



REPUBLIC OF KENYA



KENYA LAW
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**Thigah v Borderless Tracking Limited (Civil Application
E046 of 2022) [2022] KECA 1388 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1388 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E046 OF 2022
SG KAIRU, JA
DECEMBER 16, 2022**

BETWEEN

GIDRAF NJOROGE THIGAH APPLICANT

AND

BORDERLESS TRACKING LIMITED RESPONDENT

(An application for leave to file an application to strike out notice of appeal dated 31st May 2019 against the judgment of the Employment & Labour Relations Court at Mombasa (Linnet Ndolo, J.) delivered on 23rd May 2019 in ELC Cause No. 693 of 2016)

RULING

1. Gidraf Njoroge Thigah, the applicant, instituted suit against Borderless Tracking Limited, the respondent, before the Employment and Labour Relations Court (ELRC) at Mombasa in 2016 in Cause No. 693 of 2016 for unlawful and unfair termination of his employment. In a judgement delivered on May 23, 2019, the ELRC sustained his claim and awarded him Kshs. 559,167.00 as compensation. On May 31, 2019, the respondent filed a notice of appeal intending to appeal that judgement.
2. In his application before me dated July 12, 2022, the applicant seeks an order under rule 4 of the [Court of Appeal Rules 2022](#) for leave to file an application to strike out the notice of appeal dated May 31, 2019. In an affidavit in support of the application, Frederick Okanga, the advocate for the applicant has deponed that three years have passed since the notice of appeal was filed; that proceedings and judgement of the ELRC are ready but the respondent has not taken steps to file the record of appeal. The applicant states that there is need for closure in this matter.
3. During the virtual hearing of the application before me on September 21, 2022, learned counsel for the applicant Mr. Okanga relied on his written submissions which he briefly orally highlighted. Counsel urged that the respondent has not taken steps to prosecute the appeal despite typed proceedings



having been made available; that an earlier application to strike out the notice of appeal, being Civil Application No. 35 of 2021, was dismissed by the Court on the 4th of February 2022 on the basis of having been filed outside the period permitted by the rules without leave; and that leave is necessary to enable the applicant to file the intended application to strike out the notice of appeal.

4. Miss. Wamanga learned counsel holding brief for firm of Conrad Maloba and Associates Advocates for the respondent in opposing the application stated that since the dismissal of the application in Civil Application No. 35 of 2021 on the 4th of February 2022, there was a delay of three months in bringing the present application which was filed in July 2022. Counsel stated that the respondent had not furnished instructions but they had reached out to the respondent in the last two weeks.
5. It seems that the respondent has not, since filing the notice of appeal the subject of the intended application for striking out, taken steps for over three years in the prosecution of the intended appeal. The applicant has demonstrated that proceedings of the ELRC have been ready for some time. Although counsel for the respondent complains that there was delay in presenting application after the earlier one was dismissed, it is not comparable to the length of delay complained of on the part of the respondent in taking action subsequent to filing the notice of appeal which, in my view, is the relevant consideration for present purposes. This, I think, is a proper case for me to exercise the court's discretion under rule 4 of the [Court of Appeal Rules](#), to grant the applicant leave to file an application to strike out the notice of appeal.
6. I accordingly allow the application in terms of prayer 1 of the application dated July 12, 2022. The applicant is at liberty to file and serve an application for striking out the notice of appeal within 21 days from the date of delivery of this ruling.
7. I make no orders as to costs.

Orders accordingly.

Dated and delivered at Mombasa this 16th day of December 2022.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

