



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ayoo v Nursing Council of Kenya & 2 others (Civil Application  
E384 of 2024) [2025] KECA 785 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 785 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E384 OF 2024**

**SG KAIRU, JA**

**MAY 9, 2025**

**BETWEEN**

**FRANCIS OGOLA AYOO ..... APPLICANT**

**AND**

**NURSING COUNCIL OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**EDNA TALLAM ..... 2<sup>ND</sup> RESPONDENT**

**DUKE ONGECHI ..... 3<sup>RD</sup> RESPONDENT**

*(An application for extension of time to file and serve the Notice of Appeal and Record of Appeal against the judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Dr. Jacob Gakeri, J.) dated 20th December 2023 in ELRC Cause No. 270 of 2019)*

**RULING**

1. In his application dated 29<sup>th</sup> July 2024, the applicant Francis Ogola Ayoo seeks leave to file and serve a Notice of Appeal and Record of Appeal out of time. He intends to appeal against the judgment delivered on 20<sup>th</sup> December 2023 in Nairobi ELRC Cause No. 270 of 2019 in which the Employment and Labour Relations Court (ELRC) at Nairobi (Gakeri, J.) dismissed his claim for allowances and other dues, among other reliefs, on grounds that the 1<sup>st</sup> respondent was not his employer and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents could not be sued in their personal capacity having acted as officials of the 1<sup>st</sup> respondent.
2. The applicant's claim before the ELRC was that he was employed by the Ministry of Health on 13<sup>th</sup> February 1997; that at the time relevant to the dispute, he was working at the 1<sup>st</sup> respondent, effective 13<sup>th</sup> May 2013; that he travelled to Uganda and commenced his Masters Course on 28<sup>th</sup> September 2015; that he verbally informed the Director of the 1<sup>st</sup> respondent; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents questioned his absence from office and on 2<sup>nd</sup> November 2015, the 3<sup>rd</sup> respondent issued a suspension



- letter; that the applicant finally received course approval and salary reinstatement on 10<sup>th</sup> May 2017, backdated to 1<sup>st</sup> October 2015, but his allowances were not reimbursed. Aggrieved, the applicant filed suit complaining about the withholding of emoluments and allowances and violation of his rights.
3. In the judgment delivered on 20<sup>th</sup> December 2023, the subject of the intended appeal, the learned Judge found that no direct employer-employee relationship existed between the applicant and the 1<sup>st</sup> respondent, as he was an employee of the Ministry of Health seconded to the 1<sup>st</sup> respondent; further that the applicant's claim was statute-barred due to the passage of time since the alleged grievances occurred in 2015; and that there are no grounds for personal liability against the named 2<sup>nd</sup> and 3<sup>rd</sup> respondents, as their actions were within their official capacities. The applicant's other claims were rejected for lack of evidence or merit.
  4. Having ran out of time to challenge that judgment, the applicant filed the present application for extension of time which was canvassed before me on 26<sup>th</sup> March 2025. In support of the application, learned counsel for the applicant Mr. Munyalo Muli relied on the grounds on the face of the application, the applicant's supporting affidavit and written submissions. The explanation for the delay involved is that the applicant instructed one Kefa, a clerk in the firm of Nyandieka & Company Advocates, to prepare and file an appeal on his behalf and paid him for the job but the said Kefa "never filed and the said Kefa kept evading" him; and that in July 2024 he then approached his present advocates who lodged the present application.
  5. It is the applicant's case that the delay in filing the notice of appeal and the record of appeal is not deliberate as he "was misled by the said Kefa" whom he "truly believed could assist" him; that the intended appeal has high chances of success, and the respondents will not suffer any prejudice.
  6. In opposition to the application, learned counsel Mr. Abuga Davis appearing with learned counsel Mr. Clifton Ouko for the 1<sup>st</sup> and 2<sup>nd</sup> respondents relying on a replying affidavit sworn by Eugene Ayubu, the Acting Corporation Secretary and Director, Legal Services of the 1<sup>st</sup> respondent as well as their written submissions urged that the Court has no jurisdiction to entertain the application in the absence of a notice of appeal; that the applicant has not provided any lawful explanation for his failure to file his appeal within time; that the explanation by the applicant that he instructed a clerk, an unqualified person under Section 31 of the *Advocates Act*, is an offence and not a lawful reason for failing to file his appeal in time; that the delay of seven months in making this application is inordinate and inexcusable and his illegal dealings with an unqualified person cannot be justification for the delay.
  7. Moreover, counsel submitted, the applicant has not demonstrated arguability of the intended appeal not having attached any draft memorandum of appeal; that the grounds on which the ELRC dismissed the applicant's claim, namely that the 1<sup>st</sup> respondent was not the applicant's employer and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents could not be sued in their personal capacities are not uncontroverted.
  8. There is no appearance or response by the 3<sup>rd</sup> respondent, who was duly served with hearing notice on 5<sup>th</sup> March 2025.
  9. I have considered the application, the affidavits, the submissions and authorities cited against the principles applicable in matters of this nature. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time, that discretion should be exercised judicially. In *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR the Supreme Court of Kenya pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the



court. Other considerations include whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay. Public interest is also a relevant consideration.

10. Earlier, in *Fakir Mohamed vs. Joseph Mugambi & 2 Others* [2005] eKLR this Court stated:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor”.

11. With those principles in mind, judgment in this case was delivered by the ELRC on 20<sup>th</sup> December 2023. Under Rule 77(2) of the *Court of Appeal Rules*, the applicant had 14 days after the date of the judgment, to lodge the Notice of Appeal. Even if the period of Christmas recess is excluded in the computation of time, the notice of appeal should have been filed before end of January 2024. The applicant deponed in his affidavit that “following the dismissal” of his suit, he spoke to a clerk, one Kefa, to prepare and file an appeal on his behalf.

12. Even if one was to disregard for a moment that the applicant in doing that was clearly aware that he was not instructing an advocate, he does not state specifically, when he instructed the said clerk. The chat messages the applicant has exhibited to his affidavit as evidence of his follow up on the matter bear the dates between 8<sup>th</sup> June and 11<sup>th</sup> July. The present application dated 29<sup>th</sup> July 2024 was filed on 30<sup>th</sup> July 2024. What the applicant was doing between the month of February and June 2024 is therefore not clear. There is no explanation for that delay at all.

13. The applicant has not discharged his burden to satisfy the Court that extension of time should be granted. It bears repeating, as stated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others*, (above), that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court and the party seeking extension of time has the burden to lay a basis to the satisfaction of the court.

14. Having concluded that there is no satisfactory explanation for the delay, I need not go into considerations of prejudice and prospects of success of the intended appeal, even though on the face of it, there is no demonstration of what the intended grievances with the judgment are. As the Court stated in *Abdul Aziz Ngoma vs. Mungai Mathayo & Another* [1976] KECA 16 KLR:

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after “sufficient reason” for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”

15. The applicant’s application dated 30<sup>th</sup> July 2024 fails and is hereby dismissed. The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall have the costs of the application.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**S. GATEMBU KAIRU, FCIArb.**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

