



REPUBLIC OF KENYA



KENYA LAW
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**Wanyahora v Mediamax Network Limited (Civil Application
E236 of 2022) [2022] KECA 1278 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1278 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E236 OF 2022
HM OKWENGU, JA
NOVEMBER 18, 2022**

BETWEEN

DANIEL WANYAHORA APPLICANT

AND

MEDIAMAX NETWORK LIMITED RESPONDENT

(An application under Article 159(2) and Rule 4, 42, 43 and 47 of the Court of Appeal Rules, 2010 for leave to the applicant to file an appeal against the Judgment of the Employment and Labour Relations Court (Rika, J) delivered on 27th May, 2022 in ELRC Petition No. E030 of 2020)

RULING

1. By a notice of motion dated June 30, 2022 the applicant Daniel Wanyahora seeks in the main, leave to file an appeal out of time against the judgment of the Employment and Labour Relations Court (ELRC) (Rika, J) delivered on May 27, 2022, out of time.
2. The applicant who had sued his employer Mediamax Network Limited (respondent), for violation of his rights, including unfair/unlawful and/or wrongful termination of his employment, is aggrieved that the learned judge dismissed his petition. He intends to prefer an appeal against the whole judgment. However, his notice of appeal was not filed within 14 days as required under rule 75(2) of the *Court of Appeal Rules, 2010*, hence the motion.
3. The applicant explains that contrary to the information that had been given to his advocates that judgment would be delivered on June 30, 2022, the judgment was delivered on May 27, 2022 via email. Upon learning of the judgment, his advocate made efforts to file the notice of appeal but had complications arising from e-filing. The applicant's advocate eventually lodged the notice of appeal in the e-portal, but his accountant failed to make payment for the notice of appeal within the required 14 days as instructed by the advocate. The applicant pleads that he stands to suffer prejudice if the



orders sought are not granted as his intended appeal which has high chances of success, will not see the light of day.

4. The applicant has also filed written submissions in which he urges that he is deserving of the exercise of the court's discretion. He relies on the decision of Nambuye JA, in *Vishva Stone Suppliers Co Limited vs RSR Stone (2006) Limited [2020] eKLR*. He maintains that the balance of convenience is in his favour as he stands to suffer enormous prejudice as compared to the respondent. The applicant pleads that he has sufficiently explained the delay which was only 5 days. He also relies on the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR*. In a further affidavit sworn in reaction to the respondent's replying affidavit, the applicant reiterates that the failure to file the notice of appeal in time was not occasioned by his indolence, but by the inadvertent error in his advocate's office.
5. The respondent opposed the application through written submissions in which it contends that the judgment of the ELRC having been delivered on May 27, 2022, the notice of appeal should have been filed by June 10, 2022, but that the notice of appeal was instead lodged on June 15, 2022, and served on June 24, 2022 after time had lapsed for effecting service of the notice. The respondent urged that the notice of appeal filed by the applicant is not valid as it is not endorsed with a court stamp. Relying on *Bookpoint Limited vs Guardian Bank Limited & anor [2021] eKLR*; *Mwangi Kinuthia vs Joseph Njoroge Mwangi [2001] eKLR*; and *Mistry Premji Ganji (Investments) Limited vs Kenya National Highway Authority [2019] eKLR*, the respondent argues that without first validating the notice of appeal, the application for leave to file an appeal out of time, is an exercise in futility.
6. Rejecting the argument that the issue of time frame is a technicality, the respondent refers to this court's decision in *Council, Jomo Kenyatta University of Agriculture and Technology vs Joseph Mutuura Mbeera & 3 others [2015] eKLR*. It maintains that the cause for delay in filing and effecting service of the notice of appeal as explained by the applicant, is neither a genuine mistake nor an inadvertent omission, but simply a case of inaction on the part of the applicant's counsel. It relies on *Rajesh Rugani vs Fifty Investments Limited & anor [2005] eKLR*, in which this court rejected inaction as not being an excusable mistake which it can look at with sympathy. Finally, the respondent urges that it will suffer prejudice if the orders sought are granted, as it will continue shouldering the burden of a legal suit sustained by a party who has no regard to the rules of the court.
7. Rule 4 of the Court of Appeal Rules, 2022 gives this court power to extend time for the doing of any act under the rules. This section has been addressed by this court severally. In *Leo Sila Mutiso vs Hellen Wangari Mwangi [1999] 2EA 231*, this court held that the decision whether or not to extend time is discretionary, and the court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay, second, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourth, the degree of prejudice to the respondent if the application is granted. The court also stated that the discretion under rule 4 must be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy.
8. In *Fakir Mohamed v Joseph Mugambi & 2 Others, [2005] eKLR*, Waki JA elaborated further as follows:

