



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: ASIKE-MAKHANDIA, JA IN CHAMBERS)

CIVIL APPLICATION NO. 3 OF 2020

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....APPLICANT

AND

EASTERN PRODUCE (K) LIMITED.....RESPONDENT

(Being an application for leave of extension of time to file Notice of Appeal and

Records of Appeal out of time in an intended appeal from the ruling of the

Employment and Labour Relations Court at Kericho delivered at Nakuru

by Lady Justice M. Mbaru . in Kericho Employment &

Labour Relations Court Cause No. 72 of 2018)

RULING

Before me is a notice of motion dated 13th January 2020 brought under the provisions of Rule 4 of the Court of appeal Rules by the applicant, **Kenya Plantation and Agricultural Workers Union**. The applicant seeks leave to file and serve the Notice of Appeal as well as record of appeal out of time against the ruling and order of **Mbaru, J** in the **Employment and Labour Relations Court (ELRC) Cause No. 72 of 2018** between the applicant and the respondent, **Eastern Produce (K) Limited**.

The application is premised on the grounds that the ruling was delivered in Nakuru in the absence of Counsel for the applicant. The applicant was not aware that the ruling would be delivered in Nakuru; that the file could not be traced in the court registry until the time for lodging of a notice of appeal and the substantive appeal had lapsed; and that the intended appeal raises weighty issues of law which ought to be determined in this appeal.

The application is further supported by the affidavit of **Erastus Orina**, counsel for the applicant who deposes that on 4th November 2019 directions were given by the trial court that parties do file written submissions to the application dated 20th March 2019 and thereafter the ruling would be delivered on 21st November 2019 **PRESUMABLY** (emphasis mine) in Kericho. That however the ruling was delivered on 21st November 2019 in Nakuru without notice to the applicant, and the file could not be traced thereafter until only after the prescribed time for lodging of the notice of appeal and the appeal itself had lapsed which explains the delay. That no prejudice will be visited upon the respondent if the application is allowed as the delay was not deliberate.

The application is opposed by the Respondent through the replying affidavit of **Denis Gitaka** sworn on the 28th February 2020. He deposes that the applicant instituted a suit in Kericho against the applicant being **Kericho ELRC No. 72 of 2018, Kenya Plantation and Agricultural Workers Union Vs. Eastern Produce Kenya Limited**. The Respondent filed an application seeking to have the said suit struck out for being res judicata. Parties appeared before **Mbaru, J.** on 16th May 2019 for directions which directions were issued to the effect that the application be disposed off by way of written submissions and the same be mentioned on 24th September 2019 and 4th November 2019 respectively to confirm the filing of submissions. When the matter was mentioned on 4th November 2019, the applicant's counsel was present and a ruling date was fixed for 21st November 2019 and the venue communicated as Nakuru. The Respondent deposes further that the ruling was delivered in Nakuru as previously communicated and its legal representative was in attendance although the

applicant's counsel was absent. The application was nevertheless allowed; that no evidence has been adduced by the applicant to show that its representative or counsel went to Kericho Law Courts to attend the delivery of the ruling since it alleged that, to its understanding this was the communicated place of delivery of the ruling; that the applicant is in any case culpable of prolonged inaction, unreasonable and inordinate delay having filed the application two months after the ruling was delivered and has not given reasonable explanation. Lastly, the respondent swears that the intended appeal has no merit at all, is an afterthought and an abuse of court process.

Parties filed written submissions in support of and in opposition to the application. The applicant's submissions merely reiterates and expounds on the grounds in support of the application as well as the supporting affidavit. In support of the application though the applicant cites the following authorities to buttress its case regarding the principles that guide the court in dealing applications for extension of time; **Velor Enterprises Ltd Vs. Paragon Electronics Limited [2017] eKLR**, **Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others 2014 eKLR** and **Rajesh Rughani v Fifty Investment Ltd & Another [2005] eKLR**, which authorities I have carefully read and considered.

