



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: OKWENGU JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. 44 OF 2020 (UR 28/2020)**

**BETWEEN**

**ALMASI BEVERAGE LIMITED.....APPLICANT**

**AND**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....RESPONDENT**

*(Being an application for leave to lodge a notice of appeal out of time against part of the*

*judgment and decree of the Employment and Labour Relations Court at Kericho*

*(Njagi Marete, J.) delivered on 26th April, 2017*

*in*

*ELRC Case No. 87 of 2016)*

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**RULING**

[1] **Kenya Union of Commercial Food & Allied Workers**, the respondent herein, filed a claim against **Kisii Bottlers Limited (KBL)** in Employment and Labour Relations Court (ELRC), **Case No 87 of 2016**, seeking among others, compensation for unlawful termination of its members who were employees of KBL; salaries for days worked, overtime, leave, any other lawful benefit payable to the employees and cost of the suit.

[2] Upon hearing the dispute, ELRC (**Njagi Marete, J**) gave judgment in favour of the respondent and ordered, *inter alia*, that KBL reinstates the employees and pay each 2 months' salary as compensation for unlawful termination of employment, as well as cost of suit. KBL filed a notice of appeal against the judgment of ELRC on the 10th May, 2017. However, it did not file the record of appeal

[3] In the meantime, **Almasi Beverages Limited (the applicant herein)** took over the operations of KBL and subsequently KBL was wound up. By an order of the superior court made on 11th December 2019, the applicant was substituted as the respondent in place of KBL in the ELRC suit. The applicant has now come before us with a motion seeking extension of time to enable it file a notice of appeal and a record of appeal out of time. The applicant claims that it has an appeal with high chances of success, and blames the Counsel then representing KBL, for taking no action in pursuing the appeal.

[4] The respondent opposed the applicant's motion relying on a replying affidavit sworn by **Mike O. Oranga (Oranga)**, its National Organizing Secretary. In the affidavit, Oranga deposes that: although the applicant appears to have lodged the present application on 29th May 2020, it was not served on the respondent until almost a year later on 15th April, 2021; and that the applicant has a duty to explain the delay in service if indeed the application was filed on 29th May, 2020.

[5] Further, Oranga deposed that although the applicant obtained an order in ELRC for stay of execution, it did not comply with the condition that was imposed by the court, as it chose to deposit the decretal amount in their advocate's account at Sidian Bank, instead of depositing the amount in a joint account with the respondent as ordered by the court; that the applicant only deposited the amount in court following another order issued by ELRC; that the notice of appeal having been lodged on 6th June, 2017, the record of appeal ought to have been filed within 60 days from that date; and that the applicant has taken more than 3½ years to lodge their appeal, without any good reason.

[6] The respondent maintained that the applicant is not in a hurry to have the matter resolved as it is enjoying the order of stay of judgment and decree that was issued in the ELRC. In the meantime, the affected members of the respondent are suffering prejudice as they have not been reinstated and have been denied their compensation and outstanding salaries due to the stay order.

[7] The applicant and the respondent, each filed written submissions urging the Court to find in their favour. The applicant also filed a list of authorities in support of its submissions.

[8] In its submissions, the applicant reiterates that it has an arguable appeal which it is desirous of pursuing, and has already prepared a record of appeal in readiness for filing. The applicant argues that the circumstances under which the termination was done does not support reinstatement and therefore the appeal is well merited. In addition, that the employees were dismissed 6 years ago and they are likely to have been engaged in alternative work for their sustenance and would not therefore suffer undue prejudice; and that the applicant stands to suffer substantial loss if the judgment of the court is executed.

[9] The applicant explained that the delay was caused by KBL shutting down their operations, and the applicant taking over, and the erroneous belief by counsel for the applicant that KBL had for all intent and purposes ceased to exist; that the delay to approach court after substitution was undertaken was not inordinate; and that the Court has not only unfettered discretion but is also obliged by Article 159 (2)(d) of the Constitution to determine disputes without undue regard to technicalities. The applicant therefore urged the Court to allow its motion.

[10] In its submission, the respondent reiterated that ELRC gave judgment in favour of its members, which judgment they have not been able to realize; that ever since the filing of a notice of appeal by the applicant on 6th June, 2017, the applicant has made no effort to file the intended appeal; and that the applicant has been complacent since obtaining an order of stay of execution of the judgment. The respondent argues that the delay is inordinate and intended to deny the respondent's members the benefit of the judgment made in their favour; that the substitution of the applicant in ELRC in place of KBL having been done on 11th December 2019, no plausible reason has been given as to why no action was taken in pursuing the appeal. The respondent urged that its members are suffering prejudice as a result of the delay which is glaringly inordinate.

[11] I have carefully considered this motion, the affidavit in reply, the written submissions filed by the respective parties, and the authorities cited. Under Rule 4 of the Court Rules, the Court has unfettered discretion in considering an application for extension of time. However, that discretion must be exercised judicially.

[12] As was stated by this Court in **Leo Sila Mutiso vs Hellen Wangari Mwangi [1999] 2EA 231:**

***“...there are some matters that this Court must take into account in exercising its discretion and this includes, the length of the delay, the reason for the delay and the degree of prejudice if any that the respondent is likely to suffer if the application is granted. Moreover, the Court must further consider whether the delay is inordinate, and or prejudicial to the respondent.”***

[13] The Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others [2014] eKLR**, crystalized the principles to be applied in an application for extension of time as follows:-

***“1. 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;***

***2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***

***3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***

***4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***

***5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***

***6. Whether the application has been brought without undue delay; and***

***7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

[14] Taking cognizance of these principles, I have considered whether the applicant is deserving of the exercise of this Court's discretion. In doing so, I note that the record of appeal ought to have been filed on or before 5th August 2017, being the statutory 60 days from the date of filing the notice of appeal, that is, 6th June 2017. This was admittedly not done. This application was filed on 29th May 2020, which is 2 years and 9 months from the expiry of the statutory timeline. This period of delay is certainly inordinate.

[15] The explanation that was given for the delay is that the applicant's advocate believed that KBL had ceased to exist for all intents and purposes, and therefore took no action in pursuing the appeal. This explanation is illogical, as both the advocate and the applicant were well aware that the applicant was taking over the assets and liabilities of KBL. Moreover, the applicant was substituted in place of KBL on 11th December, 2019 and it was therefore clear that it was stepping in the shoes of KBL.

[16] In **Daqare Transporters Limited v Chevron Kenya Limited [2020] eKLR**, this Court in dismissing an appeal in which blame was being laid on the advocate, stated in part as follows:

***“There was no explanation for the indolence of the appellant and we concur with the holding of the learned judge that the***

***former Counsel was not solely to blame. We echo the holding in RAJESH RUGHANI V FIFTY INVESTMENTS LIMITED & ANOTHER [2016] eKLR where the Court, in holding that there was not sufficient explanation given for the delay in prosecuting a suit, reasoned that;***

*“It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay.”*

[17] I find that the explanation given by the applicant for the delay is totally inadequate, as the applicant was as much to blame for the delay as the advocate. In addition, the applicant is enjoying an order of stay of execution that has the effect of keeping the respondent’s members in whose favour the ELRC judgment was issued, from enjoying the benefits of the judgment. The judgment included reinstatement, which has not been realized 4 years down the line. It cannot be said that the delay is not prejudicial to the respondent.

[18] For these reasons, I find that the applicant has failed to demonstrate that it is deserving of the exercise of this Court’s discretion. Accordingly, the notice of motion dated 29th May, 2020 is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR**