



**Lusweti v Board of Trustees, National Social Security Fund (Civil Application E549 of 2023) [2024] KECA 141 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KECA 141 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E549 OF 2023  
DK MUSINGA, JA  
FEBRUARY 16, 2024**

**BETWEEN**

**PATRICK WEKHOMBA LUSWETI ..... APPLICANT**

**AND**

**BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY  
FUND ..... RESPONDENT**

*(An application for extension of time to file an intended appeal against the Judgment and Decree of the Employment and Labour Relations Court (Rutto, J.) dated 31st July 2023 in ELRC Cause No. 678 of 2017)*

**RULING**

1. The applicant’s Notice of Motion dated 16<sup>th</sup> November 2023 brought under rule 4 of this Court’s Rules seeks extension of time “to file both in the ELRC Court and in the Court of Appeal and serve upon the respondent the notice of appeal dated 18<sup>th</sup> August 2023 and the letter of even date seeking certified typed proceedings, judgment and decree.” The applicant also seeks to have the notice of appeal and the letter bespeaking proceedings, judgment and decree deemed as duly filed and served in time.
2. The application is supported by an affidavit sworn by Willis Odhiambo, a Legal Clerk in the firm of Walubengo Waningilo & Company Advocates, which is on record for the applicant. He states, inter alia, that on 18<sup>th</sup> August 2023 he was given by his employer copies of a notice of appeal dated 18<sup>th</sup> August 2023 and a letter of even date seeking certified typed copies of proceedings, judgment and decree in Nairobi ELRC Cause No. 678 of 2017, but inadvertently he did not file and serve the said documents, instead he filed them away, only to realize his mistake when he was preparing the record of appeal.



3. In paragraphs 6, 7 and 8 of his affidavit, Willis Odhiambo states as follows:

- “6. Immediately I realized that the Notice of Appeal was not filed and served, and I had misplaced the ones earlier prepared, I informed my superiors who prepared the fresh ones on 18<sup>th</sup> August 2023 and instructed me to proceed and file in court and serve.
7. I therefore proceeded to file the notice of appeal dated 18<sup>th</sup> August 2023 in the Employment and Labour Relations Court on 18<sup>th</sup> August 2023 and served the respondent after it had been signed by the Deputy Registrar. Annexed therewith and marked WO1 is a copy of the said notice of appeal.
8. On 18<sup>th</sup> August 2023 I filed it in the Court of Appeal and attached herein marked WO2 is the acknowledgement of receipt.”

4. This application is not opposed. As at the date when it came up for hearing, 13<sup>th</sup> February 2024, the respondent had not filed any replying affidavit or submissions, despite service of hearing notice on 2<sup>nd</sup> February 2024 by way of an email. That notwithstanding, I have to exercise my discretion judiciously, taking into consideration relevant factors that have been spelt out by this Court in a plethora of its decisions, as summarized in *Muringa Company Limited vs. Archdiocese of Nairobi Registered Trustee* [2020] eKLR as follows:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In considering the last principle, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

5. The judgment sought to be appealed from was delivered on 31<sup>st</sup> July 2023. Rule 77(2) of this *Court’s Rules* requires the notice of appeal to be lodged within 14 days after delivery of the decision.

6. Willis Odhiambo states that he received the notice of appeal and the letter bespeaking proceedings on 18<sup>th</sup> August 2023, which was already outside the 14 days’ period. The reason for the delay between 31<sup>st</sup> July and 18<sup>th</sup> August 2023 is not explained at all. In *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR, this Court held:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably excisable.”

7. The Legal Clerk said that he filed away the notice of appeal and the letter requesting for certified copies of the proceedings, judgment and decree that were given to him on 18<sup>th</sup> August 2023. He does not say for how long the documents stayed filed away. He however contradicted himself by stating that, “...I



informed my superiors who prepared the fresh ones and instructed me to proceed and file in court.” He adds that “he proceeded to file the notice of appeal dated 18<sup>th</sup> August 2018” in the ELRC and in this Court on 18<sup>th</sup> August 2023. This does not make any logical sense at all! If the documents were first given to him on 18<sup>th</sup> August 2023, and he forgot to file and serve the same in time, only to stumble upon them much later when he was preparing the record of appeal, how can he say that “on 18<sup>th</sup> August 2023 I filed it in the Court of Appeal”?

8. There is also inconsistency between the date of the application – 16<sup>th</sup> November 2023 and the date when Willis Odhiambo swore his affidavit - 18<sup>th</sup> November 2023.
9. Further, there are no proposed grounds of appeal at all. I cannot therefore make a prima facie view of the chances of success of the intended appeal.
10. I find this application devoid of merit and dismiss it in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**D. K. MUSINGA, (P)**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

