



**Kiundi v Kenya Pipeline Company Limited (Civil Application  
E214 of 2021) [2023] KECA 102 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 102 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E214 OF 2021  
HM OKWENGU, JA  
FEBRUARY 3, 2023**

**BETWEEN**

**RICHARD KIOKU KIUNDI ..... APPLICANT**

**AND**

**KENYA PIPELINE COMPANY LIMITED ..... RESPONDENT**

*(An application for leave to pursue an intended appeal as a pauper and for extension of time to lodge and serve the memorandum of appeal and record of appeal out of time in the intended appeal against the decision of the employment and Labour Relations Court (Mbaru, J) delivered on 17th January 2018 in ERLC No. 282 of 2015)*

**RULING**

1. By a notice of motion dated June 21, 2021, brought under Sections 3A & 3B of the *Appellate Jurisdiction act*, Rule 4 and 115 of *Court of Appeal Rules 2010*, the applicant Richard Kioko Kiundi, has moved the Court for two main prayers. First, that leave be granted for him to pursue an intended appeal as a pauper and the intended appeal to be lodged without prior payment of court fees or security for costs. Secondly, that the Court do extend time to enable him lodge and serve the memorandum of appeal and the record of appeal out of time to enable him pursue his intended appeal against the judgment of the Employment and Labour Relations Court (ELRC) delivered on January 17, 2018.
2. The application is anchored on grounds stated in the applicant's supporting affidavit and the body of the notice of motion. It arises from a judgment in a suit which was filed by the applicant in the ELRC against his employer, Kenya Pipeline Company Limited (the respondent), for unlawful summary dismissal from his employment as a result of which the applicant sought aggravated, punitive and exemplary damages, as well as damages for breach of contract and general damages for defamation.
3. Upon hearing the applicant's suit, the ELRC delivered a judgment in which it dismissed the applicant's claims, except for claims for payment of salaries, emoluments and allowances that were due to the



- applicant during the period of his suspension. The applicant who was aggrieved by the judgment, obtained leave to appeal out of time through a ruling delivered on June 21, 2019, (Ouko JA, as he then was).
4. In his supporting affidavit, the applicant has explained that his efforts to file the record of appeal have been frustrated because he is required to pay court fees of Ksh. 106,800 which amount he has not been able to raise; that since 2019 he has tried to raise the required amount but has not been successful; and that as a result of losing his job, and the stresses of maintaining his family, he developed hypertension and diabetes, and was also hospitalized at the Nairobi Hospital for a blood clot. In addition, he was also diagnosed with stomach cancer malignant adenocarcinoma of the gastric sack, which required him to undergo surgery.
  5. His insurance company declined to cover the cost of treatment, as a result of which, he had to liquidate virtually all the assets he had in order to put funds together to pay for the required medical treatment. He spent about Kshs.5 million locally and in India between 2013 and 2014, and again Kshs.3 million between 2015 and 2018. Due to his financial problems, he has approached Mr. Wilfred Nderitu SC, who has agreed to take up his intended appeal on a pro bono basis if his application to file the appeal as a pauper is allowed. He therefore pleads with the Court to allow his application.
  6. The applicant has filed written submissions in which he relies on *Benjamin Barasa Wafula vs Moses Chetame Sikanga & 22 others* [2015] eKLR; and Peter *Onditi Ogugu v Allpack Industries Ltd & anor* [2014] eKLR in which this Court held that in order for an applicant to succeed in an application to file an appeal as a pauper, they must provide evidence that they have a genuine appeal, and that they lack the means to pay the required fees or security for costs. The applicant also relied on *Jane Nyabuto Kembero vs Siraj Sheikh Musdaf* [2013] eKLR, where the Court stated that it would accommodate a financially handicapped applicant who has a genuine grievance.
  7. The applicant urged the Court to hear the Deputy Registrar under Rule 115(2) of the *Court Rules* as per *Benson Buchu Gichuki vs Norwegian Peoples Aid* [2012] eKLR; and *Stephen Gatbuki Kinyanjui vs Peter Gatiburi Karingu* [2018] eKLR where a report was made by the Deputy Registrar and considered by the Court in regard to an applicant's impecunity. The applicant submitted that he has a bona fide appeal with a high probability of success, and therefore, urged the Court to grant his motion.
  8. The respondent opposed the applicant's motion through written submissions in which it identified two issues for determination by the Court. First, whether the Court should grant leave for the applicant to pursue the intended appeal as a pauper. Secondly, whether the Court should grant leave and further extend time for the applicant to lodge and serve the memorandum of appeal out of time.
  9. In regard to extension of time, the respondent relied on the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* [2014] eKLR, arguing that the applicant has not met the threshold for extension of time as he has not explained why he took so long to apply for extension of time, and waited for 2 years before coming to Court. The respondent relied on *George Mwende Muthuri vs Mama Day Nursery School Limited*, Nyeri CA 2014 eKLR, for the proposition that inability to raise legal fees is not a justifiable reason and that 20 months' delay is inordinate and inexcusable.
  10. As regards the application for the applicant to be allowed to pursue the appeal as a pauper, the respondent submitted that the applicant has not availed a draft memorandum of appeal to demonstrate to the Court that he has a good appeal. The respondent therefore urged the Court to dismiss the applicant's motion.
  11. I have carefully considered the application, the affidavit in support and in reply, and the contending submissions. As regards the applicant's prayer to be allowed to file his appeal as a pauper without paying



