



**Waga v Bidco Oil Refineries Limited (Civil Appeal (Application)  
E189 of 2021) [2023] KECA 860 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 860 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E189 OF 2021  
HM OKWENGU, JA  
JULY 7, 2023**

**BETWEEN**

**SAMUEL OMONDI WAGA ..... APPLICANT**

**AND**

**BIDCO OIL REFINERIES LIMITED ..... RESPONDENT**

*(Being an application for extension of time to file and serve notice and record of appeal out of time from the whole judgment, orders and decree of the Employment and Labour Relations Court at Nairobi (Radido, J) delivered on 20th September 2019 in Nairobi ELRC No. 1047 of 2014)*

**RULING**

1. On September 20, 2019 the Employment and Labour Relations Court (ELRC) (Radido J), having heard a claim lodged by Samuel Omondi Waga the applicant, herein against the respondent herein Bidco Oil Refineries Limited who was his employer, found that the applicant's employment was unfairly terminated, but declined to award any compensation or reliefs sought by the applicant.
2. By an application dated March 4, 2023, the applicant has now moved this court seeking leave to file a record of appeal dated January 7, 2021 out of time, in an appeal from the judgment delivered on September 20, 2019. The motion is supported by grounds stated on the face of the motion, and an affidavit sworn by the applicant on March 4, 2023.
3. In brief, the applicant who is aggrieved by the judgment of the ELRC, believes that he has an arguable appeal which raises serious legal issues. He contends that following the ELRC judgment, he applied for proceedings and obtained a certificate of delay on December 7, 2020, and that in the interest of justice, his application should be allowed to obviate a clear miscarriage of justice.
4. The applicant has also annexed a memorandum of appeal wherein he has raised 3 grounds of appeal. These are that the trial judge having found in favour of the appellant in regard to unfair termination, engaged in legal contradictions in declining to make any award in favour of the applicant; that the



learned judge erred in making a finding that award of compensation to a successful litigant on a positive judgment is a discretionary remedy; and that the trial judge arrived at a finding and conclusion that is so fundamentally wrong, that this court must intervene in favour of the applicant.

5. The application is opposed through a replying affidavit sworn by Daisy Owuor (Daisy), an advocate who is working in the respondent company as the head of legal. Daisy deposes that the applicant has failed to meet the basic requirements for granting an application for extension of time, as his application was filed over two years after the judgment subject of the intended appeal, and no plausible explanation has been given to justify the length of the delay or the reason for the delay. In addition, no explanation has been given for the filing of the appeal 4 months after the certificate of delay was issued. Daisy deposes that the intended appeal has little or no chances of success.
6. Both the applicant and the respondent have filed written submissions each urging the court to find in their favour. In his submissions the applicant explains that the record of appeal was ready and signed by January 7, 2021, and that it was only discovered on April 10, 2021 that the appeal had not been lodged in court. The record of appeal was then filed in court and given a number Civil Appeal No E189 of 2021 and immediately thereafter, the applicant filed the application for extension of time. The applicant contends that in essence the delay is only 34 days, and that the court has discretion under rule 4 of the [Court of Appeal Rules](#), as read with order 50 rule 5 of the [Civil Procedure Rules](#), to extend time. The applicant also relies on *Leo Mutiso vs Hellen Wangari Mwangi* [1999] 2EA 231.
7. The applicant submitted that: the notice of appeal and request for proceedings were filed and served timeously; the proceedings were collected on December 4, 2020; the record of appeal should have been filed by March 1, 2021 but was instead filed on April 12, 2021 which was 34 days late; and that the delay is not inordinate and was due to one Mr Upendo Allan, the advocate who was handling the file, abruptly leaving the firm representing the applicant. Citing *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* [2018] eKLR, the applicant submitted that there was an honest mistake on the part of the advocate and that in a bid to purge the mistake, the advocate moved immediately, to file the appeal.
8. The applicant also relied on *Nzoia Sugar Co Limited vs West Kenya Sugar Limited* [2020] eKLR, that followed *Mwangi S Kimenyi vs Attorney General & Anor*, regarding the inordinate delay. Citing *Itute Ingu & anor vs Samuel Mwakabi Mwendwa* [1994] eKLR and *Ruppa Savings & Credit Cooperative Society vs Violent Shidogo* [2022] eKLR, the applicant urged the court not to visit the mistake of the advocate upon him. Finally, the applicant submitted that he has an arguable appeal which raises triable issues, and that the respondent would not suffer any prejudice if the orders sought were granted.
9. For the respondent, it was submitted that the only issue for determination by the court is whether the application should be granted. It was argued that rule 4 of the [Court of Appeal Rules](#) does not specify the exact conditions that need to be met before the court can exercise its discretion in relation to extension of time, and therefore, the test for determination of such matters is on a case by case basis, based on the peculiar circumstances of each case.
10. The respondent counsel elaborated on the conditions often cited as the prerequisite to the exercise of discretion under rule 4 of the [Court of Appeal Rules](#). The counsel cited *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR, in which the Supreme Court set out the principles to be considered in determining an application for extension of time. Counsel urged the court to find that the applicant's motion fails the test as it was filed over 2 years after the appeal was filed, and no plausible explanation has been given for the delay.
11. The respondent's counsel drew the court's attention to Petition (Application) No 27 (E031) of 2022, *Mariam Saidi Mwambora & 9 others vs Spire Properties (K) Limited & 50 others*, where the Supreme Court held that a delay of 3 days in lodging the notice of appeal was inexcusable, unsatisfactory and



