



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**(G.B.M. KARIUKI JA) IN CHAMBERS**  
**CIVIL APPLICATION NO. NAI.208 OF 2014**

**EASTLEIGH MATTRESSES LTD.....APPLICANT**

**VERSUS**

**STEPHEN MIHANG'O KARIUKI .....1ST RESPONDENT**

**WINNIE MUTHONI KARIUKI .....2ND RESPONDENT**

**NELSON WAINAINA NJUGUNA .....3RD RESPONDENT**

(Being an application for extension of time to lodge a Notice of Appeal against part of the decision of the Industrial Court in Nairobi (Rika J) made on 1st July 2014

in

Cause No. 1752 of 2011)

\*\*\*\*\*

**RULING**

**1.** The applicant, Eastleigh Mattresses Ltd, lodged in this court on 13th August 2014 an application by way of Notice of Motion dated 11.8.2014 seeking orders:-

(1) That time for lodging a Notice of appeal against part of the decision of the Industrial Court in Nairobi (Rika J) made on 1st July 2014 in Cause No.1752 of 2011 be extended.

(2) That costs of the application be in the cause.

**2.** The application was supported by two affidavits, one sworn by Mr. Joseph Kamau Chege, the Managing Director of the applicant, and the other by Mr. Robert Macharia, the learned counsel for the applicant.

These two Affidavits show that;

(i) The Applicant was the defendant in the Industrial Court suit Number 1752 of 2011 in which the respondents, Messrs Stephen Mihango Mwangi, Winnie Muthoni Kariuki, and Nelson Wainaina Njuguna, claimed payment of terminal benefits totaling to Shs.2,787,174/15 as evidenced by paragraph 8 of their statement of claim in the suit.

(ii) After the conclusion of the hearing of the case, the Industrial Court was to deliver judgment on notice to the parties.

(iii) The applicant's counsel on record in the suit, Mr. Robert Macharia, was never served with notice of delivery of the judgment.

(iv) The applicant's counsel received on a date in July 2014, which date he did not specify in his affidavit, a letter dated 9th July 2014 informing him that judgment had been delivered. The letter itself did not indicate the date of delivery. It, however, demanded payment of Shs.211,886 awarded by the Industrial Court to the respondents.

(v) The applicant's counsel dispatched his clerk immediately to the court to find out the date of delivery but the court file could not be traced.

(vi) Counsel for the applicant also went to the court registry on a date that he did not indicate to get a copy of the judgment but he only managed to get the court file on 23.7.2014 when he obtained a copy of the judgment.

(vii) The counsel for the Respondents sent to the applicant's counsel a draft decree for approval under cover of the former's letter dated 10th July 2014.

(viii) Counsel for the applicant lodged in this court on 13.8.2014 the application which is the subject of this ruling, seeking the aforementioned orders for extension of time to file notice of appeal.

3. The replying affidavit sworn by Winnie Muthoni Kariuki on her own behalf and on behalf of the other respondents does not say the applicant's counsel had been served with notice of delivery of the judgment. Rather, it indicates that on 11.7.2014 the latter was served with a draft decree for approval from which he should have deciphered that judgment was delivered and perhaps the date of delivery.

4. When the application came up for hearing before me on 3rd August 2014, the applicant's counsel, **Mr. Macharia**, submitted that he came to know that judgment had been delivered on 9.7.2014 but he did not know on which particular date judgment had been delivered. He visited the court registry to confirm delivery of the judgment and on 23.8.2014 obtained a copy of the judgment from which he discerned that judgment was delivered on 11.7.2014. By then, time for giving notice of appeal had expired as Rule 75(1) and (2) of this Court's Rules provides that:

**“Any person who desires to appeal to the court (of appeal) shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**

**Every such notice shall subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”** (underlining is mine).

5. **Mr. Macharia** told the court that he saw no need of filing a Notice out of time without leave because it would have been struck out. Moreover, he said, he could not give notice without first picking out the issues of law to be pursued on appeal and before determining whether the appeal was going to be against the whole or part of the judgment and he argued that this entailed perusal of the judgment itself first. Section 17 (1) and (2) of the Industrial Court Act (Act No.20 of 2011) provides that:

**“ (1) Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.**

**(2) An appeal from a judgment, award, decision, decree or order of the Court shall lie only on matters of law.”**

6. When he determined that the applicant's appeal was in respect of part of the judgment, the applicant's counsel stated that he filed the application for extension of time on 13.8.2014. It was the submission of the applicant's counsel that although the respondents were found by the court to have been involved in irregular crediting of loyalty points and that they wrote statements admitting the accusations and also that there was adequate evidence given to justify their termination, the trial court nevertheless found that the termination was unfair on procedural grounds and awarded them the amount aforementioned. In short, **Mr. Macharia** contended that the intended appeal is arguable and that the delay in giving the notice of appeal was not inordinate and was explained.

7. On his part, **Mr. Nyabena**, the learned counsel for the respondents opposed the application and relying on the respondent's replying affidavit submitted that the application was an afterthought and that the applicant had not even applied for a copy of the proceedings to indicate that he intended to appeal. At any rate, the applicant's counsel, he further contended, perused the judgment on 23.7.2014 and it was not until 13.8.2014 (after 21 days) that he lodged the application for extension of time. Counsel posed the question: "Why did he wait for so long?" In counsel's view, omission to apply for proceedings shows that the applicant was tardy in taking steps with a view to appeal. It was **Mr. Nyabena's** further submission that the applicant was taciturn on proposed grounds of appeal as it had failed to indicate the points of law, if any, on which the applicant desires to appeal. In counsel's view, the application does not indicate what part of the judgment the applicant is aggrieved by. In his view the application has no merit and should be dismissed as it is designed, in counsel's view, to deny the respondents the fruits of the judgment.

