



**Sobayeni & another v Australian Consultants Limited & another (Cause E586 of 2020) [2024] KEELRC 2548 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2548 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E586 OF 2020  
SC RUTTO, J  
OCTOBER 18, 2024**

**BETWEEN**

**LYDIA SUZY SOBAYENI ..... 1<sup>ST</sup> CLAIMANT**

**GEORGINA GLADYS SOBAYENI ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**AUSTRALIAN CONSULTANTS LIMITED ..... 1<sup>ST</sup> APPLICANT**

**GURGEET KAUR TS CHANA ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. By an Application dated 21<sup>st</sup> June 2024, the Applicants pray for extension of time to file the Notice of Appeal against the judgment delivered by this Court on 3<sup>rd</sup> May 2024. The Applicants further pray for a stay of execution of the orders of 3<sup>rd</sup> May 2024 pending hearing and determination of the Appeal.
2. The Application is premised on the grounds appearing on its face and the Supporting Affidavit of the 2<sup>nd</sup> Applicant herein, Ms. Gurgeet Kaur T. S Chana.
3. Ms. Gurgeet deposes that two years after the suit was filed in 2020, she separated with her husband, who remained the sole director and shareholder of the 1<sup>st</sup> Applicant. At the time of the separation, the company bank accounts had funds and payments were still being made into the said bank accounts. She no longer operates the 1<sup>st</sup> Applicant’s bank accounts.
4. She further avers that she was not aware that judgment had been delivered in this case until her advocate on record, Mr. Amanyia sent a copy of the same by email on 14<sup>th</sup> May 2024 at 4:20pm. That by then, 11 days had already elapsed since judgment was delivered on 3<sup>rd</sup> May 2024. Thereafter, Mr. Amanyia refused to talk to her or communicate with her. She was then referred to another Advocate by her accountant.



5. That due to the delay, the Applicants were not able to lodge a Notice of Appeal on time.
6. The Claimants/Respondents opposed the Application through a Replying Affidavit sworn on 15<sup>th</sup> July 2024 by Ms. Lydia Suzy Sobayeni, the 1<sup>st</sup> Claimant herein. She avers that the issues raised in the Application are completely inaccurate, unnecessary and are aimed at wasting this Honorable Court's judicial time further delay enjoyment of the fruits of the judgment upon successful litigation.
7. She avers that the Applicant was sued in her legal capacity as the Managing Director and shareholder of the 1<sup>st</sup> Applicant whose responsibility included overseeing the day to day running of the 1<sup>st</sup> Applicant. It is her view that the issues raised by the 2<sup>nd</sup> Applicant on the separation from the husband is a personal affair that should not be before this Honourable Court and more so affect their enjoyment of the fruits of successful litigation.
8. She further deposes that the execution of the judgment is not solely against the 2<sup>nd</sup> Applicant as purported, but is against all Applicants herein. The 2<sup>nd</sup> Applicant cannot now purport to realize the risk of suffering any form of prejudice now that it is time to execute the decree, as she fully participated and even testified on behalf of the 1<sup>st</sup> Applicant.
9. That the Claimants have suffered great prejudice on account of the Applicants' conduct of delaying the Court process and allowing the present Application will be furthering the prejudice.
10. The Claimants further contend that the Applicants' advocate was present in Court during the delivery of the judgment and the claim that they were never timely advised by their then advocates is unfounded and should not be a basis to deny them enjoyment of the fruits of the judgment.
11. The Application was canvassed by way of oral submissions on 25<sup>th</sup> July 2024. Mr. Oigara submitting on behalf of the Applicants argued that the delay in filing the Notice of Appeal was occasioned by the Applicants' former Advocate. It was his further submission that the right to appeal is a constitutional right and that the Applicants have an arguable appeal with high chances of success.
12. Submitting on behalf of the Claimants, Mr. Njeru posited that the Applicants have not met the threshold for grant of the orders sought in the Application. He argued that the Applicants have not shown willingness to deposit security and have not satisfied the Court that they can pay the decretal sum should the Appeal fail. With respect to the delay in filing the Notice of Appeal, Mr. Njeru posited that the case belongs to the parties and that the 2<sup>nd</sup> Applicant knew that after hearing, what follows is judgment.
13. I have given due consideration to the Application, the grounds in support thereof as well as the Claimants' Response to the Application. To my mind, the main issue for determination at this juncture is whether the Applicant's prayer for extension of time should be granted.
14. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR enunciated the principles that govern the exercise of discretion in applications for extension of time as follows: -

