



**Ondari v Maisha Mabati Mills & another (Civil Application  
E609 of 2024) [2025] KECA 1551 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1551 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E609 OF 2024  
K M'INOTI, JA  
OCTOBER 3, 2025**

**BETWEEN**

**SHEM ONKWARE ONDARI ..... APPLICANT**

**AND**

**MAISHA MABATI MILLS ..... 1<sup>ST</sup> RESPONDENT**

**JOKALI HANDLING SERVICES LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Application for extension of time to appeal from the ruling and order  
of the Employment & Labour Relations Court at Nairobi (Manani,  
J.) dated 15<sup>th</sup> February 2024 in ELRC App. No. 152 of 2022)*

**RULING**

1. The background to this application for extension of time is the protracted litigation that followed the enactment of *Work Injury Benefits Act*, 2008 (the Act). The High Court declared unconstitutional provisions of the Act that divested jurisdiction to hear and determine work injuries and occupational diseases claims from the courts and vested it in the Director of Occupational Safety and Health Services (the Director). Subsequently this Court reversed the decision of the High Court, a position which was ultimately upheld by the Supreme Court.
2. Even after this Court reversed the decision of the High Court declaring the Act unconstitutional, litigants, among them the applicant, continued to lodge claims in courts rather than with the Director. One such case was the applicant's, which the Chief Magistrate's Court at Thika entertained and determined. On appeal, the Employment & Labour Relations Court (Manani J.) held on 25<sup>th</sup> October 2022 that the trial was a nullity for want of jurisdiction.
3. The applicant subsequently applied to the ELRC to review, set aside its decision and reopen the appeal, relying on Practice Directions issued by the Hon the Chief Justice on 28<sup>th</sup> April 2023 to guide how



pending cases in courts pertaining to work injuries and disease claims should be dealt with. By a ruling dated 15<sup>th</sup> February 2024, the ELRC dismissed the application for review, after finding that the Practice Directions did not have retrospective application and could not form the basis for re-opening a decision made before the promulgation of the Directions.

4. The applicant did not prefer an appeal against that ruling within the prescribed time but instead, on 18<sup>th</sup> October 2024, some eight months later, applied for extension of time to appeal. The applicant blames the court for the delay in lodging the appeal because it did not avail a copy of the ruling until 8<sup>th</sup> May 2024.
5. In written submissions dated 14<sup>th</sup> July 2025, the applicant submits that the delay involved in this application is not inordinate and is explained by the efforts he was making to obtain a copy of the ruling. He relies on the decisions in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR and *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR where, respectively, delays of one year and 9 months and two months and 8 days were not considered inordinate. He also cites *Vishiva Stone Suppliers Co Ltd v RSR Stone (2006) Ltd* [2020] KECA 361 (KLR) in support of the submission that rules of procedure should not be allowed to tramp substantive justice.
6. It is also the applicant's submission that the intended appeal raises arguable issues, among them the proper interpretation of the Directions; whether the courts had jurisdiction and whether his right to access justice was violated.
7. The 1<sup>st</sup> respondent opposed the application vide a replying affidavit sworn on 8<sup>th</sup> July 2025 by M. W. Njihia and written submissions dated 11<sup>th</sup> July 2025. That respondent contends that the conduct of the applicant was manifestly dilatory and inexcusable in that having filed the application on 18<sup>th</sup> October 2024, the same was not served on the 1<sup>st</sup> respondent until 2<sup>nd</sup> July 2025, more than nine months later. It is further submitted that the applicant has not presented a genuine explanation for failure to file the appeal within the prescribed time because the ruling was delivered on 15<sup>th</sup> February 2024 in the presence of the parties and further that the delay of five months after purportedly obtaining the ruling was unexplained.
8. The 1<sup>st</sup> respondent further contends that the applicant is obliged to present a satisfactory and plausible explanation for the delay, with clear and valid reasons. In support it relied on the decisions in *Andrew Kiplagat Chemarigo v Paul Kipkorir Kibet* [2018] eKLR and *Bartilol & 3 Others v Bartilol & Another* [2024] KECA 607 (KLR). It is also submitted that the intended appeal is frivolous in so far as Practice Directions do not operate retrospectively.
9. The 2<sup>nd</sup> respondent did not respond to the application.
10. I have carefully considered this application. It is axiomatic that the power vested in the Court by rule 4 of the Court of Appeal Rules to extend time is discretionary and unfettered. However, that discretion has to be exercised judiciously rather than arbitrarily. As pointed out by the Supreme Court in *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR, what that means is that no party has a legal right to extension of time. Extension of time is an equitable remedy and is only available to a deserving party on a case by case basis. Further, the party that seeks extension of time bears the onus of laying basis to the satisfaction of the Court that extension of time is justified in the circumstances of the case.
11. In determining whether to grant or deny extension of time, the Court considers various factors, among them, the length of the delay; the reason, if any, for the delay; the degree of prejudice likely to be suffered by either party; the prospects of the appeal; the constitutional value and principle that justice should not be delayed. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, CA No. Nai. 255 of 1997; *Fakir*



