



**Ochieng v Awanad Enterprises Limited & 2 others (Civil Appeal  
(Application) E054 of 2021) [2025] KECA 757 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 757 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E054 OF 2021**

**SG KAIRU, JA**

**MAY 9, 2025**

**BETWEEN**

**LABAN OWINO OCHIENG ..... APPLICANT**

**AND**

**AWANAD ENTERPRISES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PILI MANAGEMENT CONSULTANTS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**HEZRON AWITI BOLLO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time to seek leave and to file the Record of Appeal against the Ruling and Orders of the Employment and Labour Relations Court of Kenya (Byram Ongaya, J.) dated 18th June 2021 in ELRC Cause No. 66 of 2019)*

**RULING**

1. In his application dated 28<sup>th</sup> November 2024 citing provisions of the Constitution, the Appellate Jurisdiction Act and Rule 4 of the Court of Appeal Rules, the applicant Laban Owino Ochieng seeks: leave to file the record of appeal out of time; leave to file an application out of time for leave to appeal the ruling of the Employment and Labour Relations Court (ELRC) delivered on 18<sup>th</sup> June 2021 in ELRC Cause No. 66 of 2019.
2. Based on the material before the Court, the background in brief is that applicant's suit, which appears to have originally been filed before the Magistrate's Court, was struck out by the ELRC in a ruling delivered on 18<sup>th</sup> June 2021 on grounds that it was time barred. Intending to challenge that decision of the ELRC, the applicant filed Civil Appeal No. E054 of 2021, under which the present application has been filed. The respondents applied, by an application dated 5<sup>th</sup> May 2023 to have the appeal struck out on grounds of incompetence on account of having been filed and served out of time. The appeal,



- and that application were scheduled to be heard on 31<sup>st</sup> October 2023 and on that occasion, counsel urged the Court to hear and determine the application and the appeal together.
3. In its ruling delivered on 26<sup>th</sup> April 2024, the Court found that without leave, the record of appeal was served six months later after it was filed thereby rendering the appeal incompetent and struck it out with costs. Dissatisfied, the applicant moved the Court by an application dated 7<sup>th</sup> May 2024 seeking orders to recall, review or set aside the ruling of 26<sup>th</sup> April 2024. After hearing the parties on that application, it was dismissed by the Court in its ruling delivered on 22<sup>nd</sup> November 2024.
  4. The applicant then filed the present application 28<sup>th</sup> November 2024 which came up for hearing before me on 27<sup>th</sup> February 2025 during which learned counsel Mr. P. Amuga appeared for the respondents. There was no appearance for the applicant, despite notice of hearing having been served on the applicant's advocates Mosi & Company Advocates but who had however filed written submissions dated 18<sup>th</sup> December 2024.
  5. The applicant's case is that he did not get the certified copy of the ruling and typed proceedings of the ELRC on time; that the record of appeal ought to have been filed on or before 25<sup>th</sup> September 2022 and should have been served on or before 2<sup>nd</sup> October 2022 but the same was filed on 20<sup>th</sup> December 2022 and served on the same date; that the delay was occasioned by the applicant's former advocate having "changed offices and disappeared and could not be traced on time" prompting him to change advocates; that the incompetence and blatant omissions of his previous advocates should not impede his access to justice; that the intended appeal is arguable and raises serious constitutional questions.
  6. The respondents on the other hand urge that the decision of the ELRC the subject of intended appeal was delivered way back on 18<sup>th</sup> June 2021, that the delay in lodging the appeal and in making this application has not been explained at all or sufficiently; that there is no explanation why the applicant did not lodge his appeal, which has since been struck out, within the stipulate period; that the applicant has also not explained why the application for extension of time was not made in a timely fashion; that upon the respondents having applied to strike out the appeal, the applicant did not then take remedial action to seek extension of time; that the applicant has inundated the respondents with multiplicity of actions and endless litigation and the intended appeal is frivolous.
  7. I have considered the application, the affidavits in support and the replying affidavit, as well as the rival submissions. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time, that discretion should be exercised judicially. As the Supreme Court of Kenya pronounced in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others*, Supreme Court Application No. 16 of 2014[2014]eKLR 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.
  8. Earlier, Waki JA in *Fakir Mohamed vs. Joseph Mugambi & 2 Others* [2005] eKLR (Civil Application No. Nai. 332 of 2004 stated as follows:

“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”.

9. With those principles in mind, the judgment of ELRC the subject of intended appeal was delivered on 18<sup>th</sup> June 2021. The notice of appeal ought to have been filed by 2<sup>nd</sup> July 2021. I am unable to tell when the notice of appeal was filed. Regarding the record of appeal, Rule 84 of the Court of Appeal Rules provides that the record of appeal should be filed within sixty (60) days after the date when the notice of appeal is lodged. In this case the notice of appeal ought to have been filed by 2<sup>nd</sup> July 2021 and therefore the record of appeal should have been filed by 2<sup>nd</sup> September 2021 assuming that the proviso to Rule 84 was not in play.
10. The record of appeal in this case was stated to have been filed on 20<sup>th</sup> December 2022. A delay of one year and three months in filing the record of appeal. What is the applicant’s explanation? On the one hand, the explanation is that he did not get the certified copy of the ruling and typed proceedings from the ELRC on time. On the other hand, the applicant states that his former advocates disappeared with the record of appeal. I am not sure whether it is both or either of those ‘reasons’. Nonetheless, and as already noted, it is his case that, after delivery of the judgment on 18<sup>th</sup> June 2021, his advocate disappeared and could not be traced. That may well be so, although there is no evidence of any efforts he made to follow up on the matter. As Waki, JA stated in *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* [2015] KECA 987 (KLR):

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel”.
11. Moreover, as submitted by counsel for the respondents, the applicant was put on notice through the respondents’ application dated 5<sup>th</sup> May 2023 of the defects in the appeal and should then have moved the court for extension of time. Instead, the applicant awaited the disposal of the application dated 5<sup>th</sup> May 2023, then unsuccessfully applied to review the decision of the Court on that application, and then belatedly moved the Court with the current application. As it is, this application was not filed until November 2024. There is no explanation for that delay.
12. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others*, (above), was clear that a party seeking extension of time has the burden to lay a basis to the satisfaction of the court. In this instance, I am not persuaded that the applicant has laid a proper basis for the Court to exercise its discretion in his favour.
13. Consequently, the applicant’s application dated 28<sup>th</sup> November 2024 fails and is hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT MOMBASA 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.*

**Deputy Registrar**

