



REPUBLIC OF KENYA



**KENYA LAW**  
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**Eldoret Grains Limited v Kipkoech & 14 others (Civil Application  
108 of 2019) [2021] KECA 273 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 273 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 108 OF 2019  
J MOHAMMED, JA  
DECEMBER 3, 2021**

**BETWEEN**

**ELDORET GRAINS LIMITED ..... APPLICANT**

**AND**

**GILBERT KIPTOO KIPKOECH & 14 OTHERS ..... RESPONDENT**

*(An application for leave to file a memorandum and record of appeal out of time from the judgment of the Employment and Labour Relations Court at Kisumu (Rika, J.) and delivered by (Nduma, J.), dated 6th December, 2018) in E.L.R.C Cause No. 227 OF 2013)*

**RULING**

1. Eldoret Grains Limited (the applicant) moved this Court vide an application dated 9th September, 2019 seeking for leave to file a memorandum and record of appeal out of time against the judgment of the Employment and Labour Relations Court (E.L.R.C) at Kisumu (Rika, J) delivered on 6th December, 2018. Gilbert Kiptoo Kipkoech and 14 others are the respondents herein.
2. The application is brought under Rule 4 of the [Court of Appeal Rules](#) as well as Order 50 Rule 6 of the [Civil Procedure Rules](#) and is premised on the grounds: that the applicant's erstwhile advocates had failed to file the memorandum and record of appeal within the stipulated time; that the delay in filing an appeal was neither deliberate nor intentional but was as a result of the negligence and mistake of its erstwhile advocates; that the applicant has always made its intentions clear that it is dissatisfied with the judgment of the E.L.R.C and wishes to appeal against the said judgment; and that the delay is not inordinate, is excusable and shall not in any way prejudice the respondents.
3. In response to the application, the respondents aver: that on 18th January, 2020 the parties herein entered into a consent in E.L.R.C No. 227 of 2013 wherein the decretal sum in the sum of Kshs.1,345,976/= was released to the respondents' advocates; that the said consent was adopted as an order of the court on 6th February, 2020 thus marking E.L.R.C No. 227 of 2013 fully settled; that



the instant application is therefore overtaken by events and allowing it would amount to an academic exercise; and that the delay of more than two years has not been explained.

#### Submissions

4. The application was dispensed with by way of written submissions. The respondents filed their submissions wherein they reiterated the contents of their replying affidavit. The respondents further submitted that the judgment herein has been satisfied by consent of the parties herein above alluded to hence no prejudice will be occasioned to any party in the event that the instant application is dismissed with costs.

#### Determination

5. I have considered the application, the grounds in support thereof, the submissions filed by the respondents and the law. The issue for determination is whether the application is deserving of the orders sought. The discretion that this court is called to exercise in the determination of this application is provided under Rule 4 of the Court of Appeal Rules as follows:

“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.”

6. *In Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231* which is the locus classicus, laid down the parameters of applications under Rule 4 of this Court’s Rules 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 this Court 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.” [Emphasis supplied].

7. As regards the length of delay, in *Andrew Kiplagat Chemaringo v. Paul Kipkorir Kibet [2018] eKLR*, this Court stated as follows:

“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 favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

8. The impugned ruling was delivered on 6th December, 2018 whereas this instant application was filed on 9th September, 2019. The delay in filing the instant application was therefore approximately nine (9) months. In a bid to explain the delay, the applicant avers that its erstwhile advocates failed to file the memorandum and record of appeal within the time stipulated by the law. The applicant further avers that the delay in filing the appeal was as a result of the negligence and mistake of its erstwhile advocates.



8. In *Rajesh Rughani vs Fifty Investment Ltd. & Another (2005) eKLR* this Court held:

“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.

10. Similarly, in *Bains Construction Co. Ltd. vs John Mzare Ogowe (2011) eKLR* the court observed:

“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”.

11. In the absence of any affidavit from the applicant's erstwhile advocates to explain their failure to file the appeal for a lengthy period, it can only be surmised that they were guilty of inaction. The explanation of the delay is therefore not satisfactory as the applicant also had a responsibility to follow up on the progress of the matter.

12. Regarding the chances of success of the intended appeal, the applicant contends that the intended appeal has merit and has annexed a memorandum of appeal. On this aspect I am guided by the case of [\*Athuman Nusura Juma v. Afwa Mohamed Ramadhan CA No. 227 of 2015\*](#) where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

13. On prejudice likely to be suffered by the respondents should the relief sought be granted, this court has to balance the competing interests of both parties. The respondents' contention is that they will suffer irreparable damage should this application be allowed as they have used a lot of resources in litigation and should be allowed to enjoy the fruits of their judgment.

14. From the circumstances of this instant application, the applicant has not demonstrated the existence of the parameters set out in *Leo Sila Mutiso (supra)*. The delay in filing the memorandum and record of appeal has not been satisfactorily explained.

14. In the circumstances, I find no merit in the notice of motion dated 9th September, 2019 and dismiss it with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2021.**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

