



**Makomo v National Council Young Men Christian Association Kenya (Civil Application E627 of 2022) [2022] KECA 1402 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1402 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E627 OF 2022  
AK MURGOR, JA  
DECEMBER 16, 2022**

**BETWEEN**

**DANIEL MAKOMO ..... APPLICANT**

**AND**

**THE NATIONAL COUNCIL YOUNG MEN CHRISTIAN ASSOCIATION  
KENYA ..... RESPONDENT**

*(Being an application for extension of time for lodging a Record of Appeal against the judgment of the Employment and Labour Relations Court(S. Rutto, J.) delivered on 27th May 2022 in Employment and Labour Relations Court Case No. 1813 of 2016)*

**RULING**

1. By a notice of motion dated September 21, 2022, brought pursuant to sections 3A and 3B of the [Appellate Jurisdiction Act](#), rules 4 and 82 of the [Court of Appeal Rules](#), 2022, the applicant, Daniel Makomo, seeks to extend time for lodging the record of appeal against the judgment and decree of the Employment and Labour Relations Court and for the record of appeal filed on September 16, 2022 to be deemed as duly filed.
2. The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by the applicant, wherein it was contended that when the judgment was delivered, he was not in Nairobi, as he had gone to reside in his rural home; that following the onset of the Covid 19 pandemic gymnasiums in Nairobi shut down, and being a gym instructor by profession, he was unable to obtain gainful employment, which forced him to return to his rural home; that, he was not on telephone at the time and as a result, lost contact with his advocates. It was further contended that, his advocates on record took the step of filing a notice of appeal immediately after the judgment was delivered, and they also requested for the proceedings, which they obtained within the 60 days required to file the record of appeal, even as they waited for him to return to Nairobi to formalize the instructions to file the appeal.



3. The applicant contended that it was upon visiting his advocates that he came to learn that the judgment was delivered, and he instructed them to proceed to file the record of appeal; that it was filed on September 16, 2022. He stated that the intended appeal has merits and he should be given a chance be heard by this court, particularly since his claim was dismissed on a technicality; that the delay in filing the record of appeal has not been inordinate; that the respondent will not suffer prejudice if this application is allowed, and that he is willing to abide by any conditions of this court.

Learned counsel for the applicant, Messrs Khayega Chivai & Co Advocates filed written submissions which reiterated the averments of the applicant's motion. Counsel added that the length of delay of 50 days, was not inordinate and that the reason for the delay was excusable, and plausible.

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 vs Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997.

Guided by the above factors, the judgment was delivered on May 27, 2022, and a Notice of appeal was lodged on the same date. A memorandum and record of appeal was lodged on September 16, 2021. This motion was filed on September 21, 2022. This would amount to a delay of about 2 months for filing of the record. As to whether the delay has been explained, the applicant's case is that owing to the Covid 19 pandemic, he was unable to obtain gainful employment as gymnasiums shut down, and he was rendered unemployed with nothing to do. This forced him to return to his rural home to wait out the situation. He did not have a phone and lost touch with his advocate; that this notwithstanding the advocate went ahead to file a notice of appeal and to obtain the proceedings, while awaiting his instructions.

5. Given this explanation, I am prepared to find that the delay has been satisfactorily explained.

The applicant should therefore proceed *poste haste* to have his appeal ventilated in this court, and considering that the delay was not inordinate, I do not envisage that any prejudice will be occasioned on the respondent.

6. In sum, the applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time to lodge the appeal. Accordingly, the memorandum and record of appeal lodged on September 16, 2022 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 16<sup>TH</sup> DAY OF DECEMBER, 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**

