



**Turea Limited t/a Dr. Mattress v Mohamed (Civil Application  
E030 of 2022) [2022] KECA 1271 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1271 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E030 OF 2022  
P NYAMWEYA, JA  
NOVEMBER 18, 2022**

**BETWEEN**

**TUREA LIMITED T/A DR. MATTRESS ..... APPLICANT**

**AND**

**ALI MOHAMED ..... RESPONDENT**

*(An application for extension of time to file and serve a Notice of Appeal and a Memorandum of Appeal against the Judgment of the Employment and Labour Relations Court at Mombasa (B. Ongaya J.) dated 1st April 2022 in ELRC Appeal No 44 of 2021)*

**RULING**

1. The Applicant herein, Turea Limited t/a Dr. Mattress, seeks orders, by way of an application dated 11<sup>th</sup> May 2022, of extension of time to file a Notice of Appeal and a Memorandum of Appeal against the judgment dated 1<sup>st</sup> April 2022 delivered in Mombasa ELRC Appeal No 44 of 2021 by the Environment and Labour Relation Court (ELRC) at Mombasa (B. Ongaya J.) and that the said Notice of Appeal and the Memorandum of Appeal be deemed as duly filed. The Applicant had also sought an order in the said application for stay of execution of the judgment delivered in Mombasa ELRC Appeal No 44 of 2021, which prayer was abandoned during the hearing of the application by its counsel, since it cannot be granted by a single Judge.
2. The application is supported by an affidavit sworn on even date by James Kamau, an advocate in the Applicant's firm of advocates, to which a Notice of Appeal and Memorandum of Appeal both dated 11<sup>th</sup> May 2022 were attached, as well as the judgment dated 1<sup>st</sup> April 2022 delivered in Mombasa ELRC Appeal No 44 of 2021. The Applicant explained that the Notice of Appeal was not filed within the fourteen (14) days due to the inadvertent error by its counsel, who instructed his clerk to file the Notice of Appeal within the statutory period but only became aware of the failure to do so in the course of taking instruction for its memorandum of appeal one month after the Notice of Appeal was supposed



- to be filed. The deponent pleaded that the mistake was not calculated to defeat the ends of justice and should not be visited on the Applicant to their detriment. Additionally, that the right to be heard was sacrosanct and the Applicant should not be denied his day in Court due to Counsel's mistake. It is urged that the Appeal was merited and had a high chance of success.
3. The Respondent filed grounds of opposition and a replying affidavit both dated 20<sup>th</sup> May 2022 in response. It is the Respondent's case that the instant application is brought in bad faith and intended to scuttle the process of justice and the realisation of the Respondent's dues, since the Applicant had been ready and willing to have the decretal sum released in settlement of the terms of the judgment delivered by the ELRC. In addition, that no cogent or valid reason had been presented by the Applicant as to why it took so long to proffer an appeal before this Court, especially since there is no affidavit drawn and filed by their clerk whose mistake occasioned the delay, and the Respondent's advocates had been in constant communication with the Applicant's advocates regarding the outcome of the judgment in Mombasa ELRC Appeal No 44 of 2021. Therefore, that there should be an end to litigation; the Applicant will not suffer irreparable loss of any nature since the doctrine on *voluntis non fit injuria* applied, and equity ought to consider as done that which ought to have been done. Lastly, that the affidavit in support of the instant application has been sworn by the Applicant's advocate and not the Applicant on contentious issues, and should be struck out in limine.
  4. A virtual hearing of the application was held on 20<sup>th</sup> September 2022. Learned counsel, Mr. David Tole, appeared for the Applicant, while learned counsel Mr. Oduor Opalo appeared for the Respondent. Both counsel reiterated their averments while highlighting their respective written submissions dated 17<sup>th</sup> May 2022 and 20<sup>th</sup> May 2022. The Applicant's counsel identified two issues for resolution, namely, whether the Applicant had satisfied the prerequisites under Rule 4 of the Court of Appeal Rules, and whether there was an arguable appeal. He urged that the Court is clothed with sufficient jurisdiction and discretion to grant orders extending time, and cited the decision by the Supreme Court of Kenya in the case *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* [2019] eKLR and of this Court in *Paul Wanjobi Mathenge vs Duncan Gichane Mathenge* [2013] eKLR in this regard. Further, that the law did not set out any minimum or maximum period of delay, and all that it required was that any delay should be satisfactorily explained. Counsel submitted in this regard that the Notice of Appeal ought to have been filed by 15<sup>th</sup> April 2022 and the memorandum of appeal ought to have been filed by 2<sup>nd</sup> May 2022. Therefore, that the Applicant was out of time for a period of under 30 days, while also noting that a 5-day holiday was declared from 29<sup>th</sup> April 2022 to 3<sup>rd</sup> May 2022, and the ELRC granted the Applicant stay of execution until 5<sup>th</sup> May 2022.
  5. The decisions in *Vishva Stone Suppliers Company Limited vs RSR Stone (2006) Limited*, [2020] eKLR, and *Catherine Njoguini Kenya & 2 others vs Commercial Bank of Africa Ltd*, Civil Application No. Nai.366 of 2009 were also cited for the submission that the mistakes of counsel cannot be visited on an innocent party, especially where the delay has been explained. Furthermore, that the right of appeal was protected in our Constitution and, the delay having been adequately explained and corrective action promptly taken, the Court should find in the Applicant's favour in the interest of justice. Additionally, that the appeal was arguable and raised serious, weighty and triable issues for the Court's consideration, which the Applicant detailed in the Memorandum of Appeal.
  6. In answer to the Respondent's averments, the Applicant's counsel submitted that the affidavit sworn by an advocate was confined to facts he was able of his own knowledge to prove, and was not defective. He placed reliance on the decision in *Kamlesh M.A. Patni vs Nasir Ibrahim Ali & 2 others* CA 354/2004 that there was no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. They submitted that the affidavit in question did not wade into contentious matters and only sought to address issues that were within



counsel's knowledge by virtue of his participation in the suit and is therefore properly on record. The Applicant's counsel also asked the Court to find that grounds in the opposition did not meet the threshold of matters to be contained therein, and made reference to issue of facts which need production of evidence and examination of witness. He placed reliance on the case of *Kartar Singh Dhupar & Co. Ltd. vs Lianard Holding Limited* [2017] eKLR that a preliminary objection or grounds of opposition relate purely to matters of law.

