



**Amunga v Kenyatta University College (Civil Application  
E193 of 2021) [2022] KECA 929 (KLR) (19 August 2022) (Ruling)**

Neutral citation: [2022] KECA 929 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E193 OF 2021  
HM OKWENGU, JA  
AUGUST 19, 2022**

**BETWEEN**

**HELLEN AMUNGA ..... APPLICANT**

**AND**

**KENYATTA UNIVERSITY COLLEGE ..... RESPONDENT**

*(Being an Application for extension of time within which to file and serve a notice of appeal and the Record of Appeal out of time against the Judgment of the Employment and Labour Relations Court at Nairobi (Wasilwa J) dated 9th October 2018 in NRB ELRC Cause No. 301 of 2012)*

**RULING**

1. Hellen Amunga the applicant herein, filed a suit in the Employment and Labour Relations Court (ELRC), against her employer Kenyatta University for unfair termination of her employment. Her suit was partially dismissed on 26<sup>th</sup> October 2018, the ELRC holding that her termination was fair. Consequently, she moved this Court by way of a notice of motion dated 7<sup>th</sup> June, 2021 seeking orders for leave to file a record of appeal out of time, against the judgement of the ELRC. She also sought to be granted time to serve the record of appeal out of time.
2. In an affidavit sworn in support of the motion, the applicant contends that her advocate prepared a notice of appeal and filed it in time, but the advocate was not able to file the copy of typed proceedings that were supplied to him on 13<sup>th</sup> May, 2021 because the applicant was not able to raise the required fees until ten (10) days after the statutory time had lapsed. The applicant pleads that the unlawful termination of her employment has not only caused her financial loss, but is also a threat to her career and reputation.
3. The respondent opposed the application through a replying affidavit sworn by its senior legal officer Aaron Tanui, in which it is deposed that the judgment was delivered on 26<sup>th</sup> October 2018 and that the



reason given for delay in filing the appeal is not excusable, and therefore no good and sufficient cause has been given to justify the Court extending time.

4. The applicant's advocate has filed written submissions in which she reiterates that the applicant has met the threshold for granting leave to file the record of appeal out of time as she has given a good explanation for the failure to file the record of appeal within time. Counsel urges that no prejudice will be suffered by the respondent if leave is granted for the applicant to file the record of appeal out of time.
5. In addition, counsel maintains that the applicant's appeal has high chances of success. In support of her submissions, the applicant's counsel relies on *George Muniu Kinuthia vs Samuel Waweru Mwangi*, Civil Appeal (Application) No. 291 of 2017; and *Paul Chalo Kariuki vs David Teddy Davis Ngala*, Civil Appeal (Application) No. 24 of 2015.
6. The respondent's counsel also filed written submissions in which he relied on [\*Naomi Wambui Gachiengo vs Isaac Maina Kamau & Anor\* \[2020\] eKLR](#), for the proposition that financial constraints on the part of an applicant cannot be accepted as a valid reason for extending time to lodge an appeal. Further, the respondent contended that the applicant, having failed to comply with Rule 115 of the Court of Appeal Rules in pursuing the intended appeal as a pauper, she cannot rely on that provision of the law regarding her financial ability. In this regard the respondent relied on [\*Elkana Kipruto Tallam vs Moi University\* \[2020\] eKLR](#).
7. The respondent pointed out that the application is fatally defective as the applicant has not placed before the Court the notice of appeal and the letter requesting for typed proceedings. The respondent relied on the Supreme Court decision in [\*Nicholas Kiptoo arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others\* \[2014\] eKLR](#). Finally, the respondent relied on this Court's decision in [\*Fred V Mwala vs Unga Limited\* \[2016\] eKLR](#) in which the Court dismissed an application for extension of time where the length of delay was inordinate and no reasonable explanation was advanced, and stated that it would not reopen the matter after the unexplained delay, as that would be prejudicial to the respondent.
8. I have considered this application, the contending affidavits, the rival submissions, and the law. Rule 4 of the Court of Appeal Rules, 2010 under which the applicant approached this Court, gives this Court discretion to extend time for the doing of any act required by the Rules. However, this discretion has to be exercised judicially.
9. In [\*Mwangi vs Kenya Airways Limited\* \[2003\] KLR 486](#) this Court referred to *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* Civil Application No. NAI 255 of 1997 (unreported) (Leo Sila Mutiso case), in which it was stated:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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. The Court proceeded in [\*Mwangi vs Kenya Airways Limited\*](#) (supra) to explain the threshold set out in the *Leo Sila Mutiso case* as follows:

“These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an



unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the Rule itself gives a discretion which is not fettered in any way.

Again, as we have pointed out, we do not think the Court intended that the list of four items it set out in *Mutiso's* case, ante, was ever meant or intended to be exhaustive. It is also clear that the third issue for consideration, namely, the chances the appeal succeeding if the application is granted is merely stated as something for a "possible" consideration, not that it must be considered."

11. Thus, the threshold set out in *Leo Mutiso's* case is not cast on stone. The bottom line is that the explanation given for the delay must be satisfactory, and the Court has the discretion to consider any other reason that it considers satisfactory given the circumstances before it.
12. The first question that I need to address is whether the applicant is properly before this Court. In *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* (supra), the Supreme Court asserted that the filing of a timely notice of appeal is a jurisdictional prerequisite and that:

"unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal."
13. The applicant contends that her notice of appeal against the impugned judgment was filed within time. However, I have carefully perused the notice of motion but have not been able to find any copy of the notice of appeal, or the receipt for the payment. The respondent's contention that no notice of appeal has been filed is therefore not without substance.
14. The applicant herein not having demonstrated that she initiated the appellate process by filing a notice of appeal, the issue of leave to file a record of appeal cannot arise, as a record of appeal can only be anchored on the notice of appeal. Without the notice of appeal, the record of appeal has nothing to stand on. To this extent, the applicant is not properly before the Court and her notice of motion is fatally defective.
15. In addition, in her affidavit sworn in support of the motion, the applicant explains as follows:

"7. That being aggrieved by part of the judgment, I instructed my advocate on record to file an appeal against the judgment immediately the judgment was delivered;

8. That am advised by my advocate on record that the notice of appeal was prepared and filed in time, (sic) which was done;

8. That am further advised by my said advocate that the copy of the typed proceedings was supplied to her on 13<sup>th</sup> May, 2021 and she prepared the record of appeal save that I raised the Court fees 10 days outside the statutory time for filing the case;

8. That the application is brought without undue delay."
16. The explanation given by the applicant is quite casual. She has not taken any trouble to annex a copy of the notice of appeal, if any was available. She says she raised the court fees 10 days late but she does not



give the date nor provide any evidence of payment of the money to the advocate, so that one cannot tell the exact period of delay. In *Francis Mwai Karani vs Robert Mwai Karani*, Civil Application No. NAI 246 of 2006, which was cited by Makhandia, JA in *Naomi Wambui Gachiengo vs Isaac Maina Kamau & Anor* (supra), Omolo, JA in rejecting an excuse such as that posed by the applicant stated:

“The lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of Rule 112 of this Court’s Rules.”

17. Even assuming that the applicant is properly before the Court, the explanation that she has given is not sufficient to justify the Court exercising its discretion in her favour. For these reasons, I find that the applicant’s motion is not only fatally defective, but also lacks merit.
18. The upshot of the above is that I dismiss the applicant’s notice of motion. Given the background to the application, I do not find it appropriate to award costs. I therefore order each party to meet their own costs.

Those shall be the orders of the Court.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF AUGUST, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

