Attorney General v Mulekano (Civil Application E175 of 2024)
[2025] KECA 1059 (KLR) (13 June 2025) (Ruling)

Neutral citation: [2025] KECA 1059 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E175 OF 2024

MSA MAKHANDIA, JA

JUNE 13, 2025

BETWEEN

THE HONOURABLE ATTORNEY GENERAL ..... APPLICANT

AND

DOUGLAS WAWIRE MULEKANO ..... RESPONDENT

(Being an Application for leave to Appeal out of time from the Judgment and decree of the Employment and Labour Relations Court at Bungoma, (Keli, J.) dated 14th March, 2024. in ELRC Cause No. 6 of 2020)

RULING

1. The application before me is dated 26th November, 2024, and contains two substantive prayers to wit that; leave to file and serve the record of appeal out of time be granted to the applicant and secondly, the filed record of appeal serialised as COACA/ E277/2024 of even date and lodged in the e-filing system of our court be deemed as duly filed.

2. The application is expressed brought pursuant Section 3 and 3A of the *Appellate Jurisdiction Act*, Rules 4,12 and 41 of the *Court of Appeal Rules*. The grounds in support of the application and which give the background to the application are that; by a judgment rendered on 14th March 2024, the Employment and Labour Relations Court "the ELRC" at Bungoma found in favour of the respondent by holding that his dismissal from the Kenya Defence Forces was unlawful and unfair. As a result, the ELRC awarded him Kshs.5million as compensation plus costs and interest of the suit. The court also directed that the applicant to initiate and complete relevant processes to allow the payment of pension to the respondent in terms of the Kenya Defence Forces Pension Provisions.

3. The applicant was aggrieved by the judgment and decree aforesaid and consequently opted to lodge an appeal by filing a Notice of Appeal dated 18th March 2024. Besides the Notice of Appeal, Mr. Kiptum Chemas, Special State Counsel, handling the brief also wrote a letter bespeaking proceedings. The

proceedings were ready and were indeed collected on 12th July 2024. However, as counsel was preparing the record, he suddenly fell ill on 17th July, 2023, and was advised to take two weeks off work. Whilst still on sick leave, counsel was advised to take his privileged leave commencing from 30th July, 2024 to 9th September, 2024.

4. The file was later reassigned to a Mr. Tuitoek, learned counsel to handle. Being under the mistaken and false impression that the record of appeal had been prepared and filed by his predecessor filed, he did not bother to complete the preparation of the record of appeal. It was only during the routine file management and bring up, an internal office exercise, that the inaction in respect of the file came through. Upon realizing the error and or the omission, without delay, the applicant's counsel urgently prepared and filed in this Court the record of appeal. From the foregoing the applicant depones that the error or inaction on the part of the applicant was not deliberate and should not therefore be visited upon an innocent applicant. The applicant insists that it is keen in prosecuting the intended appeal which it argues has overwhelming chances of success. That this Court should exercise its discretion in favour of the applicant with the object of serving substantive justice. The final ground advanced by the applicant is that the respondent will not suffer any prejudice if the application is allowed.

5. The application is further supported by the affidavit by Mr. Kiptum Chemas, sworn on the same date. The affidavit merely reiterates and expounds on the grounds aforesaid and therefore there is no need to rehash it.

6. The application was vehemently opposed by the respondent through a replying affidavit sworn by Mr. Omagwa Angima, learned counsel for the respondent dated 27th may,2025. He depones that apart from filing the Notice of Appeal, the respondent had not taken any concrete and diligent steps in pursuit of the appeal. That the applicant's allegation that he was prevented from pursuing the appeal on account of the trial court not notifying him of the availability of proceedings was an excuse rather than a reason which this Court should reject. That the applicant had not demonstrated what steps it had taken in pursuit of the proceedings. That it was surprising that the special counsel's indisposition came on 17th July, 2024, just five (5) days after receiving the proceedings. That counsel's conduct demonstrates lack of seriousness in dealing with the matter as he left the matter unattended and chose to proceed on what he calls "annual privileged leave". That in any event the intended appeal lacks merit. That whilst it is true that this Court on applications of this nature has wide and unfettered discretion, however such exercise has to be judicious and not capricious. Finally, counsel depones that allowing the application will prolong the suffering of the respondent who was cruelly terminated from service with Kenya Defence Forces. The least that the applicant could do is to allow the respondent to benefit from the fruits of his judgment.

