



**Obondo v Judicial Service Commission (Civil Application
E401 of 2023) [2023] KECA 1509 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1509 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E401 OF 2023
M NGUGI, JA
DECEMBER 8, 2023**

BETWEEN

DISMUS OMONDI OBONDO APPLICANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

*(Being an Application for leave to file a notice of appeal out of time from
the judgment of the Employment & Labour Relations Court at Nairobi
(S. Rutto Chemitei J.) delivered on 9th June, 2023 in ELRC 135 of 2017)*

RULING

1. By the application dated 15th August 2023, brought under section 7 of the [Appellate Jurisdiction Act](#) and rule 4, 31, 41, 42, 43 and 47 of the [Court of Appeal Rules](#), the applicant seeks leave to file a notice of appeal out of time from the judgment of the ELRC (S. Rutto/Chemitei J.) delivered on June 9, 2023 in ELRC No. 135 of 2017. (The name of the judge who delivered the judgment is not clear as there is reference to Stella Rutto J. and S. Chemitei J., and since the judgment sought to be appealed from is not annexed to the application, it is not possible to tell what the correct name of the trial judge is.)
2. The applicant further seeks orders that this Court be pleased to extend time for filing an appeal and that the draft notice of appeal be deemed to be duly filed upon payment of the requisite filing fees. The draft notice of appeal is not attached to the application.
3. The application is based on the grounds on its face and is supported by an affidavit sworn by the applicant's advocate, Ms. Cynthia Omuya, on the same date.
4. The applicant states that judgment was delivered on 9th June 2023 in the presence of counsel for both parties, and his claim was dismissed. Immediately after the delivery of the judgment, the counsel who took the judgment went on leave and inadvertently failed to update the case file or leave instructions that a notice of appeal ought to have been filed within 14 days. That it is only on 27th June 2023, three



days after the lapse of the fourteen days' timeline to file a notice of appeal, that the inadvertent mistake was realized by counsel for the applicant.

5. Ms. Omuya, an advocate practicing with the firm of Musyoka Murambi & Associates states that she is on record for the applicant. She reiterates the grounds forming the basis of the application and avers that it was only on 6th July 2023, fourteen days after lapse of the timeline for filing the notice of appeal, that the applicant's advocate who took up the matter realized the inadvertent mistake.
6. That after realizing that the time for filing the notice of appeal had lapsed, they immediately reached out to the applicant who was aggrieved by the said judgment and instructed that an appeal be filed. The time to file a notice of appeal having lapsed, counsel immediately filed an application at the trial court, seeking to file the notice of appeal out of time. The application was, however, struck out on 11th July 2023 on the grounds that the court did not have jurisdiction. This application dated 15th August 2023 was then filed on behalf of the applicant.
7. Ms. Omuya avers that the period for filing a notice of appeal having lapsed, the applicant should be granted leave to appeal out of time. The delay in filing the notice of appeal, she avers, should be attributed to the advocate and the error should not be visited on the applicant nor prejudice his right to appeal. She further avers that the applicant is genuinely interested in pursuing the intended appeal as it raises substantial issues that should be heard and determined.
8. There is no response to the application, nor have the parties filed submissions.
9. Under rule 4 of the Rules of this court, this court has discretion to "... extend the time limited by these Rules, or by any decision of the Court or of a superior Court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act ..." on such terms as it thinks just.
10. With regard to the factors to be considered in determining an application for extension of time, this Court has stated in a number of its decision that what should be considered on such an application are the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is granted- see *Leo Sila Mutiso vs Rose Hellen Wangare Mwangi* Civil Application No Nai 255 of 1997 (UR) and the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* [2019] eKLR. In this latter case, the Supreme Court laid down the principles that govern the exercise of discretion in applications for extension of time as follows:
 - a) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; ..."



11. I have considered the application and the affidavit in support. I note that the judgment sought to be appealed against was delivered on 9th June 2023. Under rule 77(2) of this Court's Rules, a notice of appeal should have been filed within 14 days of the judgment. It was not.
12. It is averred on behalf of the applicant that the advocate who was present at the reading of the judgment immediately went on leave, and it was not discovered until 27th June, 2023 that judgment had been delivered, three days, according to the applicant, after the notice of appeal should have been filed. The applicant's counsel avers that the discovery was made on 6th July 2023, and an application for extension of time dated 6th July, 2023 was filed before the ELRC. The motion was, however, struck out by the ELRC on 11th July, 2023, for lack of jurisdiction. The applicant has not annexed either a copy of the application or the order striking it out.
13. What the applicant's grounds in support of his application and the affidavit by Ms. Omuya shows is as follows: that the applicant was represented in court when the judgment of the ELRC was read. A notice of appeal was not filed, the explanation given being that the applicant's counsel, who is not named and has not sworn an affidavit in this regard, 'went on leave' and did not inform others of the need to file a notice of appeal.
14. The applicant and his counsel realized, either on 27th June or 6th July 2023, that a notice of appeal needed to be filed, so they filed an application before the ELRC for leave to file the notice out of time. The application was struck out on July 11, 2023. The applicant did not take any steps until August 15, 2023, when the present application was filed, over 34 days after his application was struck out, and in excess of two months after the delivery of the judgment he seeks to appeal against.
15. Having considered the above matters, I am not satisfied that the delay in this matter, which I find to be inordinate in the circumstances, has been explained to the satisfaction of the Court. I am not persuaded that a delay of close to two months, blamed on an unnamed advocate who has not sworn an affidavit to explain the delay, is excusable. It is my finding, therefore, that the application dated August 15, 2023 is without merit, and it is hereby dismissed but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023.

MUMBI NGUGI

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

