



West Kenya Sugar Company Limited v Kenya Union of Sugar Plantation and Allied Workers Union (Civil Application E105 of 2021) [2021] KECA 312 (KLR) (17 December 2021) (Ruling)

Neutral citation: [2021] KECA 312 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E105 OF 2021
MA WARSAME, JA
DECEMBER 17, 2021**

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED APPLICANT

AND

**KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS
UNION RESPONDENT**

(An application for extension of time to file and serve a notice of appeal out of time and for stay of execution against the judgment and order of the Employment and Labour Relations Court at Kisumu (Radido, J.) dated 17th March, 2021 in Cause NO. 369 OF 2018)

RULING

1. By a Notice of Motion dated 7th July 2021 the applicant, West Kenya Sugar Company Limited has invoked this Court's jurisdiction under Rule 4 and 5(2)(b) of the [Court of Appeal Rules, 2010](#) seeking leave to file and serve a Notice of Appeal out of time and a stay of execution against the Judgment in the ELRC pending the hearing and determination of its intended appeal.
2. The grounds in support of the motion as stated in the face thereof and reiterated in the affidavit of Duncan Abwayo is that the ELRC judgment was delivered on 17th March 2021 and the applicant immediately instructed its former advocates, Federation of Kenya employers to file a Notice of Appeal, that thereafter the applicant instructed the firm O&M Law LLP to take over the matter on 20th May 2021 and it took considerable time to file a change of Advocates consent between its former and current advocates due to the Covid 19 pandemic, that when the consent was being filed on 28th June 2021, the applicant's advocates became aware that there was no notice of appeal on record necessitating the current application and that the applicant has since applied for typed proceedings and certified copies of the judgment vide its letter dated 17th June 2021.



3. In opposing the application, the respondent in a replying affidavit dated 3rd November 2021 deponed urged that there was no proof that the applicant instructed its former counsel to file a Notice of Appeal, that the letter requesting for the typed proceedings was not filed within the stipulated time, that the consent which was filed more than a month from the date of instruction is not mandatory given that counsel could still have represented the appellant by seeking leave of court.
4. I have considered the application and the affidavit in support thereof as well as the replying affidavit and submissions by counsel and judicial authorities cited. The discretion of a single judge under Rule 4 is wide and unfettered. The principles that govern the exercise of discretion in an application for extension of time such as this are well known. They include but are not limited to the length of the delay, the reason for the delay; (possibly) the chances of the appeal succeeding if the application is granted; and, the degree of prejudice to the respondent if the application is granted (See the case of *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* [1999] 2 EA 231).
5. Bearing the above in mind, the only issue for my determination is whether the applicant's explanation for delay between 17th March 2021 when the impugned judgment was delivered and 7th July 2021 when the application for extension of time was filed, warrants the exercise of this court's discretion.
6. The applicant alleges that upon delivery of the judgment, it instructed its former advocates immediately to file a notice of appeal, it then instructed current advocate on 20th May 2021 to file a memorandum of appeal and that the delay in filing the instant application was as a result of a failure by its previous advocates to act on its instructions to file a notice of appeal and the delay in filing a consent of change of advocates.
7. It is clear to me that there was a mix up between the applicant and its Advocates on record. It is the case of the applicant that the failure has been caused by its former Advocates. The question that arises is whether the omissions or actions of the former Advocates should be visited upon the applicant. It is not the law as I understand it that all omissions of Advocates are excusable. Each matter must be evaluated on its unique and peculiar facts and circumstances. In this case I am satisfied with the explanation given by the applicant and consider this case fit for the exercise of my discretion and I direct that the record of appeal be filed and served within the next 14days.
8. As for the prayer seeking stay of execution, the same is misconceived as the order can only be granted by a full bench of this Court as provided under Rule 53(2) of the Court of Appeal Rules.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

M. WARSAME

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

