



REPUBLIC OF KENYA



**Omukatia v Kenvic School (Civil Application E228 of 2023)  
[2025] KECA 1217 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1217 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E228 OF 2023**

**F SICHALE, JA**

**JULY 4, 2025**

**BETWEEN**

**FRANCIS FWOBE OMUKATIA ..... APPLICANT**

**AND**

**KENVIC SCHOOL ..... RESPONDENT**

*(Being an Application for Extension of Time to file an Appeal out of Time against the Judgment of the Employment and Labour Relations Court at Machakos (M.Onyango J), dated 23rd March 2023 in (Machakos ELRC Petition No. 3 of 2021))*

**RULING**

1. Before me is an omnibus application by way of Notice on Motion dated 29<sup>th</sup> May 2023, brought pursuant to the provisions of Article 159 of *the Constitution* of Kenya, Section 1A,1B, 3A 79G & 95 of the *Civil Procedure Act*, Order 42 Rule 6,7 & 8 and Order 51, Rule 1,3,4,10,11, 13 & 16 of the Civil Procedure Rules, Rule 4 of the Court of Appeal Rules 2022 and all other enabling provisions; in which Francis Fwobe Omukatia (“the applicant” herein), seeks the following orders:
  - “i. Spent.
  - ii. That the Honourable Court be pleased to extend time for filing the Notice of Appeal and subsequently issue an order that the physical file in the cause be transferred from Nairobi to Machakos registry for purposes of filing the intended appeal.
  - iii. That the Honourable Court be pleased to issue summons to any necessary party including the Clerk to Hon Lady Justice Maureen Onyango for purposes of giving true accounts of facts as to the delay in producing the file at the registries.



- iv. That the Honourable Court be pleased to grant leave to the appellant to lodge an appeal out of time against the judgment of LADY JUSTICE MAUREEN ONYANGO delivered on 23<sup>rd</sup> March 2023.
  - v. That the Honourable Court be pleased to order for stay of execution of the judgment delivered by LADY JUSTICE MAUREEN ONYANGO on 23<sup>rd</sup> March 2023 pending hearing and determination of this application and intended appeal.
  - vi. That the Honourable Court be pleased to deem the annexed Notice of Appeal and Memorandum of Appeal as duly filed subject to payment of such court fees if any.
  - ii. That the Honourable Court be pleased to make an Order waiving the need for the appellant to supply security before the application herein is heard and determined or in the alternative and without prejudice, the appellant be allowed 90 days to find a reasonable security to be paid pursuant to Order 42 Rule 6 (2) (b) of the Civil Procedure Rules.
  - ii. That the costs be provided in course.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that he had filed Machakos ELRC Petition No. 3 of 2021, claiming several Constitutional violations by the respondent who was his employer, which Petition was dismissed by M. Onyango J, on 23<sup>rd</sup> March 2023.
  3. That, the impugned judgment was delivered by the learned judge while in Eldoret and she advised that the file be delivered in Nairobi and the applicant’s advocates attempts to lodge the Notice of Appeal on 4<sup>th</sup> April 2023, were not successful as the file could not be traced and remains untraceable, thereby occasioning inadvertent delay thus unfairly locking the appellant from lodging the Notice of Appeal on time.
  4. The motion was opposed vide a replying affidavit sworn on 18<sup>th</sup> July 2023 by victoria Gakami, a Director of the respondent who deposed inter alia that the alleged reasons for the delay of filing the Notice of Appeal were an afterthought and a delaying tactic by the applicant in paying the respondent’s costs upon receiving the Bill of Costs on 11<sup>th</sup> May 2023.
  5. It was submitted for the applicant that the impugned judgment was delivered on 23<sup>rd</sup> March 2023 and that therefore the applicant had until 14<sup>th</sup> April 2023 to lodge his Notice of Appeal.
  6. That, he attempted to do so on 14<sup>th</sup> April 2023 but he was unsuccessful as the file could not be traced and that further the registry could not stamp the same without the court file.
  7. On prejudice, it was submitted that the applicant would be greatly prejudiced if the instant motion was not allowed as the respondent already filed its Bill of Costs and would unfairly execute for costs.
  8. On the other hand, it was submitted for the respondent that the reasons advanced by the applicant for the delay were deliberate, constitute an afterthought and serve as a delaying tactic to avoid paying the respondent’s Bill of Costs and that further, he had failed to provide substantial evidence to justify the delay.
  9. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit the respective parties’ submissions, the cited authorities and the law.



10. As I had alluded to earlier, the applicant has filed an omnibus application where he seeks amongst others an order for extension of time to file an appeal out of time and an order of stay execution.
11. It is evident, that some of the orders that the applicant is seeking cannot be granted by this Court sitting as a Single Judge for obvious reasons. Be that as it may, I will proceed and consider the applicant's prayer for extension of time, as I note that the jurisdiction of this Court pursuant to Rule 4 of the Court of Appeal Rules, has been properly invoked.
12. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not are now old hat. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion, the Court should do so judiciously.
13. See *Mwangi v Kenya Airways Limited* [2003] KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported)), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled 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 reason 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.”
14. In the instant case and as regards the length of the delay, the impugned judgment was delivered on 23<sup>rd</sup> March 2023, whereas the instant motion was filed on or about 29<sup>th</sup> May 2023. There was therefore a delay of 2 months and 6 days, which delay I do not consider to be inordinate.
15. Turning to reasons proffered for the delay, the applicant has contended that he had attempted to file the Notice of Appeal on 4<sup>th</sup> April 2023, but the same was not possible owing to unavailability of the court file.
16. I have looked at the annexures attached to the motion and more specifically the letters dated 4<sup>th</sup> April 2023, to the Deputy Registrar Employment and Labour Relation Court Nairobi, requesting for certified copies of the judgment and proceedings, the letters dated 5<sup>th</sup> April 2023 and 24<sup>th</sup> May 2023, requesting the Deputy Registrar of the Employment and Labour Relations Court at Machakos to assist in tracing the file, the letter dated 24<sup>th</sup> May 2023, to the Deputy Registrar Employment and Labour Relations Court Nairobi seeking to know whether the file had since been transferred to Machakos and the letter dated 25<sup>th</sup> May 2023, to the Deputy Registrar Employment and Labour Relations Court at Machakos requesting for a Certificate of Delay.
17. From the circumstances of this case, it is evident that the delay herein was occasioned by non-availability of the Court file and the applicant was not at fault, as these were circumstances beyond his control. In view of the foregoing, I consider the reasons given for the delay to be reasonable/plausible and ultimately therefore, I am of the considered opinion that the delay herein has been sufficiently explained to the satisfaction of this Court.
18. As to the arguability or otherwise of the intended appeal, it would not be in my place to make a determination on the same sitting as a Single Judge and I will therefore make no comment regarding the same.



19. Finally on prejudice, I satisfied that the applicant will be greatly prejudiced if the instant motion is not allowed as he will have been completely driven from the seat of justice. On the contrary, the respondent will not suffer any prejudice as the applicant's petition was merely dismissed.
20. The totality of my findings therefore, is that that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time.
21. Accordingly, the applicant's motion dated 29<sup>th</sup> March 2023 is merited and the same is hereby allowed as prayed in terms of prayer Iv only.
22. The applicant is hereby granted leave to lodge an appeal out of time against the judgment of M. Onyango J, dated 23<sup>rd</sup> March 2023 and in any event within a period of 30 days from the date of this ruling failure to which these orders shall stand vacated.
23. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY, 2025.**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

