



**Road Tainers (MSA) Ltd v Kiminza Munuve (Civil Application
E093 of 2021) [2022] KECA 993 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 993 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E093 OF 2021
SG KAIRU, JA
SEPTEMBER 23, 2022**

BETWEEN

ROAD TAINERS (MSA) LTD APPLICANT

AND

MUMO KIMINZA MUNUVE RESPONDENT

(An application for leave to appeal out of time and that notice of appeal filed on 2nd November 2021 against the judgment of the Employment & Labour Relations Court at Mombasa (Ndolo, J.) delivered on 7th October 2021 in ELRC Cause No. 389 of 2018 be deemed as duly filed)

RULING

1. Intending to appeal against a judgment of the Employment and Labour Relations Court (ELRC) (Ndolo, J.) delivered on October 7, 2021 in which that court held that the applicant unfairly terminated the respondent's employment and awarded him twelve months' salary in compensation, the applicant, by its application before me dated November 29, 2021 seeks an order for leave to appeal out of time and that its notice of appeal filed on November 2, 2021 be deemed as duly filed.
2. During the hearing of the application before me on May 11, 2022, the applicant was represented by Miss. Abdi, learned counsel who held brief for Mr. Anaya. There was no appearance for the respondent despite notice of hearing having been served on the firm of C. O. Otolo & Company Advocates for the respondent.
3. Based on the application, the supporting affidavit of Yusuf Ibrahim Pasta, the Managing Director of the applicant, and the applicant's written submissions dated February 24, 2022, the facts, which have not been contested by the respondent, appear to be that: the impugned judgment was delivered on October 7, 2021 without notice to the advocates for the applicant; on October 28, 2021 the advocates for the applicant, Matete Mwelese & Co Advocates wrote to the Deputy Registrar of the ELRC inquiring whether the judgment had been delivered and if not when it would be delivered whereupon the



applicant's advocates established that judgment had been delivered on October 7, 2021; the applicant's advocates were then supplied with a copy of the judgment at the registry; that on November 2, 2021, the applicant filed a notice of appeal before the ELRC and the same was served on the respondent's advocates on November 5, 2021. The present application was then made on November 29, 2021.

4. It was submitted for the applicant that the delay involved was occasioned by the fact that the applicant did not receive notice of delivery of the impugned judgment; that the delay is explained and is not inordinate; that the intended appeal, based on the exhibited draft memorandum of appeal is arguable and that not prejudice will be occasioned to the respondent if this application is allowed. Counsel relied on the decision in *Moroo Polymers Limited vs. Wifred Kasyoki Willis* [2019] eKLR in support of its application.
5. In their submissions in opposition to the application, C. O. Otolu & Company Advocates for the respondent urged that the delay involved is not sufficiently explained; that the judgment delivered on October 7, 2021 having been made available to the applicant on October 28, 2022, the applicant was still within time to file the notice of appeal and memorandum of appeal and that the time to appeal ought to have lapsed on November 7, 2022; that the applicant has not explained why it filed a notice of appeal on November 2, 2022 and failed to file a memorandum of appeal on time despite having nine days which was sufficient to file the same. For the principles that should guide the Court in considering the application, the Supreme Court of Kenya case of *Nicholas Kiptoo Arap Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR was among the cases cited.
6. In the event that the Court finds the application merited, counsel for the respondent urged that the applicant should be ordered to deposit security for costs within fourteen days. In that regard reference was made to this Court's ruling in *Ready Consultancy Limited vs. Tima Abdalla & 21 others* [2021] eKLR.
7. I have considered the application and the submissions. There are many authorities for the proposition that the Court has unfettered discretion under Rule 4 of the Court of Appeals which discretion must however be exercised judicially. In *Nicholas Kiptoo Arap Salat vs. Independent Electoral and Boundaries Commission & 7 others* the Supreme Court of Kenya set out the the under-lying principles that a Court should consider in exercise of such discretion as follows:

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



8. With those principles in mind, it is not disputed that the applicant did not receive prior notice of delivery of judgment from ELRC and that it was as a result of the follow up and inquiries made by the applicant's counsel at the registry of ELRC that a copy of the judgment dated October 7, 2021 was made available sometime after the advocates letter dated October 28, 2021 was received in ELRC on October 29, 2021. Under Rule 75 (1) and (2) of the *Court of Appeal Rules, 2010*, notice of appeal should have been lodged within fourteen days from the date of the judgment meaning at the latest it should have been filed by October 21, 2021. Clearly therefore, by October 29, 2021, the time for lodging the notice of appeal had already lapsed. The contention by the respondent's advocates that the applicant "was still within time to file the notice of appeal" when the copy of the judgment was supplied is not correct.
9. The calendar shows that October 29, 2021 was a Friday and on the Tuesday November 2, 2021, the applicant's advocates then filed a notice of appeal, albeit out of time and served it on the respondent's advocates on November 5, 2021. The present application dated November 29, 2021 was thereafter filed. The applicant does not explain why, having filed the notice of appeal on November 2, 2021 and having served it on November 5, 2021 it did not sooner present this application. I do not however think, all things considered, that the delay was so inordinate as to deprive the applicant favorable exercise of the Court's discretion. The draft memorandum of appeal annexed to the application demonstrates that the intended appeal is arguable and it has not been demonstrated what prejudice the respondent will suffer if the application is allowed.
10. The case of *Ready Consultancy Limited vs. Tima Abdalla & 21 others* (above) on the strength of which the respondent prayed for security of costs related to an application for stay of execution before the court and not an application for extension of time before a single judge. I have no basis for ordering security for costs.
11. In the result, I allow the application as prayed in terms of prayer 2 of the application. The applicant has 45 days from the date of delivery of this ruling to file and serve a compliant record of appeal.
12. The costs of the application shall be in the intended appeal.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