the required fees, Rule 120 of the *Court of Appeal Rules, 2022* (which was formerly Rule 115 of the *Court of Appeal Rules, 2010*), gives this Court the discretion to allow an applicant in any appeal in a civil matter to file the appeal without the payment of the necessary fees or deposit of security for costs, provided the Court is satisfied, first, that the applicant lacks the means to make the payment, and secondly, that the appeal has reasonable possibility of success.

12. The applicant's suit in the ELRC arose from a dispute concerning the termination of his employment. The applicant has explained the trials that he has gone through since the filing of his suit. His financial and health problems as deposed to evoke sympathy. He has attached necessary medical reports confirming that he has different serious ailments that has resulted in him spending a lot of money locally and abroad. The applicant has also deposed that he has virtually exhausted his assets in meeting the cost of his medication. His family has been adversely affected by his financial woes leading to a son committing suicide. These facts have not been challenged by the respondent and I am satisfied that the applicant lacks the means to pay the required court fees and the security for costs.
13. The respondent's main objection to the applicant's prayer to be allowed to file his appeal as a pauper is that the intended appeal does not have a possibility of success, as the applicant has not demonstrated that he has an arguable appeal.
14. In *Benjamin Baraza Wafula vs Moses Chetambe Sikanga* (*supra*), which was referred to by the applicant, Maraga, JA (as he then was) in dismissing an application for an applicant to be allowed to file an appeal as a pauper, stated:

“The second requirement under Rule 115 as stated is a demonstration by the applicant that he has an arguable appeal. In this application, the applicant has not exhibited in his application the pleadings in the lower court and/or the judgment he intends to appeal against. He only told me in his oral submissions that the respondents in the intended appeal claim, without any sale agreements or other documentation, that they bought portions of title number Ndirisi/Muchi/2366 from his late father that is not enough to show me that he has an arguable appeal.”

15. In the instant application, while the applicant has done an excellent job in establishing that he has no means to pay the required fees for filing his appeal, he has given very little information regarding his intended appeal. Apart from stating that he has an arguable appeal, he has not availed any memorandum of appeal nor has he given any indication of the grounds that he intends to canvass in the intended appeal, or given a copy of the judgment against which he intends to appeal. All he has given is a copy of the decree and the notice of appeal indicating that he intends to appeal against the whole decision of the court. That is not sufficient to demonstrate that “his appeal is not without reasonable possibility of success” or that he has an arguable appeal.
16. As was held in *Apondi vs Caunald Metal Packaging* [2005] 1 EA 12:

“For an application to appeal as a pauper to succeed, the appellant must satisfy the Court that he lacks the means to pay the required fees or deposit the security for costs and that the appeal is not without reasonable possibility of success. If the allegations do not show a cause of action, or even where they show a cause of action but the Court was satisfied that the appellant could not recover more than nominal damages, the Court will be justified in refusing permission because it would be unjust to the other party who would have to incur substantial costs which might not be recoverable. In this case, the applicant had not shown that his cause of action was likely to succeed.”



17. The applicant has failed to demonstrate that his intended appeal is one that raises arguable issues and is likely to succeed. It would be prejudicial to the respondent to allow the applicant leave to appeal as a pauper under those circumstances. The applicant has only satisfied one condition which does not meet the threshold for granting leave to enable him file his appeal as a pauper as he needed to prove both his financial incapacity and the fact that he had an appeal likely to succeed. For this reason, the applicant's prayer in regard to leave to file an appeal as a pauper without making payment fails.
18. As regards the application for leave to file the appeal out of time, the applicant has given a good explanation for the failure to file the appeal in time. His health and financial woes have definitely contributed to the delay. I would have been inclined to grant this prayer, but it would be futile as the applicant cannot raise the money. For these reasons, the application is dismissed with no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

