



Muthoka v Ethics & Anti-Corruption Commission & another (Civil Application E128 of 2023) [2023] KECA 1673 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1673 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E128 OF 2023
F TUIYOTT, JA
DECEMBER 15, 2023**

BETWEEN

DR MIRIAM NDUNGE MUTHOKA APPLICANT

AND

ETHICS & ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

KENYA MEDICAL TRAINING COLLEGE 2ND RESPONDENT

(Being an application for extension of time to file an Appeal out of time from the judgment of Employment and Labour Relations Court at Nairobi (Monica Mbaru, J.) dated 22nd September 2022)

RULING

1. By an application dated 4th April, 2023 said to brought pursuant to rules 4 and 75 of the rules of this Court, the applicant seeks an order for enlargement or extension of time within which to file and serve a Record of Appeal against the decision of Monica Mbaru, J. delivered on 22nd September, 2022 in Constitutional Petition No. E018 of 2022.
2. In support of the application is her affidavit sworn on even date where she deposes that once the judgment was delivered on 22nd September, 2022, she instructed her then advocates M/s Okweh Achiando & Company Advocates to lodge a notice of appeal which said notice was filed on 30th September, 2022. She then on 10th November, 2022 instructed her current advocates M/s J.A. Guserwa & Company Advocates to peruse the judgment and advise on it. The advice of the advocates was that although the notice of appeal had been filed timeously, the time for filing a record of appeal had lapsed. She further deposes that she was unable to get possession of her file from her previous advocates and that is what brought about the delay in filing the record of appeal on time. Further, that she delayed bringing the application now before Court due to delay in giving her current advocates on record



adequate instructions. Additionally, there was a delay in obtaining copies of the pleadings and Ruling from the ELC registry and her previous advocates.

3. The application is opposed by both respondents.
4. The 1st respondent filed a replying affidavit of Dr. Kelly Oluoch, the Chief Executive Officer of the 1st respondent, sworn on 13th April, 2023. She acknowledges that a notice of appeal was filed and served upon the 1st respondent on 4th October, 2022. She notes that an appeal ought to have been filed on 30th November, 2022 being in line with the sixty (60) days period for filing an appeal. In addition, she adds that the ELC registry informed the parties via an email dated 14th November, 2022 that typed proceedings were ready for collection. She further avers that despite being instructed by the applicant on 10th November, 2022, the applicant's current advocates M/s J.A. Guserwa Advocates took three (3) months to request for the applicant's file from her former advocates. She asserts that the present application was brought five (5) months after the expiry of the period for filing the appeal. Importantly, she also states that since the letter to the ELC dated 3rd October, 2022 seeking issuance of typed proceedings was not served in terms of rule 84 of this Court's rules, the applicant cannot benefit from the exclusion of time taken by the registry for preparation and delivery of typed proceedings. That therefore, this court ought to invoke its powers under rule 85 and direct that the applicant's notice of appeal be deemed withdrawn.
5. The 2nd respondent has filed grounds of opposition dated 14th April, 2023 and raises 3 grounds; that there is inordinate delay in filing the record of appeal; that the application is devoid of satisfactory explanation as to why the Record of Appeal was not filed within the stipulated time; and that there is absence of sufficient material on the merits of the intended appeal.
6. The parties all filed their submissions which are substantially a regurgitation of the positions taken in their respective affidavits or grounds in opposition
7. Rule 84 makes provision for institution of appeals and reads: -

“(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

- a. a memorandum of appeal, in quadruplicate;
- b. the record of appeal, in quadruplicate;
- c. the prescribed fee; and
- d. security for the costs of the appeal.

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.



3. The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.”
8. To start with there is no evidence that the applicant’s former advocates served the respondents with their letter of 3rd October 2022 bespeaking proceedings and the applicant cannot therefore benefit from the proviso to Sub-rule 1 of Rule 84. For that reason, time within which the applicant was required to file the appeal begun to run on 30th September, 2022 when the Notice of Appeal was lodged and lapsed on or about 30th November, 2022. Even then the proceedings were ready for collection on 14th November, 2022 which was still within the period for filing the appeal.
9. One explanation for the delay in filing the appeal was the alleged lack of communication from the applicant’s previous advocates who the Court is informed delayed in surrendering the applicant’s file to her current advocates. There is the letter of 1st February, 2023 written by her current advocates on record, M/s J.A. Guserwa & Company Advocates, to her former advocates, M/s Okweh Achiando & Company Advocates, requesting for the applicant’s file and documents for preparation of the record of appeal. That letter refers to the former advocates letter of 28th November, 2023 which has not been shown to this Court. What is clear, however, is that there had been early communication between the two advocates whose contents has been kept away from the Court. Whatever the nature of that communication, what has not been explained is why the current advocates who were instructed by the applicant on 10th November, 2023, twenty days (20) before the last day for instituting the appeal, took seventy-eight (78) days to request for the applicant’s file and documents from the former advocates.
10. There is then the delay in bringing the current application which was brought one hundred and twenty-four (124) days or so after the date of expiry of filing the appeal. The explanation given is twofold; delay in the applicant giving counsel adequate instructions; and delay in obtaining the pleadings and rulings from the ELRC and the previous advocates. Again, there is no elaboration as to the nature of instructions that the applicant could not give on time. Was it payment of fees? It is not for the Court to speculate! As to the other explanation, the uncontroverted evidence is that copies of proceedings and judgement were ready for collection by at least 14th November, 2022. What difficulty would the applicant have in collecting them. On documents from the previous counsel, I have already made my observations. In the end, the fairly long delay has not been adequately explained. The discretion under rule 4 to enlarge time is not to be exercised whimsically or on sympathy or caprice. It is one to be applied judiciously and on this occasion the applicant has not persuaded the Court that she is deserving of it.
11. I decline to grant leave for filing the appeal out of time having considered this matter within the considerations restated in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR).
12. The application of 4th April, 2023 is therefore dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

I certify that this is a true copy of the original

Signed

Deputy Registrar

F. TUIYOTT

JUDGE OF APPEAL

