



Ondiek v Gougus & another (t/a Nakuru Teachers Training College) (Civil Application E046 of 2022) [2022] KECA 1200 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KECA 1200 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E046 OF 2022
F SICHALE, JA
OCTOBER 26, 2022**

BETWEEN

WALTER NYAMBOK ONDIEK APPLICANT

AND

**PETER GOUGUS & ALICE CHEMIRMIR T/A NAKURU TEACHERS
TRAINING COLLEGE 1ST RESPONDENT**

**ALICE CHEMIRMIR 2ND RESPONDENT
T/A NAKURU TEACHERS TRAINING COLLEGE**

(Being an Application for Leave to file Notice of Appeal out of time against the Ruling of the Employment and Labour Relations Court at Nakuru (Nderitu J), dated 13th July 2022.) IN (Nakuru ELRC Cause No. 78 of 2015)

RULING

1. The application before me sitting as a single judge is a motion dated July 29, 2022, predicated upon article 159 of the Constitution of Kenya 2010, rules 4, 41, & 42 of the Court Of Appeal Rules and sections 3A and 3B of the Appellate Jurisdiction Act in which Walter Nyambok Ondiek (the applicant herein), seeks inter alia extension of time to file and serve a notice of appeal against the ruling of Nderitu J, dated July 13, 2022 in Nakuru ELRC Cause No 78 of 2015.
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that his suit was dismissed on July 13, 2022 and that he only became aware of the same on July 27, 2022, when he visited his previous advocate office for an update of the same, given the fact that he was notified when the ruling was delivered and that upon becoming aware of the dismissal, he swiftly instructed his current advocates to lodge the appeal on his behalf.



3. He further contended that he had an arguable appeal with high chances of success and that further the delay in filing the notice of appeal was not inordinate and that this honourable court ought to exercise its judicial discretion.
4. The motion is opposed vide a replying affidavit sworn by the respondent on August 31, 2022, who deposed inter alia that the applicant had failed to give a plausible explanation as to why despite being aware that his suit was dismissed on the day the ruling was delivered, failed to instruct his advocates to appeal against the same.
5. It was submitted for the applicant that the delay herein was excusable, that the intended appeal was arguable and that the respondent would not suffer any prejudice if the instant application was allowed.
6. On the other hand, it was submitted for the respondent that granting of the orders sought by the applicant would be an exercise in futility since the same would not cure the lapse on non-service of the letter bespeaking proceedings which ought to have been filed within 30 days of the ruling and that further there was no prayer for filing the record of appeal out of time and that as such, there will still be procedural lapses not salvaged in the applicant's application.
7. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the applicant's submission, the respondent's submissions, and the law.
8. The principles upon which this court exercises its discretion under rule 4 are firmly settled. The court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion the court should do so judiciously.

See [*Mwangi V Kenya Airways Limited \(2003\) KLR 486*](#) where this court stated thus:

' Over the years, the court has set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* (Civil Application No Nai 255 of 1997 (unreported), the court expressed itself thus:

'It is now well settled that the decision whether or not to extend 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.'

9. In the instant case, and as regards the length of the delay, the impugned ruling was delivered on July 13, 2022. The applicant contends that he only became aware of the said ruling on July 27, 2022, whereas the instant application is dated July 29, 2022. There has therefore been a delay of about 16 days which in my opinion I do not consider to be inordinate.
10. Regarding reasons for the delay, the applicant contends that at the time that the ruling was delivered, his previous advocate did not inform him and as such he did not have the opportunity to give his advocates on record prompt instructions to lodge the appeal. From the circumstances of this case, I am satisfied that the delay herein has been explained to the satisfaction of this court and I find the reasons given for the delay to be plausible.
11. With regard to the possibility of the appeal succeeding, I have looked at the annexed draft memorandum of appeal and I am satisfied that the applicant has an arguable appeal worthy of



consideration by the court. Of course, I am alive to the fact that I cannot say more regarding this issue lest I embarrass the bench that will be eventually seized of the appeal.

12. As regards prejudice, the respondent has not demonstrated the prejudice it would suffer if the instant motion were to be allowed.
13. Given the circumstances, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to rule 4 of this court to extend time to file the notice of appeal.
14. Accordingly, the applicants motion dated July 29, 2022, is meritorious and the same is hereby allowed in terms of prayer 2 thereof.
15. The applicant will file and serve the notice of appeal within 7 days of this ruling and further file and serve the record of appeal with 60 days of lodging of the notice of appeal failure to which these orders shall stand vacated.
16. The costs of this motion shall abide the outcome of the intended appeal. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF OCTOBER, 2022.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

