiction Act* and Rule 4, 5, 42 and 47 of this Court's *Rules* and Article 159 of the *Constitution* of Kenya, 2012 wherein Kenya Marine And Fisheries Limited, the applicant is seeking for orders for leave to file a notice and record of appeal out of time against the judgment of the Employment and Labour Relations Court delivered on December 13, 2019 in Mombasa ELRC Cause No. 186 of 2016. In the alternative, the applicant prays that orders for leave do issue to file its appeal out of time and for further orders directing on the period of filing and payment of the requisite fees.
2. The applicant further sought for orders of extension of stay of execution granted by the Employment and Labour Relations Court in ELRC Cause No. 186 of 2016 which lapsed on May 20, 2020 pending the hearing and determination of the present application. That prayer can only be considered by a full bench of this Court.
3. The grounds for the application are on the face of the Motion and are further supported by the affidavit sworn by Prof. James Njiru the director of the applicant. The deponent averred that the judgment that was rendered on December 13, 2019 was against the applicant and that an order for stay of execution



was granted in favour of the applicant for 120 days. It was further stated that the delay was inadvertent and was occasioned by unavoidable circumstances, that the applicant was bound to consult and seek further instructions from the parent Ministry and the Treasury whether to pay the decretal amount or to appeal against the same in so far as expending public resources is concerned. The deponent averred that the delay was also occasioned by pending applications in the Employment and Labour Relations Court which were yet to be heard and determined.

4. The deponent averred further that the award arising from the decision of Employment and Labour Relations Court touches on the remuneration of civil servants which adjustments if any are squarely under the ambit of the Salaries and Remuneration Commission and that it would be unconstitutional for the applicant to enforce the award without consultation. It was also asserted that the present application was the only avenue open for the applicant to safeguard the public interest and avoid crippling its activities. That the respondent will suffer no prejudice if the application is granted in order to give the applicant an opportunity to ventilate its issues on appeal. It was further asserted that the intended appeal is meritorious, arguable and had overwhelming chances of success.
5. Mr. Zacharia Achacha, the respondent's Secretary General swore a replying affidavit opposing the application for extension of time on grounds that the arguments advanced on behalf of the applicant were misleading, that there was sufficient funds at the applicant's disposal to serve the purpose of the parties Collective Bargaining Agreement RCA No. 2 of 2012 the Salaries and Remuneration Commission's advice notwithstanding.
6. It was contended that the respondent moved the Employment and Labour Relations Court for a final determination of the suit in ELRC Cause No. 186 of 2016, after the applicant failed to comply with the interim orders issued by the court on March 22, 2019, granting the applicant 90 days from the date the orders were made, to seek advice from the Salaries and Remuneration Commission, and forward copies of the interim orders issued on March 22, 2019, as well as the CPMU Report and the Closing submissions of both parties the Salaries and Remuneration Commission, to enable the court to conclusively review the dispute and give a final determination at the end of the 90 days.
7. The respondent averred that after the applicant's omission to get the input of the SRC, the court was left to make a determination. That on the date of the final judgment dated 13<sup>th</sup> December, 2019 without notifying the court orally of its intentions to appeal, the applicant sought and was granted 30 days stay of execution. As such it was contended that the present application is an afterthought and merely brought to prejudice the respondent and its members. It was further contended that the applicant was well aware that the CPMU Report to the trial court was lawful and binding with or without the SRC's input and hence the applicant's depositions in support of the present application were misguided. All in all, the respondent opposed the application in its entirety while arguing that even though the law does not compel the Employment and Labour Relations Court to consider the SRC's input in the circumstances, the court in its discretion for fair administration of justice gave the applicant ample time of 90 days to seek the SRC's advice, along with 30 days of stay of execution in the final judgment delivered on 13<sup>th</sup> December 2012. It was urged that the present application is an abuse of the court process and should be dismissed with costs.
8. I have considered this application, the affidavit in support and the submissions urged. Being a single judge, the only aspect of the application I can determine is the order sought of extension of time.



The substantive provision for accessing the relief as sought herein by the applicants is Rule 4 of the Court of Appeal Rules. It provides:

“4. 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.”

9. The parameters for the exercise of the Court’s mandate under the said provision have also been crystallized by case law. I take it from the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ.) decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR in which these were crystallized as follows:

“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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.” 12. From the above, factors I am supposed to bear in mind when determining an application of this nature are, first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.

10. From the above, the factors the court should bear in mind when determining an application of this nature are, first, the length of the delay. Second, the reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted
11. The delay involved in this application is 116 days. The issue then is whether the applicant has offered sufficient explanation for the delay of 116 days between December 13, 2019 when the final judgment was delivered, and May 27, 2021 when the present application for extension of time was filed, and whether the said delay was justifiable, inadvertent or inordinate as contended, in the circumstances. The explanation advanced by the applicant for the delay is that it had to consult its parent Ministry and also Treasury on whether to pay the decretal amount or to appeal against the same. The applicant emphasized that it is a state corporation in Kenya established by an act of parliament which must comply with set down guidelines in regards to seeking instructions and dealing with expending public resources. The applicant also explained that there were pending applications in court which had to heard and determined.
12. Regarding seeking of instructions from the parent Ministry and the Treasury, Professor James Njiru who saw the affidavit in support of the application. Exhibit 4 a letter to the Principal Secretary dated 30/12/2019. without going to the details, Prof Njiru was seeking support or funds to meet the decretal amount in the ELRC Judgement which is the subject of this intended appeal. Prof Njiru reported that that letter was never responded to. Subsequently it is then when they drafted the notice of the memorandum of appeal which is annexure 5A and B both of which are undated. Going by the date



of the affidavit which is dated 27/5/2020 it shows that the applicant waited for a response from the parent Ministry for one (1) year and four (4) months before bringing this application.

13. I have considered explanation given for the delay in filing this application and find it unreasonably and inordinate delay. It also speaks to lack of diligence as there is no evidence to show that between 30/12/2019 and 27/5/2020 that any follow up or reminders were sent. Even without going into the issue of arguability of the intended appeal and the prejudice that the respondent stands to suffer if the application is granted. So even without going into those two grants I am satisfied that the application is undeserving of the exercise of discretion in his favour.
14. Accordingly, I decline to grant an extension of time lodge the appeal as sought in the application dated 27/5/2020. The application 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**