' The exercise of this court's discretion under rule

4 has followed a well-beaten path since the stricture of 'sufficient reason' was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of



prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See *Mutiso vs Mwangi*, Civil Application No Nai 255 of 1997 (ur), *Mwangi vs Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General*, Civil Application No Nai 8 of 2000 (ur) and *Murai vs Wainaina* (NO 4) [1982] KLR 38’.

9. In *Nicholas Kiptoo Arap Korir Salat vs the Independent Electoral and Boundaries Commission* (supra), the Supreme Court weighed in by setting out principles to be considered in exercising discretion to extend time for filing appeals, as follows:
 - (i) 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and;
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.’
10. It is not disputed that the applicant did not file the notice of appeal within the required 14 days. The issue for determination is whether the applicant has provided a reasonable explanation for the delay in filing the notice of appeal, whether the delay in filing the notice was inordinate and, whether there is any prejudice that is likely to be suffered by the respondent which cannot be atoned by an award of costs, if time is extended.
11. I have carefully considered the contending submissions and affidavits. The applicant’s explanation is that the delay was occasioned by inadvertence in his advocate’s office. The advocate explains that they went to lodge the notice of appeal on the June 8, 2022, on which date, the accountant in the law firm was tasked to pay the requisite fee. Apparently the accountant experienced challenges in making the payments but did not alert the advocate. Consequently, the notice of appeal that had been lodged within time was paid for on the June 15, 2022, which was 5 days outside the 14 days within which the notice of appeal was to be lodged.
12. The respondent has urged the court not to exercise its discretion in the applicant’s favour not only because the notice of appeal was filed out of time, but that, the delay is aggravated by other infractions: the notice was served upon the respondent outside the seven days provided by the rules; the notice of appeal served upon the respondent is fatally defective as it bears no rubberstamp of the High Court and lacks any other endorsement by the registrar of the High Court; and that the applicant has not made any attempts to have the flaws regularized.
13. Addressing first the respondent’s argument that the applicant’s motion ought not to be granted as the same is premised on a defective notice of appeal, as a single judge, my jurisdiction under rule 4 of the



Court of Appeal Rules, is limited to extension of time for the doing of any act authorized or required by the rules. An issue concerning the legality of the notice of appeal is one which goes to the root of the appeal, which should be heard by a full bench of this court. I am fortified in this by rule 55(2)(c) of the [Court of Appeal Rules 2022](#) that specifically excludes an application to strike out a notice of appeal or an appeal, from the remit of a single judge.

14. It is apparent that the issue of the judgment having been delivered on May 27, 2022 instead of June 30, 2022, is a non- issue as the applicant admits that the judgment was delivered virtually on May 27, 2022, a copy of which was forwarded to his advocate through email on the same day.
15. It beats logic that the applicant claims that his advocate did not see it until June 3, 2022. That could only be attributed to poor organization in the advocate's office, which is no excuse. In any case the applicant contends that the notice of appeal was prepared and lodged on the e-portal on June 8, 2022, but that the delay in filing the notice was actually caused by the accountant in the advocate's office, who apparently experienced difficulties on the e- portal, and only managed to file the document on June 15, 2022.
16. Given the above facts, the delay in filing the notice of appeal is a delay of only five days. It is also apparent that the notice of appeal was served on the respondent on June 24, 2022 which was two (2) days outside the 7 days provided for service. The period of delay is basically minimal and the explanation given plausible, particularly because the reasons for the delay are factors outside the applicant's control. As much as an advocate is expected to exercise diligence in the pursuit of his client's case, lapses do occur and it would not be appropriate to penalize the applicant who has exhibited interest in pursuing his appeal. The lapse is not of a serious nature and there is no prejudice that the respondent is likely to suffer if the application is granted.
17. In the circumstances of this case, I think it is appropriate that the court should exercise its discretion in the applicant's favour. Accordingly, I grant the applicant's motion and deem the notice of appeal filed on June 15, 2022 and served on the respondent on June 24, 2022 as duly filed and served. The applicant shall file the record of appeal within 60 days from the date hereof. The applicant shall pay the costs of this application to the respondent in any event.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

