



**Munyua v ABSA Bank Kenya PLC (Civil Application
E243 of 2024) [2024] KECA 892 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 892 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E243 OF 2024
S OLE KANTAI, JA
JULY 26, 2024**

BETWEEN

OLIVER THANDI MUNYUA APPLICANT

AND

ABSA BANK KENYA PLC RESPONDENT

(An application for extension of time to file and serve Notice of Appeal out of time against the Ruling of the Employment and Labour Relations Court of Kenya at Nairobi (B. Ongaya, J.) delivered on 17th November, 2023 in E.L.R.C Cause No. E205 of 2023)

RULING

1. I am asked in the main in the Motion on notice brought under various provisions of law including rules 4 and 47 of The [Court of Appeal Rules 2010](#) to be pleased to grant the applicant an extension of time to file and serve Notice of Appeal and letter requesting for typed proceedings out of time for an intended appeal against the ruling delivered by Ongaya, J. on 17th November, 2023 in Nairobi Employment and Labour Relations Court (ELRC) Misc. Application No. 205 of 2023. In grounds in support of the Motion and in a supporting affidavit of the applicant Oliver Thandi Munyua it is said, inter alia, that the said ruling was issued in total disregard of the evidence adduced and the prevailing law and regulations; that delay to file a Notice of Appeal and to apply for proceedings on time was not intentional or deliberate; that time for filing Notice of Appeal ran out before the applicant could instruct counsel and that if I do not give leave to file the said documents the applicant will suffer irreparable damage and be prejudiced as there is a risk of execution of the ruling against the applicant without the benefit of his intended appeal being heard. The applicant says that the error not to file appeal on time was not inordinate, that the intended appeal is arguable with high chances of success.
2. Attached to the Motion is an application filed by the applicant at ELRC where he prayed for leave to file a petition out of time. It was explained in that petition that the applicant who had been an employee of the respondent Absa Bank Kenya PLC had his services summarily terminated. He was tried in criminal



court of some offences but he was eventually acquitted on appeal. He had appealed the decision by the respondent to dismiss him from employment but the respondent, upon review, upheld its decision. He thus applied before Ongaya, J. for time extension to file a petition seeking compensation for the said dismissal from employment. The Judge considered the application and in the ruling delivered on 17th November, 2023 he identified the only issue calling for his determination:

“...whether the Court should exercise discretion in favour of the applicant to grant leave for filing of petition belatedly and the time of limitation under section 90 of the Employment Act, 2007 having lapsed.”

3. The Judge found that there was no disabling ground established why the applicant had failed to file suit prior to lapsing of time of limitation in section 90 of the Employment Act. He found no provision of law having been urged granting him jurisdiction or power to extend time or grant leave, and:

“...It appears that, as submitted for the respondent, after the summary dismissal and rejection of the administrative appeal or review, the cause of action crystallised but the applicant offers no explanation why he failed to promptly move the Court ”

4. The application was dismissed.

There is a Notice of Appeal dated 14th May, 2024 to appeal against the whole ruling delivered on 17th November, 2023.

5. In a replying affidavit to the Motion before me Peter Mburu Waiyaki a lawyer for the respondent who has conduct of the matter says that the application is an abuse of the process of the court and an afterthought in a bid to justify the failure by the applicant to institute an appeal against the respondent within the prescribed time; that rule 77 of our rules requires a party who wishes to appeal to file a Notice of Appeal within 14 days of the decision to be appealed which the applicant did not do; that delay is inordinate being a delay of over 5 months; he depones at paragraphs 9-12 (inclusive) of replying affidavit:

“9. That the delay is inordinate being a delay of over 5 months.

10. That it is untenable for the Applicant and his Advocates to claim that the delay in filing the Notice of Appeal was as a result of the Applicant's failure to issue instructions. The Applicant's advocates, being the same advocates for the Applicant in the superior court, ought to have notified the Applicant of the 14-day time limitation and sought instructions before the lapse of the prescribed period. In any case, it is clear from the Applicant's Supporting Affidavit that he was aware of the timeline and he was aware that he delayed in issuing instructions to his advocates.

11. That neither the Applicant nor his advocates have demonstrated why instructions were not sought and obtained within the prescribed time period. In fact, no explanation has been tendered to explain the failure to issue and receive instructions with (sic) the prescribed time period.

12. That a client's delay in issuing instructions cannot be a valid reason for undue delay. As a matter of fact, the Applicant's advocates should have advised the Applicant that it was too late to lodge an appeal when they received the



instructions a whole 5 months after the ruling by the superior court was delivered.”

6. Mr. Waiyaki says that the applicant acted in disregard for statutory timelines – that the application at the ELRC was filed on 3rd October, 2023 after the applicant had been dismissed from employment on 23rd March, 2018; that the application at ELRC was made 5 years after cause of action arose which was beyond the 3 year mandatory time limit prescribed by section 90 of the Employment Act; that the application before ELRC was filed 4 months after the criminal appeal had been concluded. Counsel thinks that the intended appeal has no chance of success.
7. I have seen and considered written submissions and the case law cited in support or opposition to the application.
8. The principles that guide the Court in an application for leave to extend time for doing an act contemplated by the Court of Appeal Rules are well known and were well captured in the oft-cited case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 as follows:

“ It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well stated 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.”

So I have to consider length of delay.

9. Ruling intended to be appealed was issued on 17th November, 2023. The application before me is dated 14th May, 2024. There is a period of over 5 months from the date of the ruling to when the Motion was filed and the only explanation for delay is that it took some time for the applicant to instruct counsel to appeal. I note what the respondent has said in this respect - that there has been disregard of timelines by the applicant all the way where the application before ELRC for extension of time to file the petition was done 5 years after dismissal and 4 months after the appeal in the criminal appeal had been concluded. I note also that Notice of Appeal to challenge the ruling of 17th November, 2023 is dated 14th May, 2024, over 5 months from when ruling was delivered. I have not been told why this delay-no reasonable explanation has been offered for this time lapse.
10. The reason for delay offered – that it took time for the applicant to instruct counsel is not reasonable where the applicant had been involved all along in the litigation in criminal court and before ELRC. Reasonable steps should have been taken to take steps for appealing as prescribed by the rules.
11. I do not find that the intended appeal has a chance of success. The Judge held that there was no provision for extension of time in employment matters. The applicant did not tell the Judge of any disability (as contemplated by the Employment Act) that would have prevented him from moving the Court on time as required.
12. No material has been placed before me on which I could exercise my discretion in favour of the applicant. I find the Motion to have no merit and I dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

