



REPUBLIC OF KENYA



Kenya Hotels and Allied workers Union v House & another (Civil Application E097 of 2023) [2023] KECA 1372 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KECA 1372 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E097 OF 2023
HA OMONDI, JA
NOVEMBER 17, 2023**

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNION APPLICANT

AND

GREEN VIEW GUEST HOUSE 1ST RESPONDENT

JOSHUA OKOTH MIGIRE 2ND RESPONDENT

(An application for extension of time to file a Notice of Appeal out of time from the Judgment and Decree of the Employment and Labour Relations Court at Kisumu (Baari, J.) dated 8th December 2022 in ELRC No. 2 of 2022)

RULING

1. The application dated 28th July 2023 brought pursuant to Rule 4 *Court of Appeal Rules*, 2010 seeks the following prayers that:
 - (i) Time for filing the notice of appeal dated 3rd July 2023 be enlarged and the notice be deemed as properly on record.
 - (ii) That the applicant be allowed to file the record of appeal upon grant of prayer one above.
 - (iii) Costs in the cause.
2. The application is supported by an affidavit of even date sworn by Chadwick Oloto Ngono.
3. The applicant had filed a claim ELRC No. 2 of 2022 before the Employment and Labour relations Court on behalf of its aggrieved union member, Phillip Osano Athemba, seeking that the respondents be ordered to pay to the grievant, 15 days worked for September, 2020; 1 year's pending leave days; 8 months pro-rated leave; 14 pending public holidays; 560 pending off days, Service pay for 11 years; and wage underpayment.



4. The respondents entered appearance but did not file a response to the claim. The matter proceeded on formal proof, and on 8th December 2022, partial judgment was entered in favour of the applicant's prayers, but some of the reliefs sought were dismissed as not being adequately proved. The applicant applied for review of the judgment by the trial court, but this was denied on the grounds that it would be tantamount to sitting on its own appeal. The applicant then applied to the trial court for extension of time to file appeal, which was also denied for lack of jurisdiction. The applicant explains that as a result of these applications, time lapsed; hence the delay in filing the notice of appeal; that nonetheless, the application has been filed promptly, so discretion should be exercised in favour.
5. Rule 4 of the Court of Appeal Rules gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso v Rose Wangari Mwangi* Civil Application No. Nai. 255 of 1997 (unreported) held that the discretion of a single Judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka vs. Waruguru Kithaki & 2 Others* (2013) eKLR.
6. M'Inoti, J, had this to say concerning Rule 4 in *Imperial Bank (IR) & Anor vs. Alnashir Popat and Others* [2018] eKLR:

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favor. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”
7. Discretion also depends on circumstances of each case as per *Mongira & Another vs. Makori & Another* [2005] eKLR.
8. The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat vs. IEBC* [2014] eKLR sets down these principles as follows:
 - (i) Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - (ii) A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
 - (iii) Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
 - (iv) Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
 - (v) Whether there will be any prejudice suffered by the respondent if extension is granted.
 - (vi) Whether the application has been brought without undue delay.
 - (vii) Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of Julius Kamau Kithaka (supra) is whether prima facie the intended Appeal/Appeal has chances of success or is a mere frivolity.



9. There is no dispute that two applications were filed argued and determined; that would significantly take up some time. The applicant in my view, has satisfactorily explained the cause of the delay in filing the appeal; I find that that the applicant has met and satisfied the principles set out for this court to exercise its discretion in her favor and grant the extension. I therefore grant the prayers sought in the following terms:

- a) The applicant be and is hereby granted leave to file and serve a notice of appeal within 7 days from the date of the delivery of this ruling. Upon filing the notice of appeal the applicant will have 60 days within which to file and serve the record of appeal. The costs of this application shall abide the final outcome of the appeal.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF NOVEMBER, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

