



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. 415 OF 2018**

**NIXON MWAI**  
**KIMITI.....CLAIMANT**

**-VERSUS-**

**BRITISH ARMY TRAINING UNIT KENYA.....**  
**....RESPONDENT**

**RULING**

**Introduction**

1. By a Notice of Motion dated 1<sup>st</sup> August 2024, the Claimant/Applicant sought the following orders:-

***(a) That this Honourable Court be pleased to admit this Application for consideration during this vacation period.***

***(b) That the Notice of Motion Application filed herein be certified as extremely urgent and be heard on priority basis.***

- (c) That this Honourable Court be pleased to issue an order granting leave to the law firm of OMEGA & ASSOCIATES ADVOCATES to come on record for the Applicant/Claimant in place of MUGO & ASSOCIATES ADVOCATES judgment having already been entered in this matter.**
- (d) That this Honourable Court be pleased to enlarge the time within which the Applicant/Claimant is required to file his Notice of Appeal intimating his intention to file an Appeal against the Judgment of the Hon. Justice Onesmus N. Makau delivered on the 26<sup>th</sup> April, 2019;**
- (e) That the draft Notice of Appeal filed herewith be deemed to have been duly filed upon payment of the requisite fees;**
- (f) That the costs of this Application be provided for.**

2. The Motion was supported by the Applicants Affidavits sworn on 1<sup>st</sup> August 2024 and 10<sup>th</sup> September 2024. It was opposed by the Respondent vide Grounds of Opposition dated 25<sup>th</sup> July 2025 and it was disposed of by written submissions.

## **Facts**

3. The Applicant peacefully worked for the Respondent until 20<sup>th</sup> September 2017 when he was served with a retirement notice effective 11<sup>th</sup> December 2018 upon turning 60 years. The Claimant protested the notice contending that he was a person with disability and therefore the law provided for mandatory retirement age of 65 years.
4. The Respondent was not moved by the Claimant protest and the Claimant resigned. Subsequently he sued alleging constructive dismissal but after the trial the Court dismissed the suit. Allegedly his advocate was aware that he was dissatisfied with the said decision but failed to file a Notice of Appeal within the prescribed time. He urged the Court not to visit his advocates mistake on him.
5. In the meanwhile the Claimant, allegedly suffered mental breakdown as a result of the dismissal of the suit and he was not able to instruct another Advocate to take over the conduct of the matter. Therefore he averred that the delay in lodging the Notice of Appeal was not deliberate but rather due to his mental incapacity.
6. He maintained that leave to file the Notice of Appeal out of time is deserving because the trial Court erred by dismissing his suit.

7. The Respondent's case on the other hand was that the Application was brought after inordinate and unjustified delay of more than five (5) years from the date of delivery impugned judgment. It was averred that the delay has not been explained as that there is no expert evidence to demonstrate that the Applicant lacked mental capacity to instruct counsel from 26<sup>th</sup> April 2019 to 1<sup>st</sup> August 2024. Therefore it prayed for the Motion to be dismissed because the Claimant slept on his rights.
8. Having considered the Motion, Affidavits, Grounds of Opposition and the rival submissions, the main issue for determination is whether the Applicant has laid before this Court any basis for granting leave to file Notice of Appeal out of time.

### **Analysis**

9. Rule 77 of the Court of Appeal Rules provides that:-

***“ (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.”***

***(2) Each notice under sub rule (1) shall, subject to rule 84 and 97, be lodged within fourteen days after the date of the decision against the decision (sic) for which appeal is lodged.”***

10. The power to extend the time for giving notice of intention to appeal is donated by section 7 of the Appellate Jurisdiction Act as follows:-

***“ The High Court may extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a certificate that a case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:***

***Provided that in the case of a sentence of death no extension of time shall be granted after the issues of the warrant for the execution of that sentence.”***

11. The above provision should be given a purposive interpretation so that the power donated therein is extended to cover this Court because its decisions are appealable to the Court of Appeal under the same Act and the rules of procedure made thereunder. The power must, however, be exercised on the basis of certain threshold being met.

12. In the case of **Nicholas Kiplos Arap Korir Salat v. IEBC & 7 others (2014) eKLR** the Supreme Court held that the court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:-

“

- i. ***Extension of time is not a right of 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 for extension of time has the burden of laying a basis to the satisfaction of the court***
- iii. ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- iv. ***Whether there is a 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 respondents if the extension is granted;***
- vi. ***Whether the application has been brought without undue delay; and***
- vii. ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

13. The Applicant blamed the delay in filing a Notice of Appeal on two reasons. The first reason is that his Advocates failed to file the notice despite the knowledge that he was dissatisfied by the Court’s judgment. In that regard, he urged that the mistake of his counsel should not be visited on him.

14. The second reason was that due to the said judgment of the Court, he suffered mental breakdown and he remained incapacity until a doctor certified him fit and he instructed the Advocate now on record to revive his case and lodge an appeal to the appropriate forum.
15. The Respondent did not file any Replying Affidavit to rebut the factual averments.
16. I have carefully considered the explanation by the Applicant in his two Affidavits and I am satisfied that the delay in filing a notice of intention to appeal within the prescribed time was not deliberate but was caused by mental illness on the part of the Applicant. The said mental incapacity amounts to a sufficient cause that warrants the exercise of this Court's discretion to extend the time for filing the Notice of Appeal. There is however, no proof that his former advocate had instructions to file any appeal on behalf of his sickly client. Such instructions cannot be assumed for the blues.
17. The Applicant deposed that the extension will not prejudice the Respondent and the latter did not demonstrate that it will suffer prejudice that cannot be remedied by costs. Consequently, I allow the Notice of Motion dated 1<sup>st</sup> August 2024, in the following terms:

- a) The Claimant is granted leave to change his Advocates.

- b) The time for filing Notice of Appeal is extended and the Claimant is granted 14 days of this Ruling to lodge his notice as prescribed by the relevant law.
- c) The Claimant is condemned to pay throw away costs of Kshs. 5,000/- to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUAL IN OPEN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF DECEMBER, 2025.**

**ONESMUS MAKAU  
JUDGE**

**Appearance:**

Alosa for the Respondent

No appearance for the Claimant