Mohamed v Joseph Mugambi & 2 Others, CA. No. Nai 332 of 2004; and Imperial Bank Ltd (In Receivership) & Another v Alnashir Popat & 18 Others [2018] eKLR).

12. The ruling in question was rendered on 15<sup>th</sup> February 2024. Rule 77(2) of the Court of Appeal Rules required the applicant to lodge a notice of appeal within 14 days. Although the applicant validly submits that where appropriate, rules of procedure should not be allowed to trample substantive justice, it should not be lost that rules of procedure cannot be utterly wished away. It is through rules of procedure like rule 77(4) that the constitutional value and principle spelt in Article 159(2)(b) namely, that justice shall not be delayed, is realised. In determining whether delay is inordinate, the starting point is to bear in mind that delay relative to the period stipulated by the rules. The delay between the date of delivery of the ruling and the making of the present application is about eight months, which clearly is inordinate in the circumstances of this application.
13. What is the applicant's explanation for the delay? It is that the trial court delayed in providing to him a copy of the ruling.  
  
In support of the assertion the applicant has attached to the application two letters dated 12<sup>th</sup> and 23<sup>rd</sup> April 2024, applying for a copy of the ruling. It is worth noting that the earliest of these letters was sent two months after the date of delivery of the ruling. It is also noteworthy that the learned judge indicated at the foot of the ruling that the ruling was delivered to the parties online. In the era of online proceedings and online filing, the contention that a party was unable to file an appeal because he was waiting for a ruling that was delivered online is to say the least unconvincing, and I hold as much. As has been noted time and again by this Court, a party does not require proceedings, the ruling or the judgment, as the case may be, to lodge a notice of appeal because a notice of appeal is a one page formal document that does not require any exertion or effort to draft and file.
14. But even if I were persuaded that the applicant was waiting for the ruling, what is the explanation for the delay in filing the application for extension of time once the applicant received the ruling? From his own affidavit, the applicant received the ruling on 8<sup>th</sup> May 2024 but did not apply for extension of time until 18<sup>th</sup> October 2024, some five months later. Not only that, the applicant did not serve the application upon the respondent until 9 months later.
15. Looking at the totality of the applicant's conduct in this matter, one cannot escape the conclusion that it is wrought through and through with pervasive apathy and dilatoriness. That is not the kind of conduct that this Court will encourage, readily excuse or overlook. In short, I find that the applicant's inordinate delay is not satisfactorily explained.
16. A single judge seized of an application for extension of time cannot definitively engage with the merits or otherwise of the intended appeal. What I think is expected of such a judge is to satisfy himself or herself, on a prima facie basis, that the intended appeal is not frivolous. All I will say is that it appears to me to be beyond dispute that unless, expressly stated, practice directions, like legislation, cannot operate retrospectively. That point is well settled by the decisions of the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR.
17. As for the argument founded on alleged violation of the applicant's right to access justice and fair hearing, I will only note that the issue was never raised before the ELRC and that court neither considered nor determined it. Accordingly, I am not convinced that it is a valid issue that the applicant can legitimately raise in the intended appeal.
18. For the foregoing reasons and in particular the finding that the delay is inordinate and not satisfactorily explained, I dismiss the notice of motion dated 18<sup>th</sup> October 2024, with costs to the 1st respondent. It is so ordered.



**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2025.**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

