



**Tinega v Kenya Methodist University (Civil Application
E437 of 2021) [2022] KECA 661 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KECA 661 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E437 OF 2021
MSA MAKHANDIA, JA
JULY 8, 2022**

BETWEEN

SAMUEL OMARI TINEGA APPLICANT

AND

KENYA METHODIST UNIVERSITY RESPONDENT

(Being an application for extension of time for filing notice of appeal out of time from the judgment and decree of the High Court of Kenya at Nairobi (Nzioki Wa Makau, J.) dated 20th April 2021 in HCCC No. 2223 of 2017)

RULING

1. Before me is a Notice of Motion dated the 7th day of December 2021. The same is premised on several provisions of the law but essentially the application is brought under Rule 4 and 77 of this Court's Rules (*Court of Appeal Rules, 2010*). Four reliefs have been sought however, the key prayer is: -

“That this honorable court be pleased to grant leave to extend time for the applicant to file an appeal against the decision of Honourable Justice Nzioki Wa Makau in HCCC No. 2223 of 2017 out of time, delivered at Nairobi on 20th day of April 2021 and consequently deem the Notice of appeal dated August 9, 2021 filed in Milimani High Court Civil Case No. 2223 of 2017 valid.”

2. It has been supported by grounds on its face, the supporting affidavit of the applicant and the applicants' written submissions. The respondent has not filed any document either in opposition to or support of the application.
3. In summary, the applicant states that: the judgment was delivered on April 20, 2021 via microsoft teams online platform due to Covid-19 restrictions and as such, he could not get a hard copy of the same; at the time of delivery of the said judgment, the applicant was in his rural home in Kisii county



and there was no internet; later when he got back to Nairobi, he approached the court for a copy of the judgment but was advised to open his own e-filing account so that the judgment could be emailed to him but that did not help. With the surge in the corona cases, and due to scaling down of court activities, court registries in Nairobi scaled down activities as from March 15, 2020 to the extent that they were closed; he followed up the matter and was only able to obtain a copy thereof on May 7, 2021; after reading the same and being unsatisfied, he made up his mind to prefer an appeal and instructed his counsel to that effect; his counsel however, did not immediately file an application for extension of time within which to lodge the appeal despite the his instructions; this informed his decision to act in person; he had to file an application in the trial court to act in person in order to be granted leave to appeal out of time; however, the application was rejected on jurisdictional basis which prompted him to lodge the instant application.

4. It is the applicant's submission that the delay in filing the appeal was not deliberate but was occasioned by the inconveniences brought about by the outbreak of Covid-19 pandemic and ineffectiveness of his legal representation which acts should not be visited upon him. That the appeal has merits and therefore stands high chances of success.
5. The applicant has cited myriad of authorities which I have duly considered in support of the application. It is his submission that he had made a personal follow-up to mitigate his advocate's inaction in line with the finding in the case of *Habo Agencies Limited v Wilfred Odhiambo Masingo* [2016] eKLR and that the wrongs of a counsel should not be visited on an innocent litigant like him.
6. I have carefully considered the motion, the grounds in support thereof, the supporting affidavit, the submissions by the applicant and the cited authorities.
7. The applicant's motion is brought, under Rule 4 of this *Court's Rules*.
8. The said rule provides:
 4. Extension of time
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."
9. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising that discretion the court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. Nai 251 of 1997 where the court stated;

"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."
10. In the instant case it is not in dispute that the impugned judgment was delivered on April 20, 2021 and a Notice of Appeal filed on August 9, 2021 and the current application was filed on December 7, 2021 about eight months from the date of delivery of the judgment. The applicant contends that the reasons for the delay is because he was not advised by his former counsel on the next cause of action, failure to get the hard copy of the judgment due to COVID- 19 restrictions, the filing of applications



for review and extension of time in the trial court but which were all denied on jurisdictional grounds, and that the mistake of counsel should not be visited upon him.

11. With regard to the chances of the appeal succeeding, the applicant submitted that he has a myriad of grounds ideally going to 33 grounds among them being the complaint that the learned judge failed to consider the entirety of the evidence by the applicant; failed to address the issues of overtime, weekends public holidays and the issue of salary in lieu of notice despite the same having been pleaded.
12. Taking into totality all the circumstances of this case, I find that the delay is not inordinate. That the reasons given for the delay are plausible given that they were not controverted at all by the respondent. With regard to the possibility of the appeal succeeding, I find that the issues raised above and the many in the draft memorandum of appeal are not trivial. I am of course mindful of the fact that I cannot comment further on this sitting as a single judge. Similarly, I am of the considered opinion that the applicant would suffer great prejudice as opposed to the respondent, if leave is not granted.
13. In the end, I find that the applicant has demonstrated and satisfied me to exercise my unfettered discretion under Rule 4 of the *Court* in his favour. Accordingly, I allow the application and direct the applicant to file and serve a Notice of Appeal within 7 days from the date of this ruling and within 45 days from the date of lodging of the notice file and serve the record of appeal.
14. In default these orders shall automatically stand vacated.
15. The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

