



REPUBLIC OF KENYA



**Unga Limited v Oloo (Civil Appeal (Application) E054 of 2022)
[2022] KECA 836 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 836 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E054 OF 2022**

W KARANJA, JA

MAY 27, 2022

BETWEEN

UNGA LIMITED APPELLANT

AND

JOSEPH OLANDO OLOO RESPONDENT

(An application for extension of time within which the Appeal herein was instituted, the said Appeal being from the award/Judgment and Decree of the Employment & Labour Relations Court at Nairobi (M. N. Nderi, J) delivered by Honourable Lady Justice Maureen Onyango on 10th day of August 2016 in ELRC No. 872B of 2015)

RULING

1. Before me is an application dated 16th February, 2022 brought under Rule 4, 82 and 87 of the Court of Appeal Rules seeking orders for extension of time to file an appeal out of time against the entire Judgment and Decree of the Employment & Labour Relations Court (ELRC) at Nairobi (M. N. Nderi, J.) delivered on 10th August, 2018 in ELR Cause No. 872B of 2015.
2. The respondent was employed by the applicant on 1st November, 1996 as a Chemical Technician and later promoted to the position of Raw and Packing Materials Supervisor until 9th December, 2014. On 1st February, 2014, he was transferred from Quality controller position in Nairobi to Nakuru feeds as a Raw & Packing Materials Supervisor and on 8th December, 2014 declared redundant upon showing reluctance to proceed to Nakuru. Consequently, he filed a claim against the appellant seeking severance pay in the sum of Kshs. 682,175.16 calculated at 15 days salary for each completed year of service (18 years) and a refund of retirement benefits scheme contribution in the sum of Kshs. 70,616.40.
3. The claim was resisted by the applicant but after hearing the case, in the judgment dated 10th August, 2018, the court held that the respondent who had served the applicant for eighteen (18) years should have been paid severance pay calculated at three (3) months' salary for each completed year of service.



The court awarded severance pay calculated at three months' salary for the 18 years completed service in the sum of Kshs. 4,093,038 (Less the paid amount of Kshs. 930,229.75) thus Kshs. 3,162,808.25 and payment in lieu of 18 days leave Kshs. 45,468.

4. Aggrieved, the applicant intends to appeal the impugned decision and duly filed and served a notice of appeal dated 23rd August, 2018 to that effect. However, the applicant failed to file and lodge the record of appeal within the statutory stipulated time hence the instant application dated 16th February, 2022. The application is premised on grounds that the delay in filing the record of appeal was neither inordinate nor wilful on the part of the applicant and or the applicant's advocates; that the intended appeal is arguable with good chances of success; that no prejudice shall be occasioned on the respondent and that it is in the interest of justice for the Court to grant the orders sought.
5. The application is supported by the affidavit of Lynda Banjasworn on even date where it is averred that: the impugned decision was delivered on 10th August, 2018; that by June, 2019 they had been supplied with a copy of the relevant Decree by the respondent's advocates, the applicant requested for copies of typed proceedings, typed copy of the judgment and resultant Decree through a letter dated 13th August, 2018 and the Deputy Registrar issued a Notification of the said typed proceedings being ready for collection on 26th September, 2021 via email communication of 6th October, 2021, that they got a Certificate of Delay issued on 29th October, 2021.
6. The applicant further deposes that they instructed their advocates to engage the respondent on a "without prejudice basis" with a view to settling the matter out of court and the applicant's advocates wrote to the respondent vide letter dated 4th November, 2021, that on 25th November, 2021 the applicant's counsel was bereaved and was thus out of office from 25th November, 2021 to 13th December, 2021, that on resumption to office they embarked on compiling the record of appeal and in the process noticed that the Decree had not been certified as required under the applicable Court of Appeal rules; the applicant wrote to the Deputy Registrar on 17th December, 2021 for purposes of obtaining a duly certified copy of the Decree.
7. The applicant avers that they soon closed the office for Christmas vacation on 22nd December, 2021 and resumed on 10th January, 2022, that they obtained the certified copy of the decree on 25th January, 2022 and filed the Record of appeal on 7th February, 2022.
8. The application is opposed vide a replying affidavit sworn by the respondent on 9th March, 2022 where it is averred: that with the intention of execution his advocates prepared a draft Decree and served the same on the appellant on 25th February, 2019 yet they sought for a certified copy of the same from court on 25th January, 2022, that the conduct of the appellant in filing the appeal reeks of disinterest and is a mere afterthought aimed at delaying execution of the decree.
9. He further deposes that the typed proceedings were ready for collection on 28th September, 2021 and not 21st October, 2021 as deposed by the applicant, that the 24 day period between requesting for the proceedings and paying for the same should be factored in; that the delay in collecting the proceedings beyond 28th September, 2021 was not occasioned by the registry and should thus be excluded from the Certificate of delay.
10. The applicant has filed submissions in which it reiterates all the averments in the supporting affidavit and submits that as regards the time lapse between when the typed proceedings were ready and the day they were collected, the trial court was at the material time operating under the COVID-19 regulations and it was therefore impossible to access the registry for payment and subsequent collection of the typed proceedings after communication of the said relevant notification via email on 6th October, 2021.