8. The application was premised on rule 4 of the Rules of this court which gives this court unfettered discretionary power to extend time limited by the Rules of this court or by any decision of this court or of a superior court. The Rule provides;

**"4. 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. Under section 3A (1) of the Appellate Jurisdiction Act (Cap 9) on which this application is also premised, the overriding objective of the Act and the Rules of this court is to facilitate the just, expeditious proportionate and affordable resolution of the appeals governed by the Act. Section 3B(1) of the Act provides that the court shall handle all matters presented before it for the purpose of attaining the following aims-

**(a) the just determination of the proceedings;**

**(b) the efficient use of the available judicial and administrative resources;**

**(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**

**(d) The use of suitable technology.**

10. As was stated by this court in **Trust Bank Ltd. vs Amolo Company Ltd.** (C.A. NO.215 of 2000) **"the spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence any good reason for it not to do so."** Further **"that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuit of his rights."**

11. But sight must not be lost of the fact that Rules of court are designed to set timelines in litigation with a view to ensuring expeditious determination of disputes otherwise tardiness in the

court process might invite ridicule and result in loss of confidence in the judicial intervention. The House of Lords in its decision dealing with the amendments of pleadings in the case of **Kettewman V Hansel Properties Ltd [1958] 1 ALL ER 38**, (Lord Griffiths) pointed out, inter alia, that:

**“Since it is in the interest of the whole community that legal business should be conducted efficiently, indulgence can no longer be shown towards the negligent conduct of litigation, and the interests of justice may be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.”**

12. The sentiment expressed by the House of Lords as above captures the aims set out in section 3B(1) of the Appellate Jurisdiction Act whose purpose is to further the overriding objectives specified in section 3A of the Act.

13. It is quite plain to see that although the applicant’s counsel was not served with a notice of delivery of judgment he did peruse the judgment on 23.7.2014 and as correctly submitted by **Mr. Nyabena**, he should have applied immediately for extension of time but instead, he took 21 days to do so because it was not until 13.8.2014 that he lodged the instant application.

14. This court will be persuaded to exercise its discretionary power under rule 4 to extend time to file notice of appeal out of time if the applicant shows that the delay was not inordinate or has satisfactorily explained the reason for it and further (and possibly) that there are chances of the appeal succeeding and also that the degree of prejudice to the respondent if time is extended will be none or will be negligible, always bearing in mind that each case must be viewed and decided on its own merits. As correctly stated in the case of **Mwangi v Kenya Airways Ltd [2003] KLR 48**,

**“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap 9) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”**

15. In this application, judgment was delivered on 1.7.2014. It is not disputed that the applicant’s counsel was not notified of the date of delivery of the judgment. It is also not in dispute that around 10th July 2014, the applicant’s counsel became aware after receipt of the aforesaid correspondence that judgment had been delivered. However, he did not know the date on which it was delivered. The counsel for the respondents did not indicate it in his letter of demand for payment of the judgment debt but later when he forwarded the draft decree, the draft decree must have reflected the date of delivery of the judgment which the applicant’s counsel should have discerned. But the applicant’s counsel needed to peruse the judgment itself to determine what the legal issues to be pursued on appeal were going to be, and whether the appeal was going to be against the whole or part of the judgment. I accept that it was desirable for counsel to peruse the judgment first before lodging Notice of Appeal especially as the claim in the suit was a pecuniary one and the amount awarded to the respondents and the basis for the award could only be deciphered from the judgment.

16. In the event, the applicant could not lodge Notice of Appeal before 23.7.2014 (when the judgment was perused by its counsel) by which time the period for lodging Notice of Appeal had elapsed. Did the applicant through his counsel move with dispatch to seek extension of time to lodge Notice of Appeal after perusing the judgment on 23.7.2014? I accepted **Mr. Nyabena’s** submission that the applicant’s counsel dithered somewhat because he took 21 days before lodging the application for extension of time. However, in the circumstances of this case, it cannot be said that that period was inordinate considering that in normal circumstances instructions had to be sought and obtained and pleadings had to be drawn and affidavit/s signed by clients.

17. In the instant case, failure of the applicant’s counsel to act with greater dispatch may have prejudiced

the applicant's application for extension of time. However, after weighing one thing with another in the circumstances of this case, it is my finding that the delay was not inordinate and was in any case satisfactorily explained. The fact that the applicant did not annex a draft memorandum of appeal, though desirable, did not prejudice the application contrary to the submission by the Respondent's counsel. At this stage, it is not necessary for the applicant to show that its intended appeal has chances of success. This is not a factor that should weigh against the grant of the extension of time when it is apparent from the affidavit in support of the application that the appeal is not frivolous or a non-starter.

For these reasons I allow the application. I extend time to lodge Notice of Appeal against the judgment of the Industrial Court delivered on 1.7.2014 in Cause No.1752 of 2011 by 7 days from the date of this ruling. The applicant shall pay to the respondents the costs of this application in any event.

**Dated and delivered at Nairobi this 10th day of October 2014.**

I certify that this is a

True copy of the original.

**DEPUTY REGISTRAR**

**G. B. M. KARIUKI SC**

.....

**JUDGE OF APPEAL**