7. The Respondent's counsel on his part submitted that the Applicant had not met the requisite threshold for granting of the orders sought; that the parties had been in the courts for well over 2 years and the Applicant has been indolent; that the ELRC dismissed the Applicant's appeal of its own motion based on the incompetence and/or inadequacy of the record of appeal as presented by the Applicant therein; that it was uncontested that the Applicant herein was in the process of settling the terms of the judgment of the Court; that no effort had been made to demonstrate the error suffered by them, and that it would have been prudent to least file an affidavit sworn by the said clerk who failed to file the documents as instructed.
8. The Respondent relied on the decision of this Court in *Tana & Athi Rivers Development Authority vs Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR that the failure by an advocate to do what was required of them by law to do is not excusable. Further, the fact that the Applicant has been ready and willingly to release the decretal sum to the Respondent was indicative that it would suffer no irreparable harm, and reliance was placed on a similar holding in *Muthuri v Mama Day Nursery and Primary School Limited* [2014] eKLR. Lastly, it was the Respondent's counsel position that an advocate cannot swear an affidavit on behalf of his or her client on contested facts that require production of evidence.
9. I will commence my determination with the preliminary issue raised by both counsel for the Respondent and the Applicant on the propriety of the pleadings filed herein. On the affidavit filed in support of the application that was sworn by the Applicant's advocate, under Rule 9 of the Advocates Practice Rules, it is not the mere swearing of an affidavit by an advocate that renders it defective, but the swearing of an affidavit on contentious issues of which he or she has no knowledge of. The said rule has a proviso that expressly states so as follows: "Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears". The affidavit in question deponed to the awareness about the failure to file the Notice of Appeal and the cause of delay, which the advocate specifically states came to his knowledge when he was preparing the memorandum of appeal, and was caused by his clerk. The said advocate also deponed to the arguability of the intended appeal, which are arguments of law and cannot be said to be contentious issues. I therefore decline the invitation to strike out the supporting affidavit for these reasons.
10. On the challenge made as regards the propriety of the Respondent's grounds of opposition, I find this to be a non-issue, for the reason that Rule 50 of the Court of Appeal Rules of 2010, and now Rule 52 of the 2022 Rules require affidavits to be filed in response to an application, which the Respondent herein did do. For all intents and purposes the Grounds of Opposition filed by the Respondent were therefore superfluous and of no consequence.
11. The substantive issue for determination is that of extension of time to file a Notice of Appeal and Memorandum of Appeal. The discretion of this Court to extend time under Rule 4 is unfettered, but must still be exercised judiciously. The factors that govern the exercise of the discretion to extend time under the said Rule were well stated in the case of *Leo Sila Mutiso vs Rose Hellen Wangare Mwangi* Civil Application No Nai 255 of 1997 (ur) as being the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the



Respondent if the application is granted. Similar factors were also stated by the Supreme Court of Kenya in Nicholas Kiptoo Arap Salat vs IEBC [supra].

12. Rule 75(2) of the Court of Appeal Rules of 2010 which was then applicable, required that a Notice of Appeal is lodged within fourteen days of the decision intended to be appealed against. The same requirement is now found in Rule 77 (2) of the Court of Appeal Rules of 2022. It is not in dispute that the judgment intended to be appealed from by the Applicant was delivered on 1<sup>st</sup> April 2022, and that the Notice of Appeal was not filed within time. The relevant period of delay that requires to be explained is therefore that of about one month between the deadline for lodging the Notice of Appeal on 15<sup>th</sup> April 2022, and the date of lodging of the instant application on 13<sup>th</sup> May 2022.
13. The delay has been attributed to the failure to follow instructions to lodge the Notice of Appeal by the Applicant's advocates' clerk. The Respondent has on the other hand annexed correspondence with the Applicant's advocates which he states is evidence of initiatives at settlement of the dispute between the parties. While the period of delay may not be inordinate, I am of the view that it is inexcusable, as the explanation proffered by the Applicant is not substantiated in any way. In addition, the Applicant does not controvert the averment that the parties had commenced a process of settlement, which brings the veracity of the reasons for the delay proffered by the Applicant to question, and also brings to fore the prejudice that the Respondent is likely to suffer.
14. On the extension of time to file a Memorandum of Appeal, Rule 82 of the Court of Appeal Rules of 2010 which were then applicable, provided that an appeal was to be instituted within sixty days of the decision appealed against. The same requirement is now found in Rule 84 of the Court of Appeal Rules of 2022. It is also notable that under both the retired Rule 82 and current Rule 84, an appeal is instituted by lodging both the Memorandum of Appeal and Record of Appeal, and there has been no demonstration by the Applicant of any steps taken in filing the Record of Appeal, nor any prayers sought in this regard. Granting extension of time to file only a Memorandum of Appeal would in the circumstances therefore serve no useful purpose.
15. I therefore decline to exercise my discretion in favour of the Applicant for the foregoing reasons, and hereby dismiss the Applicant's Notice of Motion application dated 11<sup>th</sup> May 2022 with costs to the Respondent.
16. Orders accordingly

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF NOVEMBER 2022.**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