7. The application was canvassed by way of written submissions only and without appearance by counsel. In his undated written submissions filed by Mr A.K Tuitoek, it was submitted that Rule 4 of this *Court's Rules* clothes this Court with discretion to extend time limited by the rules of the court of doing of an act. Relying on the principles set out in the following cases, *Leo Sila Mutiso v Rose Hellen Wangare Mwangi* [1999] 2 EA 231, *Mwangi v Republi*c [2025] KECA 353 (KLR) and *Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] KESC 12 (KLR), counsel maintained that the application had met the threshold. That the conduct of the applicant was such that it could not impugn the exercise of the Court's discretion in his favour, that it had conceded to the delay and given valid reasons for its inaction and that the delay was in any event not inordinate. Counsel submitted further that the application was lodged without undue delay and consequently, the respondent would suffer no prejudice if the extension is granted and even if there was such prejudice, the same could be adequately compensated by an award of costs. On arguability of the intended appeal, counsel relying on the case of *Stanley Kangethe Kinyanjui v Tony Keter & Others*, submitted that indeed the intended

appeal was not frivolous but arguable. Finally, counsel submitted that mistakes of counsel should not be visited upon an innocent litigant.

8. Responding, Mr Omagwa Angima, learned counsel for the respondent, submitted that the applicant had failed to show that its conduct brought it under the auspices of the principles of granting of extension of time. That the applicant's conduct as set out in the respondent's replying affidavit ousted any claim to those principles. That there was downright and brazen disregard of the timelines on the part of the applicant confirmed by its failure to offer reasonable explaination for failure to comply. Counsel pointed out that though the applicant issued a letter bespeaking proceedings, the same was never served on them. Similarly, there was no certificate of delay served on them by the applicant. Because of all these infractions, the applicant was disqualified from the enjoyment of the discretionary powers of this Court according to counsel.

9. I have carefully read and considered the application, the grounds and affidavit in support thereof, the respondent's replying affidavit, rival submissions of the parties and the law and this is my take! Extension of time is governed by Rule 4 of the *Court of Appeal Rules*. The *Rule* provides that:

> The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

10. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso* (supra) in which it was held as follows:

> It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.

11. In the present case, the impugned judgment was delivered on 14th March April, 2024. The present application was filed on 26th November 2024, about eight (8) months later. From the record, it is apparent that the applicant duly filed and served a notice of appeal, four days later evincing its intention to contest the judgment and decree in this Court quite in time. On the very day, the applicant wrote a letter to the Deputy Registrar of this Court bespeaking proceedings and copied it to the respondent although this is contested by the respondent. The proceedings were ready and were indeed collected by the applicant on 12th July 2024. It is uncontested fact that five days later and as counsel for the applicant was in the process of preparing the record, he fell sick and took sick leave. However, the respondent questions the coincidence! That how is it possible that counsel for the applicant suddenly fell ill five days after receipt of the proceedings! The answer does not lie in my hands nor the applicant or its counsel but elsewhere. All I can say is that sickness is not dependent on an event or an occurrence and is not predictable.

12. The file was subsequently passed to Mr Tuitoek who kept it in the mistaken belief that that the record of appeal had been prepared and filed by his predecessor. It was not until the routine office bring up exercise that he was woken from his slumber when it dawned to him that infact the record of appeal had not been filed. This realisation caused him to burn midnight oil to have the record ready for filing on 26th November 2024. The events that took place after Kiptum Chemas fell ill have not been contested

by the respondent signalling the fact that they were beyond the control of the applicant and or counsel. Or even if they were, they should not be visited upon an innocent litigant.

13. As stated in the case of *Philip Keipto Chemwolo & Anor v Augustine Kubende* [1986] KECA 87 (KLR):

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on merit "

In my view therefore, the applicant has explained to my satisfaction the delay and the reasons for the delay.

14. I have looked at the grounds in the draft memorandum of appeal filed and I can say that they are not frivolous. Though the respondent claims that allowing this application will seriously prejudice him and prolong his suffering as he will be locked out of enjoying the fruits of his judgment, but this will be momentarily or temporary set-back or hiatus. It can in any event be remedied by an award of costs.

15. In my view therefore, the applicant has brought itself within the equitable embrace of Rule 4 of the *Court of Appeal Rules*. Most of the respondent's contestation regarding the competence or otherwise of the intended appeal are best reserved for an application to strike out the appeal if ever it came to pass.

16. Consequently, the application dated 26th November, 2024, is for allowing, and I hereby do so. However, the costs thereof shall go to the respondent.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF JUNE, 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR