



REPUBLIC OF KENYA



KENYA LAW
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**Elaki v Attorney General (Civil Application 042 of 2022)
[2022] KECA 722 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 722 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 042 OF 2022**

**K M'INOTI, JA
JULY 22, 2022**

BETWEEN

JACOB BUHUNGI ELAKI APPLICANT

AND

ATTORNEY GENERAL RESPONDENT

(Application for extension of time to appeal out of time from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 8th October 2020 in ELRC APP. No. 50 of 2019)

RULING

1. Before me is a motion for extension of time to appeal the Judgement of the Employment and Labour Relations Court (ELRC) (Wasilwa, J.) dated 8th October 2020. The application is woefully scanty in critical details. Other than the indication on the face of the application that the judgment arose from an appeal to the ELRC, presumably from a subordinate court, neither the judgment of the subordinate court, nor that of the ELRC are on record. The supporting affidavit, sworn by the applicant's advocate, Mr. Simeo Mugalavai Kiyonzo on 16th February 2022, does not seal these gaps and loopholes. It is accordingly impossible for me to tell the background to the intended appeal or the issues involved in it, for purposes of gauging such considerations in an application for extension of time as whether there is public interest implicated in the intended appeal, whether it has chances of success or is a mere frivolity, or the likely prejudice either party may suffer (See. *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, CA No. Nai. 255 of 1997 and *Fakir Mohamed v Joseph Mugambi & 2 Others*, CA No. Nai. 332 of 2004).
2. Matters are not made any better by the fact that there is no replying affidavit or submissions from the respondent on record.
3. As far as I can decipher this conundrum from the application and the applicant's written submissions dated 10th June 2022, the Judgment of the ELRC was delivered on 8th October 2020, about four



- months' shy of two years ago. The applicant's counsel prepared a notice of appeal (which he inexplicably describes in the application as a "Notice of Motion") and dated the same 9th October 2020, the day after delivery of the Judgment. Thereafter, the court file went missing and due to the Covid-19 pandemic, the advocates' court clerk was not able to physically access the court to follow up the matter.
4. The file resurfaced in November 2021 and the notice of appeal was ultimately filed on 7th December 2021. The application to deem the notice of appeal was filed on time was not made until 16th February 2022, more than two months' later.
 5. By dint of rule 75(2) of the Rules of this Court, a Notice of Appeal should be filed within 14 days from the date of judgment. The onus is on the applicant to explain the delay of one year and four months in performing a task that requires only a fortnight. Indeed, as the Supreme Court aptly stated in Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others [2014] eKLR, extension of time is not a right of a party. It is a discretionary remedy that is only available to a deserving party and therefore an applicant is obliged to place before the Court some plausible material explaining the reason for failure to comply with the prescribed rules.
 6. The applicant blames Covid-19 and loss of the court file for the delay of one year and four months. While it is true that Covid-19 has been on our shore since March 2020, the courts have over that period operated online. Indeed, the notice of appeal on record indicates that it was filed online. There is absolutely no evidence to substantiate the alleged loss of the court file, not even a single letter from the applicant's advocates to the Registrar on the alleged loss. But even if I were charitable enough to accept these bland reasons, the applicant states categorically that the file was available in November 2021. It took him a whole month up to December 2021 to file the notice of appeal and another two months to apply for the notice of appeal to be deemed filed on time. In my mind, that delay is inordinate and has not been explained.
 7. I fully agree with the opinion of Visram, JA in Margaret Muthoni Muchiga v. Esther Kamori Gichohi, CA No. Nai. 117 of 2009 where he stated:-

"All litigation should come to an end at some point, and so should this, at this point. To do otherwise would send the wrong message to the litigants – that it is all right to sleep on your rights and we will welcome you anytime you wake up! Clearly, the Rules of this Court must be followed, and the applicant herein has not provided me with sufficient justification to grant her the indulgence sought."
 8. In the event, I find this application bereft of merit and dismiss the same with no orders on costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND OF DAY JULY, 2022

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