11. The applicant further submits that their pleadings have demonstrated that it has neither been “lax” nor “disinterested” and denies the appeal is merely an afterthought. They rely on the case of *Liberatio Kivanga Manga vs Prime Bank* [2021] eKLR, where the court held that the appellant/advocate wrongly computed time from the date of the Certificate of delay instead of the date of collection of the typed proceedings and the case of *Imperial Bank Limited & Another vs Alnashir Popat & 18 Others* [2018] eKLR, where the Court held that where the applicant’s advocates had misinterpreted the notification that typed proceedings were ready for collection, the Court held that it was possible for there to have been different interpretations of the said notification.
12. The respondent has also filed his submissions and reiterates the contents of his replying affidavit. According to the respondent, the delay in collecting the proceedings after the applicant was informed they were ready for collection has not been sufficiently explained. From his calculation, the record of appeal was filed 2 months late which in his view is inordinate. He reads bad faith in this application which he says is purely meant to deny him the fruits of his judgment. He urges the Court to find no merit in the application and to dismiss the same with costs.
13. In exercising discretion under Rule 4, some of the considerations the Court has to bear in mind include the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted, and, possibly, the chances of success of the intended appeal should the application be granted. See *Fakir Mohammed vs. Joseph Mugambi & 2 Others* [2005] eKLR.
14. These parameters were echoed in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others*, Supreme Court Application No. 16 of 2014 [2014] eKLR where the Supreme Court of Kenya stated, inter alia, that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted and whether the application is brought without undue delay.
15. In regard to the present case, the judgment the applicant intends to challenge on appeal was delivered on 10th August, 2018. The notice of appeal was filed within time. The typed proceedings were ready on 28th September, 2021 but were collected on 21st October, 2021. The certificate of delay issued by the Registrar of the ELRC excludes the dates between the filing of the Notice of Appeal up to 21st October 2021. Ideally, therefore, the Record of Appeal ought to have been filed by 21st of December 2021. The record was filed on 7th February, 2022, a delay of less than 2 months, inclusive of the Christmas and New Year holidays.
16. Although the Court has unfettered discretion to extend time under Rule 4 of the Court of Appeal Rules, that discretion should be exercised judicially. Each case must be considered on its own facts. I have considered the circumstances surrounding this matter vis a vis the parameters set out in *Fakir Mohammed vs. Joseph Mugambi & 2 Others* and the *Nicholas Salat* cases (supra). The delay of less than 2 months cannot not in my considered view be said to be inordinate. I also find the explanation given for the delay, being the bereavement of the applicant’s counsel, and the engagement in negotiations to settle the dispute out of Court, which was not disputed, is plausible. I also note that the money is secured in an interest earning account and should the appeal eventually not succeed, the respondent will get his money plus interest.
17. Bearing all this in mind, I find this application passes muster and allow it with costs in the appeal. I order that the record of appeal be filed and served within 14 days from the date hereof failing which



the extension will automatically lapse, leaving the respondent at liberty to move the court for release of the money deposited in the joint account pursuant to the orders of the trial court. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2022.

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

