



**Ongaga v Rwaken Investments Limited (Civil Application
E263 of 2020) [2022] KECA 133 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 133 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E263 OF 2020
KI LAIBUTA, JA
FEBRUARY 18, 2022**

BETWEEN

PETER OENGA ONGAGA APPLICANT

AND

RWAKEN INVESTMENTS LIMITED RESPONDENT

(Being an Application for leave to lodge an appeal out of time from the Judgment of the Employment and Labour Relations Court at Nairobi (Abuodha Jorum Nelson, J.) delivered on 14th May 2020 in ELRC Cause No. 364 of 2013)

RULING

1. From the material placed before me, it is clear that the Applicant has failed to comply with the requirements of Rules 75(1) and (2) and 77(1) of the *Court of Appeal Rules*. Rule 75(1) and (2) provide:

“(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to Rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”
2. Rule 77(1) requires that such notice be served on the adverse party within seven days from the date on which it is filed. Rules 75(1) and (2) and 77(1) are couched in mandatory terms and do not give a party the option to sit back and, after a long while, get up to seek the Court’s leave to comply. Indeed, the Court’s discretion to extend time to lodge a Notice of Appeal must be preceded or accompanied by such Notice.



3. Addressing itself to the mandatory requirement to file and serve a notice of appeal, the Supreme Court in *University of Eldoret and another v Hosea Sitienei and three others [2020] eKLR* at para 36 observed:

“The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellants. The filing of a notice of appeal signifies the intention to appeal.”

4. In my considered judgment, the fate of the application before me depends on proof that the Applicant has signified his intention to appeal by filing and serving his notice of appeal on the Respondent as required under the Rules. Only then could he be said to have laid the basis for approaching the Court for orders to cure any delay in lodging his Notice of Appeal. No such notice has been filed, which dispossesses me of the otherwise unfettered discretion in determination of the application before me.

5. Citing the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others [2014] eKLR*, this Court had this to say in *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission and 2 others [2018] eKLR*:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

6. Accordingly, the application is fatally defective and cannot stand. Indeed, I am at a loss as to what is sought to be achieved by the intended appeal in respect of which the Applicant has not given notice. Neither is there a Memorandum of Appeal or other material on record to aid in determining the probability of success of such an appeal. For the foregoing reasons, I order and direct that the Applicant’s application for extension of time to file a Notice of Appeal be and is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