The Respondent in its submissions reminds me to consider the principles laid down in the case of **Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** and affirmed in **Paul Wanjahi Mathenge v Duncan Gichana Mathenge [2013] eKLR** with regard to extension of time. The Respondent submits that the inordinate delay of two month has not been explained as both parties were in court when the ruling date was fixed. Further that no evidence has been tendered to show that the applicant attempted to obtain the ruling in vain. The respondent has cited the cases of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others 2014 eKLR** and **Bains Construction Co. Ltd. v John Mzare Ogowe [2011] eKLR** to buttress the issue of inordinate delay by the applicant.

On the issue of arguability of the intended appeal the respondent reiterates the contents in the replying affidavit and relies on the case of **Chase Bank Limited v Diana Moraa Abuta [2021] eKLR**, to submit that a review of the draft memorandum of appeal portrays a clear misapprehension of the Superior Courts reasoning thus the intended appeal will not be arguable and that if the application is allowed it will occasion prejudice to the respondent as it would amount to a violation of the respondent's constitutional right to a fair hearing.

I have considered the application, grounds in support thereof, the applicant's supporting affidavit as well as the respondents replying affidavit, the submissions by both counsel and the law applicable. The issue for determination is whether the application has met the threshold for enlargement of time.

Rule 4 of the court of Appeal Rules under which the application is brought does not provide the factors that this court should consider or not consider in an application for extension of time. However, this court in a long line of cases has devised appropriate principles underpinning the grant or refusal of application for extension of time. See for instance the cases of **Lee Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231 & Muringa Company Ltd. V. Archdiocese of Nairobi Registered Trustees, [2020] eKLR**. In the latter case this court expressed itself thus:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of dispute, the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

Further to the above, it should be noted that there is no maximum or minimum period of delay set out under the law; only that the reason(s) for delay must be reasonable and plausible. This was so stated in the case of **Andrew Kiplagat Chemaringo v Paul Kipokorir Kibet [2018] eKLR** thus:-

“The Law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favor. There has to be valid and clear reasons, upon which discretion can be favourably exercisable”

The delay in filing the notice of appeal is approximately two months. The explanation given for the delay is that ruling was delivered without the knowledge of the applicant and in Nakuru instead of Kericho. I wish to state that from the applicants own affidavit and grounds in support of the motion, he was aware of the date of the ruling to be on 21st November 2019. This is not in contention at all save for the fact that the same was delivered in a different place being Nakuru when the applicant **PRESUMABLY** thought it was to be in Kericho. The applicant did not follow-up on the said date to find out whether the ruling was being delivered at his **PRESUMED** place or whether the venue had changed. He has not in anyway explained any step and difficulties he encountered in his quest to find the place of delivery of the ruling. No evidence has been drawn to my attention showing the applicant's intent and effort in finding out the status of the file, even after the date slated for delivery of the ruling had gone by.

The Respondent stated that Counsel for the Applicant was present in court when a ruling date was set and directions given that the same would be delivered in Nakuru and which ruling was delivered on the date slated with the applicant's counsel's knowledge. This assertion by the Respondent has not been controverted. There is no evidence indicating steps taken by the applicant to inquire about the file which it claimed to have gone missing only to resurface after time to lodging an appeal had lapsed.

The applicants' counsel has not admitted his mistake in dealing with the issue of non-attendance to the delivery of the ruling and not filing the notice of appeal on time. In the case of **Bains Construction Co. Ltd v John Mzare Ogowe[2011] eKLR** this court observed as follows:

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences”.

Similarly, in *Eliud Buku Thuku v Beatrice Wambui Mwangi [2013] eKLR*, the Court stated thus:

***“The applicant was represented by Counsel at the High Court when judgment was delivered on 23rd September, 2011. As was stated by Tunoi, JA. (as he then was) in Njoka Muriu & Another vs Evan Githinji Muriu & Another, Civil App. No. NAI 356 of 2003), a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client’s interest.*”**

I am persuaded by the reasoning in the above decisions and take it to be applicable in the current application. I find this reason for delay not convincing at all. Without deciding the point, the appeal appears to me on the face of it to be not arguable as the issues to be raised in the intended appeal are not those which were decided in the application.

For these reasons, I decline the prayer for extension of time within which to file the notice and record of appeal.

Costs of the application are awarded to the respondent.

Dated and delivered at Nairobi this 4th day of June, 2021.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR