



Onyango v National Oil Corporation of Kenya (Civil Application E350 of 2023) [2024] KECA 377 (KLR) (28 March 2024) (Ruling)

Neutral citation: [2024] KECA 377 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E350 OF 2023
PO KIAGE, JA
MARCH 28, 2024**

BETWEEN

HENRY ABEL ONYANGO APPLICANT

AND

NATIONAL OIL CORPORATION OF KENYA RESPONDENT

(An application for extension of time to file a notice of appeal out of time from the Judgment of Employment and Labour Relations Court at Nairobi (Onyaya, J.) dated 22nd June, 2023 in ELRC No. 350 of 2010)

RULING

1. The applicant beseeches this Court to extend time for the filing of notice of appeal against the judgment of the Employment and Labour Relations Court (Ongaya, J.) delivered on 22nd June 2023 and that, consequently, the notice of appeal filed on 25th July 2022 be deemed as duly filed and served.
2. The grounds on the face of the motion and the supporting affidavit of Fozah Onyimbo Advocate sworn on 25th July 2023 state that after the judgment was read, counsel for the applicant was unable to reach him so as to get proper instructions as to how to proceed with the same, and that she was only able to get hold of him on 20th July 2023 and he explained that he “had been unwell and admitted at Glenfin Donholm Cottage Hospital for a month.” He wanted to appeal and it is only when he so indicated that his advocates filed and served the notice of appeal, albeit out of time.
3. The respondent opposes the application vide the affidavit of its company secretary one Robai Musilivi sworn on 4th September 2023. He swears that the applicant is undeserving of the prayers sought for failing to provide a plausible reason for the delay. He points out that no evidence is provided of attempts by the applicant’s advocates to reach their client, and casts doubt on the narrative that the applicant was admitted in hospital, pointing out that the medical note does not say so. Moreover, nothing stopped



the said advocate from filing the notice of appeal which they could always withdraw in case their client did not wish to pursue it. He also termed the intended appeal as frivolous and not arguable.

4. I have considered the application in light of the applicable principles as authoritative laid down by the Supreme Court in *Nicholas Korir Arap Salat vs. IEBC & 7 Others* [2024]eKLR. I think, with respect, that a notice of appeal is a document so simple that it is most curious that so many advocates come before this Court to seek extension of time having failed to lodge it within the 14 days prescribed by the Rules. As the respondent herein contends, the purpose of the notice is to signify intent to appeal and it really does not require express instructions from a client. Moreover, the notice of appeal can always be withdrawn without much ado. Bearing that in mind, I would think that the delay in filing the notice therein was inordinate.
5. The saving grace would be if some plausible explanation was proffered for the delay. The absence of instructions *per se* does not persuade me. I would have been inclined to be more favourable to the applicant's plea had the narrative that the applicant was admitted in hospital been credible. But it is not. Between the grounds and the affidavit by the applicant's advocate, itself strange as the matters sworn to should have come from the applicant himself, one sees a subtle but significant disconnect. Was the applicant admitted in hospital for a month or was he just being "followed up" as the medical note states? There is no indication from the hospital records that the applicant was an in-patient at the hospital. Moreover, was he so unwell not to be in a position to communicate at all or even take calls?
6. I am particularly concerned that the medical chit dated 21st July 2023 is handwritten and signed by one 'Henry R.O.' whose designation is not indicated. It also states that the applicant "is a patient in follow up at our facility since 20th of June this year" but it is clear to the naked eye that the June is superimposed over what was clearly indicated as "July" without any counter signing. The impression that is inescapable is that it was doctored and manipulated to portray a state of things quite different from the reality.
7. It has been stated on numerous occasions that any party who seeks favourable discretion must, in order to deserve such equitable relief, himself do equity and the beginning point to my mind, is absolute candour. I am not persuaded that this has been demonstrated herein and the effect is to render the attempted explanation quite implausible.
8. In the circumstances, this application is disallowed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

