



**Gitari v Kenyatta National Hospital (Civil Application  
E238 of 2024) [2024] KECA 891 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 891 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E238 OF 2024**

**SG KAIRU, JA**

**JULY 26, 2024**

**BETWEEN**

**KATHOMI KAGENI GITARI ..... APPLICANT**

**AND**

**KENYATTA NATIONAL HOSPITAL ..... RESPONDENT**

*(eing an Application for the extension of time to file a notice of appeal from the  
Judgment of the Employment and Labour Relations Court of Kenya at Nairobi  
(L. Ndolo, J.) dated 25th January, 2024 in ELRC Cause No. E6556 of 2020)*

**RULING**

1. In her application dated 15<sup>th</sup> May 2024 invoking provisions of *the Constitution* of Kenya, the *Appellate Jurisdiction Act* and the Court of Appeal Rules, the applicant Kathomi Kageni Gitari seeks an order for extension of time to file a Notice of Appeal against the judgment of the Employment and Labour Relations Court (ELRC) (L. Ndolo, J.) delivered on 25<sup>th</sup> January 2024 in ELRC Cause No. E6556 of 2020. In that judgment, the ELRC struck out the applicant's claim on grounds that the ELRC lacked jurisdiction to entertain it as it was filed out of time. The application is backed by the applicant's supporting affidavit and written submissions highlighted before me by Mr. Mwinzi, learned counsel for the applicant.
2. The application is opposed through a replying affidavit sworn by Peris Ndungu, a Senior Human Resource Officer of the respondent buttressed by oral submissions before me by learned counsel Mr. Lumumba holding brief for Mr. Nyachoti for the respondent.
3. I have considered the application, the affidavits and the submissions against the principles applicable in matters of this nature. Although the court has unfettered discretion under Rule 4 of the Court of Appeal Rules to extend time, that discretion should be exercised judicially. In *Fakir Mohamed vs. Joseph Mugambi & 2 others* [2005]



eKLR Waki, J.A stated that:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors: See *Mutiso vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya*

*Airways Ltd* [2003] KLR 486, Major Joseph Mwereri Igweta

vs. *Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”

4. Subsequently in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014 (above) the Supreme Court of Kenya pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other considerations include whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay. Public interest is also a relevant consideration.
5. I bear those principles in mind in considering the present application. The background in brief is that the applicant is an employee of the respondent, Kenyatta National Hospital where she holds the position of Supply Chain Management Assistant. According to the respondent, in August 2015, there were stock deficiencies at the store under the superintendence of the applicant resulting in loss of over Kshs. 2 million. Following a disciplinary process, the applicant was found culpable, and the respondent decided to surcharge her for the loss. Aggrieved, in December 2020 the applicant instituted suit before the ELRC challenging the decision of the respondent to surcharge her. She obtained a temporary order in the suit restraining the respondent from effecting the surcharge. After a trial, the ELRC delivered judgment on 25<sup>th</sup> January 2024, the subject of the intended appeal, striking out the claim and at the same time discharged the temporary order restraining the respondent from effecting the surcharge.
6. With the impediment of effecting the surcharge out of the way, the respondent wrote a letter to the applicant dated 19<sup>th</sup> March 2024 informing her that in view of the judgment of the ELRC, it had decided to effect the surcharge and recovery effective 1<sup>st</sup> March 2024. Indeed, in applicant’s payslip of March 2024 reflects a “fine surcharge” of Kshs. 8,500.00; the April and May payslip reflects “fine surcharge” of Kshs. 10,500.00 each. The effecting of the surcharge appears to have stirred the applicant into action, and the decision to appeal hence the applicant’s Notice of Appeal dated 3<sup>rd</sup> May 2024 lodged with the ELRC on 8<sup>th</sup> May 2024 and subsequently the present application dated 15<sup>th</sup> May 2024 filed on 18<sup>th</sup> May 2024.
7. Judgment having been delivered on 25<sup>th</sup> January 2024, the applicant had, by dint of Rule 77(2) of the Court of Appeal Rules,



14 days after the date of the judgment, to lodge the Notice of Appeal. Therefore, the notice of appeal should have been lodged on or before 8<sup>th</sup> February 2024. It was not lodged until 8<sup>th</sup> May 2024 and the present application dated 15<sup>th</sup> May 2024 was not filed until 18<sup>th</sup> May 2024. A delay of 89 days or approximately three months in lodging the notice of appeal. What is the applicant's explanation? It is that she had financial difficulties to which learned counsel for the respondent Mr. Lumumba responded by making reference to the decision in Francis Mwai Karani vs

Robert Mwai Karani [2007] eKLR where in a ruling on an application for extension of time Omollo, JA expressed as follows:

“I must make it abundantly clear at the outset that lack of money or impecuniosity on the part of an applicant cannot

and has never been accepted as a valid reason for extending time to lodge an appeal. But as has always been said, each case must be looked at on its own facts and that is exactly what I am doing in this application. In other words, I am not establishing any new principle different from the well known one that lack of financial resources is generally not a basis for extending time.”

8. That as it may, the applicant's explanation, as set out in her supporting affidavit is that:

“...the delay in filing an appeal was occasioned by my inability to organize finances to seek legal counsel to file the appeal as my salary is already being surcharged and am earning a meagre salary of Kshs. 17,827/- which greatly aggravated my situation.”

9. However, the applicant's payslips for the months of January and February 2024 exhibited by respondent in the replying affidavit indicate that there were no surcharge deductions in those months. It cannot therefore be correct that the 'surcharging of her salary' is the reason she was unable to seek legal counsel. The explanation given by the applicant in that regard is therefore not convincing.

10. It bears repeating, that as stated by the Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, (above), that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court and the party seeking extension of time has the burden to lay a basis to the satisfaction of the court. Having failed to lay a proper basis, I decline to exercise the Court's discretion in the applicant's favour.

11. The applicant's application dated 15<sup>th</sup> May 2024 fails and is hereby dismissed. Given that there is an ongoing employer and employee relationship between the parties, I make no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

**S. GATEMBU KAIRU, FCIArb**

**JUDGE OF APPEAL**

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

Signed

DEPUTY REGISTRAR

