



REPUBLIC OF KENYA



KENYA LAW
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**Odeny v Lake Victoria South Water Services Board (Civil Application
E131 of 2021) [2022] KECA 489 (KLR) (25 March 2022) (Ruling)**

Neutral citation: [2022] KECA 489 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E131 OF 2021
M NGUGI, JA
MARCH 25, 2022**

BETWEEN

JOSHUA OMENDA ODENY APPLICANT

AND

LAKE VICTORIA SOUTH WATER SERVICES BOARD RESPONDENT

(Being an application for extension of time to file an appeal out of time against the judgment of the Employment and Labour Relations Court (Radido Stephen MCI Arb I.) dated 14th April 2021 in Kisumu ELRC Cause No. 184 of 2016)

RULING

1. In the application dated 8th September 2021 brought pursuant to the provisions of Rule 4 of the [Court of Appeal Rules](#), 2010 and Article 159(2)(d) of the [Constitution of Kenya](#), the applicant asks this Court to extend time within which he can file and serve his Notice of Appeal against the judgment of Radido J delivered on 14th April, 2021. At prayer 2 of his application, the applicant asks that time be extended within which to file and serve a Memorandum and Record of Appeal against the said judgment. He further prays that the costs of the application await the outcome of the appeal.
2. The application is supported by two affidavits, one sworn by the applicant, Joshua Omenda Odeny, on 8th September 2021 and the other by his Learned Counsel, Francis Eric Wasuna, on the same date. The applicant's grounds in support of his application that appear, with slight variations, in the affidavits sworn by the applicant and his Counsel, are as follows. The trial court delivered its judgment on 14th April, 2021 via Microsoft teams in the absence of the applicant or his representative. That he is aggrieved by the decision and he intends to prefer an appeal against the whole of the judgment. He ought to have lodged a notice of the intended appeal within 14 days of delivery of the said judgment in accordance with Rule 75(2) of the Court of Appeal Rules, but there was a delay inadvertently



occasioned by the fact that the he was not aware of the judgment until 9th August, 2021 when the respondent's Advocate informed his Advocate that judgment had been entered.

3. According to the applicant, the matter had come up before the trial court for the last hearing on 20th January, 2021. The court gave directions that the applicant files and serves his submissions before 20th February, 2021 while the respondent was required to file and serve its submissions before 20th March, 2021. The court also scheduled judgment for 14th April, 2021. However, neither party had complied with the court's directions on submissions by 20th March, 2021. On 6th April, 2021, Counsel for the respondent wrote to the Court and to the applicant's Advocates seeking that the judgment date of 14th April, 2021 be considered as a mention date for purposes of extending time within which parties could file submissions.
4. Though the applicant's Counsel did not receive any response to the letter, he assumed that time would be extended for filing of submissions. He did not also believe that judgment would be delivered on 14th April 2021. The applicant contends that he operated on the honest but mistaken assumption that the court would issue new dates, and he waited until 9th August, 2021 when he called the respondent's Advocates to enquire whether they were filing submissions. It is then that he was informed by Counsel for the respondent that judgment had been delivered. He had immediately applied for a copy of the judgement and certified proceedings.
5. The applicant contends that the judgment having been delivered in his absence and without his submissions, he has suffered prejudice and loss and stands condemned without being afforded the fair and equal opportunity to ventilate his case before the trial court. He argues that it is fair that the errors of his Advocate should not be visited upon him.
6. There was no response to the application by the respondent.
7. I have considered the application and the averments by the applicant and his Counsel. The application is brought under Rule 4 of the Court of Appeal Rules, which provides that:

“The Court may, on such terms as it thinks just, by order 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

8. The court has wide and unfettered discretion in determining whether to extend time under this Rule. In exercising the discretion however, it should do so judiciously, bearing in mind the well settled principles succinctly enunciated in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997*:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

9. The applicant concedes that he should have lodged his notice of appeal within 14 days from 14th April 2021 in accordance with Rule 75(2) of the Court of Appeal Rules. The delay in lodging the notice was occasioned by the fact that both he and his advocate were absent when the judgment was read, and he



was not aware of the judgment until 9th August, 2021 when he was informed about the judgment by his Advocate. His Advocate was not aware that the judgment had been delivered until 9th August 2021 as he had assumed that the trial court would vacate its judgment date set for 14th April 2021 and give the parties a new judgment date. The basis of this assumption was that the respondent's Counsel had requested that the judgment date set by the trial court should be converted to a mention date as both parties had failed to comply with the court's directions for filing submissions.

10. The applicant avers at paragraph 9 of his affidavit that:

“...the court insisting and delivering the judgment on 14th April, 2021 without my submissions was punitive in nature, unfair, against my Constitutional right to fair hearing, equality before the law and against natural justice. My case suffered prejudice before trial court as my Advocates on record were technically denied a chance to make submission on the case.”

11. The applicant was supposed to file his submissions in the matter before the trial court by 20th February 2021, while the respondent was supposed to file submissions by 20th March 2021. These directions were given on 20th January 2021, in the presence of all the parties, when the judgment date was also set for 14th April 2021. By 6th April 2021 when the respondent's Advocate requested for the judgment date to be converted to a mention date, the applicant had yet to file his submissions. The judgment of the trial court indicates that the respondent filed its submissions on 8th April 2021. The applicant did not file his submissions. Indeed, he did not take any action in the matter until four months later, when as his Counsel avers, he was informed that judgment had been delivered as scheduled on 14th April 2021.

12. Rule 4 of this Court's Rules requires that the Court exercises its discretion to extend time while taking into account the length of the delay and the reason for the delay. The Notice of Appeal in this matter should have been filed by 29th April 2021. The present application was filed on 8th September 2021, almost five months after the judgment. The applicant seeks to blame the trial court for the delay, that it 'insisted' on delivering judgment on the day it had said it would. The applicant and his Counsel, in my view, demonstrated an unacceptably lackadaisical attitude to his claim. He was the claimant before the trial court. He was supposed to file his submissions by 20th February 2021. He had not done so by 6th April when the respondent's Counsel wrote to the court to defer the judgment date; and it was presumptuous of him to assume that the trial court would accept the parties' disinterest in their suit and defer the judgment date.

13. In the circumstances, I am unable to exercise discretion in favour of the applicant. The application dated 8th September 2021 is without merit, and is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF MARCH, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