“The underlying principles a court should consider in exercise of such discretion should include: -

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
  - f. Whether the application has been brought without undue delay.
15. Further, in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
16. Applying the aforementioned principles to the instant Application, I find it imperative to first consider whether the Applicants have tendered a satisfactory explanation for the delay in filing the Notice of Appeal.
17. The Judgment which the Applicants intend to appeal against was delivered on 3<sup>rd</sup> May 2024. By simple arithmetic, the period for filing the Notice of Appeal lapsed on or about 17<sup>th</sup> May 2024 while the instant Application was filed on 4<sup>th</sup> July 2024. This was approximately 48 days outside the limited time for filing a Notice of Appeal.
18. The main reason proffered by the 2<sup>nd</sup> Applicant for the delay in filing the Notice of Appeal, is that she was not aware that judgment had been delivered in the matter until her Advocate who was on record at the time, sent her a copy by email on 14<sup>th</sup> May 2024. That thereafter, the said Advocate refused to talk to her hence she had to engage another Advocate.
19. Fundamentally, the Applicants have attributed the delay in filing the Notice of Appeal, on their erstwhile Advocates. The scenario presenting in this case brings to mind the holding by the Court of Appeal in the case of *Rajesh Rughani v Fifty Investment Ltd. & Another* (2005) eKLR thus:
- “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”.
20. In support of her averments, the 2<sup>nd</sup> Applicant annexed to her Affidavit a copy of an email from her previous Advocate, forwarding a copy of the Judgment on 14<sup>th</sup> May 2024. According to the 2<sup>nd</sup> Applicant, the Advocate refused to talk to her thereafter. Despite these averments, there is no evidence on record to show that the Applicants attempted to reach their erstwhile Advocate upon receiving a copy of the Judgment.
21. Nevertheless, I am inclined to give the Applicants the benefit of doubt and grant them leave to file the intended Notice of Appeal. This is bearing in mind that the delay of 48 days is not inordinate as



the Applicants instructed a new Advocate to come on record and file the instant Application without unreasonable delay.

22. The other consideration to be made by the court before allowing an application for extension of time is whether there will be any prejudice suffered by the Claimants if the extension is granted. The Claimants in this case aver that they have suffered prejudice on account of the Applicants' conduct of delaying the court process.
23. On this issue, I will follow the determination by the Court of Appeal (Korir JA) in the case of *Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi* (Civil Application E032 of 2022) [2023] KECA 381 (KLR) (31 March 2023) (Ruling) where the learned Judge reckoned that the interest of justice demands that a party is accorded every reasonable and available opportunity to ventilate their grievances within the available ranks of our judicial system.
24. To this end, I am persuaded that the Application seeking to file the Notice of Appeal out of time is merited.
25. Before I conclude, I must point out that the Applicants have further sought an order to stay execution pending hearing and determination of the Appeal. In my view, this order cannot be granted at this juncture seeing that the Applicants have just been granted leave to file a Notice of Appeal. This is yet to be done. As such, there is no basis upon which the Applicants can be granted an order staying execution pending appeal.
26. In the circumstances, the Application dated June 21, 2024 is allowed in terms of prayer 3 and the Applicants are hereby granted leave to file and serve a Notice of Appeal within 7 days from the date of the delivery of this Ruling.
27. There will be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF OCTOBER 2024.**

**STELLA RUTTO**

**JUDGE**

In the presence of:

Mr. Oigara for the Applicants/Respondents

Mr. Njeru for the Claimants/Respondents

Millicent Kibet Court Assistant

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