a clear afterthought. Counsel submitted that the memorandum of appeal as filed does not raise any good ground of appeal with chances of success. Finally, the respondent's counsel submitted that the respondent would be greatly prejudiced if the application is allowed and the matters in dispute reopened for litigation close to 20 years after the suit was filed. He urged the court to dismiss the motion.

12. The motion before me being one for extension of time, rule 4 of the Court of Appeal Rules 2022 gives discretionary powers to this court to extend time. The principles upon which such discretion can be exercised are now laid out in case law, some of which were referred to by the applicant and the respondent in their submissions. (See *Leo Mutiso vs Hellen Wangari Mwangi (supra)*; *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet (supra)*; and *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others (supra)*).
13. These principles have been well captured by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others (supra)* as follows:
  - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court ought to exercise the discretion to extend time is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay;
  7. Whether in certain cases like election petition, public interest ought to be a consideration for extending time.”
14. Although the applicant has not annexed a copy of the notice of appeal in this motion, the notice of appeal is contained in the record of appeal which was filed without leave. The notice is dated October 2, 2019 and has a date stamp showing that it was lodged in the Employment and Labour Relations Court on October 3, 2019, which was within the required 14 days. Under rule 84(1) of the [Court of Appeal Rules, 2022](#) the record of appeal is required to be filed within 60 days from the date of filing the notice of appeal. However, there is a proviso to rule 84(1) under which in computing time for the filing of a record of appeal, 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 the copy of the proceedings of the superior court, may be excluded.
15. In this case, the applicant applied for copies of proceedings and was issued with a certificate of delay duly signed by the Deputy Registrar of the ELRC, indicating that the period from October 9, 2019 to December 4, 2020, was required for the preparation and delivery of the certified copies of the proceedings. The certificate of delay is indicated as issued on December 7, 2020 and therefore, the period to be excluded must include the period between December 4, 2020 and December 7, 2020 when the certificate of delay was issued. That is to say, the period to be excluded should be from October 9, 2019 to December 7, 2020. If the proviso to rule 84(1) is applied, then the record of appeal ought to have been filed within 60 days from the issuance of certificate of delay, giving allowance for the



period from December 21, 2020 to January 12, 2021 being the Christmas recess period excluded under section 3(e) of the *Court of Appeal Rules*. According to the applicant's computation, which has not been disputed, the record of appeal should have been lodged by March 21, 2021. The applicant explains that due to an inadvertent mistake, although the record was prepared and was ready for filing, it was not lodged as the advocate who was handling the matter had left the firm representing the applicant.

16. I have considered the explanation that was given. It is evident that the applicant was interested in pursuing the appeal and did file a notice of appeal within the required time. This was followed immediately with a letter filed and served within the required time, seeking copies of the typed proceedings. The applicant followed up and indeed obtained copies of typed proceedings and a certificate of delay.
17. The explanation that the delay was due to the advocate handling the matter leaving the firm is one that is plausible, as such occurrences do happen. I note that the advocate managing the firm did not swear an affidavit in support of this explanation, and only revealed the information in the applicant's submissions that were filed. That was certainly a slip up on the part of the advocate. Given the nature of this litigation, it would not be fair nor just to penalize the applicant and deny him an opportunity to exercise his right of appeal due to a mistake of his counsel. The applicant has exhibited a copy of a memorandum of appeal which shows that there are issues which are capable of argument. It cannot therefore be said that the appeal is frivolous.
18. Weighing the inevitable inconvenience that may be suffered by the respondent in awaiting the final conclusion of this matter, if leave is granted to the applicant to file the record of appeal out of time, against the injustice that may be suffered by the applicant if he is not given an opportunity to exercise his right of appeal, I think in the circumstances, it is only fair and just that I exercise my discretion in the applicant's favour.
19. Accordingly, I allow the applicant's motion and order that the record of appeal dated January 7, 2021, filed out of time on April 12, 2021, be deemed as properly filed and served. Costs shall be in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

