



REPUBLIC OF KENYA



KENYA LAW
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**Bethsaida Resort & Spa Limited v Gauderlot (Civil Application
E002 of 2020) [2021] KECA 244 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 244 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E002 OF 2020**

JW LESSIT, JA

DECEMBER 3, 2021

BETWEEN

BETHSAIDA RESORT & SPA LIMITED APPLICANT

AND

JEAN – PIERRE GAUDERLOT RESPONDENT

((An application for extension of time to file and serve the Memorandum and Record of Appeal, in an Appeal arising from the Ruling and Order of the Environment and Land Court of Kenya at Mombasa (Omollo, J.) dated 21st November, 2019 and delivered on 16th December 2019 by Hon. Justice C. Yano) in (ELC Misc. Application No. 6 of 2018))

RULING

1. The notice of motion application coming up for hearing on 19th October 2021 is dated 18th August 2020 and has been brought under rules 4 and 41 of the Court of Appeal Rules. It seeks the following 3 orders:
 1. That the Honourable Court be pleased to extend the time for filing of the Memorandum and Record of Appeal against the Ruling and Order of the Environment and Land Court of Kenya at Mombasa (Hon. Lady Justice A. Omollo) dated 21st November, 2019 and delivered on 16th December 2019 by Hon. Justice C. Yano.
 2. That the Record of Appeal lodged on 24th August, 2010, being Civil Appeal No. 59 of 2020 be deemed as properly filed.
 3. That the costs of the Application be in the cause.
2. The application is premised on the following grounds: -



1. That the Applicant is dissatisfied with the Ruling and Order of the Environment and Land Court at Mombasa (Hon. Lady Justice A. Omollo) dated 21st November, 2019 and delivered on 16th December 2019 by Honourable Justice C. Yano.
 2. That the Memorandum and record of appeal ought to have been filed within sixty days of lodging the Notice of Appeal which Notice of Appeal was lodged on 18th December, 2019.
 3. That the failure to file the Memorandum and Record of Appeal on time was due to pending application for Leave to Appeal against the decision.**
 4. That the Ruling subject of the appeal was delivered on 16th December, 2019 at 9.00 am in the absence of the Applicant who was served with the ruling notice on 16th December, 2019 at 1.00 p.m.
 5. That there is no automatic right of appeal in respect of the Ruling and the Applicant immediately filed a Notice of Motion Application dated 18th December, 2019 seeking inter-alia leave to appeal against the Ruling.
 4. That the Applicant further filed a Notice of Appeal dated 18th December, 2019 and served the same upon the Respondent on 20th December, 2019.
 5. That leave to appeal was granted in a Ruling delivered on 10th March, 2020 and on 15th March, 2020 the Hon. Chief Justice issued a directive on the scale down of court activities throughout the country to prevent and/or minimize the spread of Covid-19.
 6. That following the announcement, there was a disruption of normal business operations both at the court registry and at the offices of the Authorities representing the parties, with measures being taken to set up structures to work from home where possible.
 7. That the Applicant had requested for a copy of the typed proceedings and a certified copy of the ruling and a certificate of delay.
 8. That the application has been brought without undue delay and the Applicant has always been keen on prosecuting the Appeal.
 9. That the Respondent will not suffer any prejudice as the Appeal will be determined on merits and justice will be duly served on both parties once it is heard and determined.
 10. The Application was supported by the affidavit of Sheila Kaburu, the Applicant's advocates, sworn on 18th August 2020 and which repeated the grounds above stated. The Applicant's advocate deposed further that the ruling the subject of the intended appeal was delivered in respect of the Applicant's Notice of Motion dated 20th February, 2018 challenging assessed costs in Kwale CMCC No. 507 of 2017 Bethsaida Resort and Spa v Jean Pierre Gauderlot. She deposed further that the Applicant's appeal is arguable with a good chance of success as demonstrated by the grounds contained in the draft memorandum of appeal.
3. No papers are on Record opposing the application. The Respondent's advocates, M/S Cootow & Associates Advocates, sent an email dated 14th October, 2021 to this court's Deputy Registrar indicating that they shall not be filing submissions to the application but shall await the decision of the court.



4. The application has merits and may be allowed, the Applicant has explained the reasons for the delay and his actions after the application for leave to appeal was granted, confirms that it is not an indolent litigant.
5. In considering this matter I will bear in mind the well-known passage often cited from the case of *Leo Sila Mutiso v. Rose Helen Wangari Mwangi* Civil Application No NAI 251 of 1997 (unreported) reading as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which the court generally takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason 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.”
6. The Applicant submitted that the evidence presented indicates that it did all it was behooved to do to prosecute the appeal expeditiously and without inordinate delay. The Applicant submitted that on the issue of delay, the approximate period of delay in filing the record of appeal is 104 days. It explained that due to the Covid-19 pandemic the courts scaled down its operations from March 2020 thus disrupting court processes. It explained further that it could not file the appeal without leave, and that the leave was granted few days before the scale down of the court activities.
7. The Applicant on the issue whether the appeal is arguable and/or has a high chance of success, contends it does as the appeal is premised on a grave misapplication of the Advocates Remuneration Order. That in this matter, the plaintiff sued for the sum of Kshs. 4,500,000.00 being the deposit paid and not the value of the property i.e., Kshs. 45,000,000.00. It was submitted that Kshs. 874,750.00, the amount involved in the appeal, is a substantial sum and that the appeal is arguable.
8. On the issue of prejudice, it was submitted that the Respondent will not suffer any prejudice as the dispute herein involves costs payable under the Advocates Remuneration Order while the substantive matter was already settled by the court. That the full ends of justice shall be met after all parties have been heard. The Respondents were served with this application and opted to file no submissions but to await this court’s ruling. In my own assessment of the case, I am satisfied that the Respondents do not stand to suffer any prejudice if the application is allowed.
9. I have come to the conclusion that there was at least 104 days of delay as to which the Applicant has given a satisfactory explanation in this matter. As to the merits of the intended appeal, I am satisfied that it may have some chances of success, which are sufficiently strong to warrant the court to exercise its discretion in the favour of the Applicant.
10. Accordingly, I order that the Applicant’s application is allowed with costs to abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

J. LESIIT

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

