



REPUBLIC OF KENYA



KENYA LAW
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**Frodak Kenya Limited v Angatia (Civil Appeal (Application)
40 of 2021) [2021] KECA 54 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KECA 54 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) 40 OF 2021
F SICHALE, JA
OCTOBER 8, 2021**

BETWEEN

FRODAK KENYA LIMITED APPLICANT

AND

MARK BUSHURU ANGATIA RESPONDENT

*(Being an Application for Extension of Time and validation of
Notice of Appeal against the Ruling and orders of Abuodha, J
dated 6th November 2020. in Eldoret ELRC Cause No. 41 of 2018)*

RULING

1. Before me is a motion dated 8th April 2021, brought pursuant to the provisions of Rule 4 of the *Court of Appeal Rules 2010*, in which Frodak Kenya Limited (the applicant herein) seeks the following orders:
 1. THAT the Court be pleased to extend time to lodge and serve notice of appeal,
 2. THAT the notice of appeal dated 18th March 2021, lodged on the same day in the superior court and served on the 19th March 2021 be validated upon the grant of extension of time and it be deemed to have been duly served,
 3. THAT the costs of this motion do abide the outcome of the intended appeal.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Fredrick Otiemo Onyangothe Managing Director of the applicant who deposed inter alia that the applicant was the respondent in Eldoret ELRC Cause No. 41 of 2018 which was heard in its absence whereupon the applicant filed an application for review of the judgment on 20th July, 2020 and the court slated the matter for judgment on notice before 30th October, 2020 and that after the said date, the applicant was not aware of what transpired until execution was carried out by the respondent on 10th March, 2021.



3. He further deposed that failure to lodge the appeal against the application for review was because the Superior Court did not give notice of the intended delivery of the ruling as initially ordered on 29th September, 2020 and that its advocates failed to inform of the matters that occurred leading to the impugned decision and that further the intended appeal raises arguable matters for consideration by the full court.
4. The application was opposed vide a replying affidavit sworn by the respondent; Mark Bushuru Angatia on 21st May, 2021, who deposed inter alia that the impugned judgment was proper, regular and meritorious and that following the entry of the judgment, the parties entered into a consent which had not been disputed to date; a clear indication that the applicant was satisfied with the same and that as such, the applicant was guilty of material non-disclosure and further the applicant's intended appeal was just a mere sham without any chances of success since the court properly exercised its discretion in dismissing the applicant's application for review under Section 16 of the *Employment and Labour Relations Act* and Article 50 of the *Constitution of Kenya, 2010* and could not be faulted in anyway.
5. The applicant in its submissions reiterated the averments in the supporting affidavit and submitted that the reason for the delay is that it was not aware when the decision sought to be impugned was delivered as on 29th September, 2020, the court made an order that judgment would be delivered on notice before 30th October, 2020 and that after the said date, it was not aware of what transpired until execution was carried out by the respondent on 10th March, 2021 and that the intended appeal raises arguable matters for consideration of the full court.
6. On the other hand, it was submitted for the respondent that the application was not merited as the applicant had not met the threshold for grant of discretionary orders sought under Rule 4 of the Court of Appeal Rules as the applicant was inter alia guilty of non-disclosure and in particular, that there was a consent on costs of the claim dated 24th October, 2019, recorded between the parties which had not been disputed a clear indication that the applicant was satisfied that the judgment was proper and that further the intended appeal was a sham, frivolous, lacked merit and did not raise triable issues and that it was not clear as to whether the appeal was against the ruling delivered on 6th November, 2020 or the main judgment.
7. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
8. The applicant seeks inter alia extension of time to lodge and serve Notice of Appeal. Rule 4 of this Court's Rules which guide the Court in applications of these nature 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.”

9. 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.”

10. In the instant case the applicant’s application for review of the impugned ruling was delivered on 6th November, 2020 whereas the instant application was filed on 8th April 2021. This is about 5 months from the date of the impugned ruling. The applicant contended that the reason for the delay was because it was not aware when the decision sought to be impugned was to be delivered as on 29th September, 2020, the court made an order that judgment would be delivered on notice before 30th October, 2020, and that after the said date the applicant was not aware of what transpired until execution was carried out by the respondent on 10th March, 2021.
11. In my view, the fact that the court did not communicate of the date of delivery of the judgment, the applicant cannot be faulted for the delay. I note that this application was filed about 5 months from the date of delivery of the impugned judgment. In the circumstances of this case, that cannot be said to be inordinate.
12. I am satisfied that a satisfactory explanation has been provided for the delay.
13. Accordingly, I allow the applicant’s motion dated 8th April, 2021. The notice of appeal dated 18th March, 2021 and lodged on the same day and served on 19th March, 2021 is hereby validated. The applicant to file and serve the record of appeal within forty-five (45) days of the ruling. Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 8th day of October, 2021.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

