



IN THE COURT OF APPEAL

AT NAKURU

[CORAM: SICHALE, J.A (IN CHAMBERS)]

CIVIL APPLICATION NO. 17 OF 2018

BETWEEN

BALLOON SAFARIS LIMITED.....APPLICANT

AND

MICHAEL CARNEVALE.....RESPONDENT

(An Application for stay of the ruling and orders of the Industrial Court of Kenya at Nakuru (Byram Ong'aya, J) dated 16th May 2014.) In
(Nakuru Industrial Cause No. 78 of 2014)

RULING OF THE COURT

By a motion dated 25th January 2018 and brought pursuant to the provisions of Article 159 (2) of the Constitution, Section 3A of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya and Rule 4 of the Court of Appeal Rules, Balloon Safaris Limited (*the applicant herein*) seeks the following orders:

“1. Spent.

2. THAT the honourable Court be pleased to extend time and grant leave to the applicant to lodge a Memorandum of Appeal out of time against the Ruling and Orders entered against the Applicant by Honourable Justice Byram Ongoya, in Industrial Cause No. 78 of 2014 on 16th May 2014.

3. THAT the Memorandum of Appeal filed by the Applicant be deemed as properly filed and on record.

4. THAT the Record of Appeal filed by the Applicant be given a hearing date on priority basis in order to dispose of the Appeal.

5. THAT this honourable court be pleased to issue any other orders that it may deem fit, just and expedient in the interests of justice.

6. THAT the costs of this application abide in the Appeal.”

The motion is supported on the grounds on the face of the motion and an affidavit sworn by **Sam Desouza** the Operations Manager of the applicant who deponed *inter alia* that the applicant being dissatisfied with the ruling and orders of the High Court in Industrial Cause No. 78 of 2014 Nakuru, filed a Notice of Appeal dated 22nd May, 2014. He further deponed that the time allowed for filing the Memorandum of Appeal had since lapsed and that the Court registry did not supply them with the requisite copies of the typed proceedings in time, to allow their advocates on record to file the Record of Appeal and that the extension of leave to file the Memorandum of Appeal and filing of the Record of Appeal will not prejudice the interests of the respondent as the matter can be set down for hearing of the appeal at the earliest convenience of the court. He further deponed that there had been no undue delay in bringing this application and that the applicant's had a strong and arguable appeal with a high probability of success.

The applicant did not file submissions despite having been given ample time to do so.

On the other hand, it was submitted for the respondent that whereas it was incumbent on the applicant to pursue the matter, they nonetheless

abandoned the Cause which laxity and indolence this Honourable Court should take cognizance of. As to whether the intended appeal would be successful if leave is granted, the Court was urged to be guided by well set precedence and reject the applicant's assertion. On prejudice, it was submitted that a period of 8 years was prejudicial to the respondent there being no plausible reason for the delay in the instance and the applicant's indolence and continued defiance while using the stay order as shield and sword to jeopardize the respondent's Cause notwithstanding the interlocutory nature of the intended appeal, challenging territorial jurisdiction of the Industrial Court in Nakuru should be taken into account, as the Cause now hangs precariously and which if delayed longer will render it moot as there is no security to secure the respondent while the applicant continues to take bids to sale or otherwise transfer assets and shares.

I have carefully considered the motion, the grounds thereof, the supporting affidavit, the respondent's submissions, the cited authorities and the law.

The applicant's motion is brought, under **Rule 4** of this Court's Rules. The said Rule provides:

"4.

Extension of time

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 or 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."

The principles upon which this court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997 where the court stated:

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."

In the instant case the impugned ruling and/or orders were issued on **16th May 2014**, whereas the instant application was filed on **29th January 2018**, a period of over **3 years** from the date of the impugned ruling. No doubt a period of over 3 years in the circumstances is inordinate. The applicant's Operations Director deponed that the delay in filing the Memorandum of Appeal was due to failure by the registry to supply them with the requisite copies of the typed proceedings whereas in the body of the motion it was stated that the delay was occasioned by inadvertence on part of their advocates. The applicant further contended that it had annexed a certificate of delay dated **24th November, 2017**. The said scanned certificate of delay is however not clear and legible. Be that as it may, if the said certificate is dated **24th November, 2017**, as contended by the applicant, and assuming that the proceedings were ready as at the said date, no explanation has been forthcoming from the applicant as to why the instant application was filed on **29th January, 2018**, a period of about 2 months from the date of the certificate of delay.

On prejudice, I note that this is a fairly old matter which has been in court for the last 7 years and the applicant has been enjoying stay orders that were issued by the court on **14th December, 2014**. From the circumstances of this case,

I am satisfied that the respondent has demonstrated to the satisfaction of this court that he will stand to suffer prejudice if the orders being sought are issued.

Taking into totality all the circumstances in this case, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration by the Court in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in **Leo Sila Mutiso case (supra)**, for extension of time.

Accordingly, the applicant's application dated **25th January, 2018**, is without merit and the same is hereby dismissed with no order as to costs.

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

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR