



**Oiro v Nairobi City County Government (Civil Appeal (Application)
E023 of 2021) [2022] KECA 1171 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1171 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E023 OF 2021
AK MURGOR, JA
OCTOBER 21, 2022**

BETWEEN

FRANCIS OCHIENG OIRO APPLICANT

AND

NAIROBI CITY COUNTY GOVERNMENT RESPONDENT

(being an appeal from the judgment and decree of the Employment and Labour Relations Court at Nairobi delivered by (Onyango, J.) on 6th November 2020 in petition number 198 of 2019)

RULING

1. By a Notice of Motion dated January 27, 2021, brought pursuant to sections 3A and B of the [Appellate Jurisdiction Act](#), and rule 4 and 82 of this [Court's rules](#), the applicant, Francis Ochieng Oiro, seeks (i) leave to lodge and appeal out of time against the decision of the Employment and Labour Relations Court of 6th November 2020; ii) that this court be pleased to grant the applicant leave to lodge a notice of appeal out of time and iii) that the memorandum and record of appeal and notice of appeal lodged on January 25, 2021 be deemed as duly filed.
2. In the motion which was brought on the grounds on its face and the supporting affidavit of Ronald Allamano On'gudi, the applicant's current counsel sworn on February 27, 2021, it was contended that the applicant was dissatisfied with the decision of the trial court and had requested the firm of Ojienda and Company advocates to lodge a notice of appeal and to request for certified copies of the proceedings as he intended to appeal against the judgment; that the firm lodged a request for proceedings, but omitted to lodge a notice of appeal; that upon realising the omission, the applicant instructed the current firm of Allamano Associates to lodge the intended appeal on his behalf on January 11, 2020; that upon receiving instructions, his current counsel immediately obtained copies of the proceedings on January 18, 2021; that the delay in lodging the notice of appeal could be attributed to a mistake on the part of the applicant's former counsel which should not be visited on the applicant.



3. Though served with the hearing notice, there was no appearance from the respondent, and neither did they file any written submissions.
4. Under rule 4 of this *Court's rules*, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if the extension was not granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997.
5. On the period of delay and the reason for delay, the judgment was delivered on November 6, 2020, and this motion was lodged on January 27, 2021, which would give rise to a delay of 82 days for filing of the notice of appeal. It ought to have been filed 14 days after the decision if the trial court was delivered. The applicant contends that the delay was occasioned by an omission on the part of the applicant's former counsel in failing to file the notice of appeal in the specified time; that on realising the omission, the applicant instructed his current advocates to file the notice of appeal and the memorandum and record of appeal.
6. A consideration of the record of appeal filed on January 25, 2021 discloses that during the hearing in the Employment and Labour Relations Court, the applicant's counsel was its former advocates. The record also discloses that the former counsel requested for the typed proceedings on November 13, 2020. It is also apparent from the record that no notice of appeal was filed simultaneously with the request for proceedings by the applicant's former counsel. Clearly, this can be construed as an omission attributable to the applicant's former counsel who was charged with the responsibility of filing an appeal. In the circumstances, I would be prepared to find that the omission was a mistake on the applicant's former counsel's part, which should not be the reason the prevent the applicant from pursuing his appeal. See *Kenya Cannery Limited v Titus Muiruri Doge*, Civil Application No Nai 64 of 1990 (unreported).
7. In addition, it is evident that, upon realising his former counsel's error, the applicant made haste and appointed the current counsel who has since obtained the typed proceedings, and has gone on to file the notice of appeal, the memorandum and record of appeal on January 25, 2021. Given the above, I am satisfied that the delay which I do not consider to be inordinate has been adequately explained.
8. With respect to the other essential elements for a rule 4 application, I take the view that the applicant is entitled to ventilate his appeal before this court and I consider that no prejudice will be occasioned to the respondent, save that it will have to mount a defence against the applicant's appeal.
9. In sum, the applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time to lodge the appeal. Accordingly, the notice of appeal, and the memorandum and record of appeal lodged on January 25, 2021 be and are hereby deemed as properly filed and served on the respondent. Costs in the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022

A.K. MURGOR

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JUDGE OF APPEAL

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



Deputy Registrar

