



**Thuo v Safaricom PLC (Civil Application E106 of 2023)  
[2024] KECA 609 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 609 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E106 OF 2023  
F TUIYOT'T, FA OCHIENG & WK KORIR, JJA  
MAY 24, 2024**

**BETWEEN**

**MICHAEL THUO ..... APPLICANT**

**AND**

**SAFARICOM PLC ..... RESPONDENT**

*(An application for withdrawal of the notice of appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nakuru (H. Wasilwa, J.) delivered on 21st April 2022 in ELRC Cause No. 20 of 2019)*

**RULING**

1. Before us is an application dated November 15, 2023, which was brought pursuant to rules 44 and 85 of the *Court of Appeal Rules, 2022*. The application asks this Court to make a finding that the notice of appeal which was filed on April 26, 2022 be deemed as withdrawn.
2. It is common ground that the judgment of the Employment and Labour Relations Court (ELRC) was delivered on April 21, 2022. The said court awarded to the applicant herein, the sum of Kshs. 1,912,705.32, as damages for unfair and unjustified termination of his employment.
3. Seven days later, on April 28, 2022, the respondent herein, filed a notice of appeal, with a view to challenging the judgment through an appeal.
4. Pursuant to the provisions of rule 84(1), the appeal ought to have been filed within 60 days from the date when the notice of appeal was filed.
5. It is the applicant's case that by the time he lodged the application herein, there had already been a delay of approximately 460 days, in the filing of the appeal.



6. It was for that reason that the applicant invoked the provisions of rule 85(1), which provide as follows;

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the court may, on its own motion or on application by any other party, make such orders.”
7. In his supporting affidavit, the applicant stated that the proceedings were ready for collection from the ELRC registry by August 28, 2023, and that he did obtain a copy of the said proceedings on that date.
8. The significance of that statement is informed by the proviso to rule 84 of the *Court of Appeal Rules*, which reads as follows;

“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”
9. Rule 84(2) imposes upon the appellant the duty to ensure that the respondent is served with a copy of the letter bespeaking the proceedings.
10. In this case, it is common ground that the respondent applied for the proceedings and also that a copy of the letter bespeaking the proceedings was served upon the applicant.
11. In the circumstances, the respondent was entitled to benefit from the exclusion of the days which the Registrar of the Employment and Labour Relations Court certified as having been required for the preparation and delivery of the proceedings, to the respondent.
12. It was the respondent’s case that it was not notified that the proceedings were ready, until December 6, 2023.
13. If that be the case, the respondent had until February 5, 2024, to file the memorandum of appeal, together with the record of appeal.
14. The real issue to be resolved by this Court is whether the 60 days should run from August 28, 2023 (as suggested by the applicant) or from 6<sup>th</sup> December 2023 (as suggested by the respondent). If the registrar notified the respondent that the proceedings were ready by August 28, 2023, time would run from that date.
15. We have given careful consideration to the two divergent views expressed by the parties. We find that whereas the applicant insists that the proceedings were ready and available by August 28, 2023, there is no document to demonstrate that the respondent was made aware of that fact.
16. The court raised an invoice on December 6, 2023, and the respondent paid the requisite fees for the typed proceedings. To our minds, that renders it more probable than not, that it is on or about that date when the registrar notified the respondent that the proceedings were ready.
17. We have taken note of the fact that on April 25, 2023 and also on October 12, 2023, the applicant’s advocates wrote to the advocates for the respondent, requesting that they be served with the record of appeal.



18. In effect, even if it were to be accepted that the proceedings were ready by August 28, 2023, that would imply that the applicant started asking for the record of appeal long before the proceedings were ready.
19. Of interest to us is the fact that in their letter dated October 12, 2023, the applicant’s advocates stated thus;

“In reference to the appeal lodged in this matter and our letter dated 2 April 5, 2023, kindly but urgently serve us with a Record of Appeal to enable us discuss with our client, the respondent, who is very anxious to have the matter concluded.”
20. We find the contents of that letter interesting because we would have expected the applicant’s advocates to have been able to seek instructions from their client, based on the record of proceedings which they had allegedly already received on August 28, 2023. Of course, we are not oblivious to the fact that it was necessary for the advocates to have sight of the memorandum of appeal before they could engage their clients in informed discussions of the appeal.
21. Before us, there is a certificate of delay dated December 7, 2023.

However, the applicant urges us to hold that the said certificate of delay is fatally defective. The defect stems from the fact that whilst the proceedings were ready by 23<sup>rd</sup> August 2023, the learned Deputy Registrar stated that the period to be exempted from the calculation of 60 days, should run until 6<sup>th</sup> December 2023.
22. In the case of *Richard Kanyago & 2 others v David Mukii Mereka* [2001] eKLR, the court held as follows;

“But with the greatest respect to Platt JA (In Nairobi Economic African Heritage [1982-88] 1 KAR, 1024, we are unable to agree that the certificate of delay is wrong, when, on the basis of available evidence, the court cannot simply ignore the same.”
23. The applicant submitted that because the respondent did not provide us with copies of the communication it exchanged with the court registry, we should conclude that the court registry notified them of the readiness of the proceedings as of 28<sup>th</sup> August 2023 and that the respondent deliberately ignored to take delivery of the same.
24. It is our considered opinion that that submission is not fact-based. By that, we mean that the applicant had not provided a factual foundation from which the conclusion could flow.
25. Just because the applicant was made aware that the proceedings were ready, does not imply that the respondent was also made aware.
26. If anything, the contents of the certificate of delay tend to re-affirm the respondent’s contention, that it was not until December 6, 2023 when the Deputy Registrar informed the respondent that the proceedings were ready. In the circumstances here, the date of delivery of proceedings, in the contemplation of that word in the proviso to rule 84(1), has to be the date when the respondent’s advocates were informed that the proceedings were ready for collection. In the event, we find no error in the certificate of delay.



27. As alluded to by the applicant, in his submissions (in paragraph 9);

“It then follows that to give rule 81 reasonable construction, time starts to run from the date of receipt of the notice from the court or such date when, in the usual course of postage, the notice would be expected to be received by the appellant.”

28. We find that the respondent was first notified about the readiness of the proceedings on or about December 6, 2023. Therefore, when the respondent lodged the record of appeal on January 24, 2024, it took action in a timely manner.

29. Accordingly, there is no merit in the application herein; it is thus dismissed, with costs to the respondent.

**DATED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

