



REPUBLIC OF KENYA



**Onyango v Almas Electronics EA Ltd & 3 others (Civil Appeal (Application)
E579 of 2021) [2022] KECA 896 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 896 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E579 OF 2021
AK MURGOR, JA
APRIL 28, 2022**

BETWEEN

PETER ODUNYA ONYANGO APPELLANT

AND

ALMAS ELECTRONICS EA LTD 1ST RESPONDENT

ALMAS ENTERPRISES EA LTD 2ND RESPONDENT

SALIM ANWARALI 3RD RESPONDENT

SHEZ SHEZAD ANWARALI 4TH RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court of Kenya at Nairobi (B Ongaya, J.) delivered on 9th October, 2020 in ELRC Petition No.74 Of 2019)

RULING

1. By a Notice of Motion dated 27th September 2021, brought pursuant to rules 4 and 41 of the [Court of Appeal rules](#) and section 3A and 3B of the [Appellate Jurisdiction Act](#), the applicant, Peter Odunya Onyango, seeks orders for this Court to enlarge time for filing of the applicant's appeal and to deem the record filed with this application as properly filed.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by F. N. Wamalwa on 23rd September 2021, wherein the applicant contended that immediately after delivery of judgement by the trial court, on 9th of October 2020, the applicant's counsel applied for copies of the proceedings and the judgment together with a certified copy of the Decree; that on 25th June 2021 they received the proceedings and judgment without the decree notwithstanding that their application had explicitly requested for a certified copy of the decree; that on 2nd July 2021 the applicant's counsel received a Certificate of delay well within the time limit specified by rule 82, but could not do so for want of a certified copy of the decree.



3. It was contended that on 2nd September 2021, the registry supplied a sealed copy of the decree notwithstanding that what was requested was a certified copy; that ultimately they were supplied with a certified copy of the decree on 15th September 2021 paving way for the filing of the application for extension of time to lodge the appeal; that time limit for lodging the appeal was caused by the enumerable back and forth and in person follow-ups with the court registry which hitherto was inaccessible on account of the Covid 19 Protocols.
4. It was further contended that a copy of the letter requesting for copies was timeously served by e-mail on counsel for the respondents on the same day it lodged with the registry; that time for lodging the appeal run out on or about 25th August 2021 due to circumstances beyond the control of the applicant and his advocates; that the appeal raises serious constitutional issues of public importance on the right to fair trial and procedural justice in both workers' disciplinary cases and termination of employment, as well as procedural justice in the hearing and determination of matters in court; that unless this Court exercises its discretion to enlarge time for lodging the appeal, the applicant's fundamental constitutional rights will go without redress.
5. A consideration of the record does not disclose that the respondents filed a reply or written submissions, notwithstanding that the respondents counsel were served on 9th February 2022.
6. Under rule 4 of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997*.
7. In this application, the applicant seeks time to be extended so as to have the record of appeal filed together with the application to be deemed as duly filed. The judgment was rendered on the 9th October, 2020. There is no indication of whether a Notice of appeal was filed and served on the respondents. Thereafter, the applicant contends that his counsel applied for copies of the proceedings, the judgment together with a certified copy of the decree; that on 25th June 2021, they received the proceedings and judgement without the certified copy of the decree which was not supplied until the 15th September 2021. Though it was contended that a certificate of delay was provided, no certificate was attached to the application. This application was filed on 27th September 2021. This would account for a total delay of 11 months.
8. Has the delay been explained? The applicant seeks to depend on the delay by the registry in supplying him with a certified copy of the decree to explain the delay. But before considering whether or not this was the reason for the delay, several shortcomings in the applicant's application stand out.
9. Firstly, as earlier observed, the applicant did not attach a copy of the Notice of appeal or a letter bespeaking a request to be supplied with the proceedings. Without this, the court was unable to establish whether the respondents were served with the Notice of appeal, or the letter of request.
10. Secondly, notwithstanding that, the applicant has indicated that he received a Certificate of delay on 2nd July 2021, the certificate of delay was not attached. Without such certificate, the period of time it took to prepare the proceedings cannot be ascertained.
11. The necessity serving the respondents with the letter requesting for the proceedings is to enable the applicant to benefit from rule 82 of the Court's rules which provision permits the time taken for preparation of the proceedings to be excluded from computation of the delay in filing of the record of



appeal. But that said, rule 82 (2) is clear. It stipulates that an applicant shall not be entitled to exclude the period of preparation unless his or her application for a copy of the proceedings is “in writing and a copy of it was served upon the respondent”.

12. Since the applicant has not demonstrated that the request for proceedings was filed or served on the respondents, it becomes evident that the time taken for preparation of the proceedings cannot be excluded. The effect of this is that, the applicant would have to explain the entire period of delay, which it has not done at all.
13. Returning to the reason that the delay was on account of the delay in supplying the certified copy of the decree. There is nothing that shows that this was in fact the cause of the delay. This is because, no complaint was lodged with the registry indicating that it had not been supplied with the certified copy as requested. Additionally, nothing shows that the registry acknowledged its error, or showed that it sought to have the error rectified. All that the applicant has provided is copy of a decree affixed with a stamp indicating that it is a certified copy, and no explanation. Essentially, there is nothing to explain the 11 month’s delay which I consider to have been inordinate and unduly prolonged.
14. With respect to the success of the appeal, in view of the applicant’s failure to attach a draft memorandum of appeal, I am unable to discern the nature of the appeal or its possible success, or the prejudice the respondents stand to suffer.
15. In sum, the applicant having failed to fulfil the threshold requirements, I decline to exercise my discretion to extend time for filing of the record of appeal and accordingly dismiss the motion dated 27th September 2021 with costs to the respondents.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 28TH OF APRIL, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

