



Nyamwa & 66 others v University of Nairobi (Civil Application E338 of 2020) [2023] KECA 267 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 267 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E338 OF 2020
AK MURGOR, JA
MARCH 17, 2023**

BETWEEN

JOHN OTIENO NYAMWA & 66 OTHERS APPELLANT

AND

THE UNIVERSITY OF NAIROBI RESPONDENT

(Being an appeal from the judgment of the Employment and Labour Relations Court at Nairobi (B. Ongaya, J.) made on 14th December, 2018 In Nairobi ELRC No. 2503 of 2016)

RULING

1. This Notice of Motion dated October 27, 2020, brought pursuant to rule 4 of the [Court of Appeal Rules](#), 2010, sections 79G and 95 of the [Civil Procedure Act](#), the applicants, John Otieno Nyamwa & 66 Others, seeks for time to be extended to file a record of appeal out of time against the judgment of the Employment and Labour Court delivered on December 14, 2018.
2. The motion was brought pursuant to the grounds on its face and an affidavit in support sworn by John Otieno Nyamwa on behalf of the applicants, where it was contended that the that the applicants were aggrieved by the dismissal of their suit and had instructed their advocates to appeal against the whole of the judgment; that they filed a notice of appeal dated December 14, 2018 and lodged it in court on December 19, 2018, and it was served on respondent's advocates on January 14, 2018; that thereafter, their advocates requested for certified copies of the typed proceedings and the judgment on December 14, 2018; that the proceedings were ready for collection on January 20, 2020 and were received by their advocates on the same day; that their advocates wrote to the court requesting for a certificate of delay to enable them lodge the appeal, but the request for the certificate went unanswered and, the file could not be traced in the court registry; that subsequently thereto, the certificate of delay was received on September 30, 2020.



3. It was further contended that the delay in filing the appeal was occasioned by their inability to obtain the certificate of delay in good time as the file could not be traced in the court registry. Furthermore, that as their advocates were preparing to file a memorandum and record of appeal in March, 2020, the Covid 19 pandemic was reported in the country causing the former Chief Justice through a press statement of March 15, 2020 to announce the scaling down of court operations countrywide from March 16, 2020 for a period of two weeks to allow for appropriate containment measures to be put in place to prevent the spread of the disease; that as a consequence, their advocates closed down their offices until August 30, 2020, and the applicants were unable to file the record of appeal together with other documents. It was asserted that the delay was not inordinate and it was in the interest of justice that this application be allowed; that the respondent would not suffer any prejudice should the time for filing the appeal be extended.
4. In grounds of opposition dated October 25, 2022, the respondent opposed the application on the grounds that it was an abuse of the court process and ought to be dismissed; that the application is a deliberate attempt to frustrate them from enjoying the fruits of its judgment and that allowing the application, would be of substantially prejudice to the respondent.
5. In their written submissions, the respondent’s counsel Messrs. KTK & Advocates added that the applicants have not demonstrated any viable reason for their delay in filing a record of appeal.
6. Under rule 4 of this *Court’s rules*, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if the extension was not grant. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997.
7. In this case the applicants seek for time to be extended to file the record and memorandum of appeal. The judgment was rendered on December 14, 2018, and the notice of appeal was filed on the same day. This application is dated October 27, 2020, which would give rise to a delay of 680 days from the date the notice of appeal was filed. Under the *rules* of this Court, the record of appeal ought to have been filed 60 days after the notice of appeal.
8. In seeking to explain the delay, the applicants have advanced several reasons. They begin by asserting that they were not able to obtain the certificate of delay from the registry because the concerned file could not be traced. Next, they contend that the onset of the Covid 19 pandemic led to the closure of their advocates offices, which did not re open until August 30, 2020, as a result of which they were unable to lodge the appeal. The question for consideration therefore is whether the delay has been satisfactorily explained.
9. Beginning with the complaint that the file could not be traced. I have considered the record, and cannot find any correspondence that would point to the loss of the court file. In addition, the record shows that the applicants were able to obtain the certificate of delay dated February 12, 2020. The Certificate stated;

“ 2. That the proceedings were ready for collection on January 20, 2020 and were received by Nyabena Nyakundi & Co Advocates on January 20, 2020.

3. That the time required for preparation of the certified copies of the proceedings and judgment was from December 14, 2018 to January 20, 2020 is 402 days.



4.This certificate of delay prepared and made ready for collection on February 12, 2020”.

10. What becomes apparent is that the proceedings were ready on January 20, 2020, and that it had taken 402 days to prepare them; that the certificate of delay was prepared and ready for collection on February 12, 2020. So that, contrary to the applicant’s assertions that the Certificate of delay was unavailable because the file could not be traced, it transpires that the registry had completed preparation of the proceedings, and supplied them on January 20, 2020, and the certificate of delay on February 12, 2020.
11. Under rule 84 of this *Courts rules*, the period of preparation of the certified proceedings can be excluded from computation of time, if the request for proceedings was also served on the respondent. In this case, I have discerned from the record that the request for proceedings was not served on the respondent. The letter was neither copied to the respondent, and nor was there any acknowledgment from them of receipt of the letter. Therefore, the applicants cannot benefit from the proviso to rule 84. So that when the 402 days and the additional 23 days for supply of the certificate of delay are computed, it is clear that a total of 425 days delay has not been in any way explained.
12. As to whether there is any explanation for the remaining 255 days, the applicants contend that they were unable to file the record and memorandum of appeal, because of the onset of the Covid-19 pandemic which disrupted court operations; that this led to the closure of their advocates firm up until August 30, 2020.
13. It is worthy of note that the applicants acknowledge that the Covid- 19 pandemic led to a scaling down of court operations for only a period of two weeks, which would explain the delay of a further 14 days up to the end of March 2020.
14. They then contend that because their advocates’ firm remain closed until the 30th of August 2020, this led to further delay. But upon further interrogation of the record, nothing shows, not even a notification from their advocates, that the firm indeed remained closed until August 30, 2020. Therefore, the period up to August 30, 2020 has not in any way been explained. Additionally, between August 30, 2020, and 2October 7, 2020 when this application was filed no explanation was provided for the failure to file the appeal. In totality therefore, the remaining period of 241 days has no explanation or reasons advanced for the delay. Consequently, without having been supplied with any material upon which I can rely that explains the delay of 680 days in filing the appeal, there is nothing on which I can exercise my discretion to extend time.
15. Turning to the question of whether the applicant’s appeal has any chance of success, I have considered the draft memorandum of appeal alongside the judgment of the trial court. It would appear that in dismissing their suit, the learned judge was not satisfied that the applicants’ had proved their case on a balance of probabilities. If indeed this is the case, then there is the likelihood that this Court will arrive at a similar conclusion upon a re- evaluation of the material that was before the trial court.
16. Finally, on whether by extending time the respondent will not suffer any prejudice, the judgment was rendered way back on December 14, 2018. Any further delay in bringing an appeal, will only seek to deny the respondent the enjoyment of the fruits of their judgment which delay I consider to be highly prejudicial to it, having regard to the circumstances of the case.
17. In sum, the applicants having failed to fulfil the threshold requirements, I decline to exercise my discretion to extend time for filing of the notice of appeal, and accordingly dismiss the motion dated October 27, 2020 with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023



A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

