



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oracle Technologies Systems (Kenya) Limited v Aluodo (Civil Application E411 of 2022) [2022] KECA 1439 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1439 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E411 OF 2022  
JM MATIVO, JA  
DECEMBER 15, 2022  
[IN CHAMBERS]**

**BETWEEN**

**ORACLE TECHNOLOGIES SYSTEMS (KENYA) LIMITED ..... APPLICANT**

**AND**

**MOSES OMONDI ALUODO ..... RESPONDENT**

*(An application for extension of time to serve a notice of appeal out of time in respect of the judgment of the Employment Court of Kenya at Nairobi (Mbaru, J.) dated 6th October 2022 in ELRC Cause No. 227 of 2019)*

**RULING**

1. Vide an application dated 10<sup>th</sup> November 2022 expressed under the provisions of sections 3A and 38 of the [Appellate Jurisdiction Act](#), Cap 9 of Laws of Kenya and rules 4, 77(1) (2) (3) (6), 79(1) of the [Court of Appeal Rules](#), 2022, the applicant prays for leave to serve its notice of appeal against the ruling of the Employment Court of Kenya at Nairobi delivered on 6<sup>th</sup> November 2022 by the ELRC Cause No. 227 or 20IO out of time. The applicant also prays for an order that the period within which the applicant should serve the respondent's advocate with its notice of appeal be extended retrospectively to 7<sup>th</sup> November, 2022. Lastly, the applicant prays that the costs of and incidental to this application be costs in the appeal.
2. The grounds in support of the application as I glean them from the application and the supporting affidavit are that on the 6<sup>th</sup> October 2022, Mbaru J delivered a judgment in ELRC Cause No. 227 of 2019 in which she inter alia declared the termination of the respondent's employment contrary to due process, unlawful and ordered the respondent to undertake clearance within 14 days for his terminal dues and entitlements to be processed and awarded compensation for kshs.2,838,486.50 and notice pay of kshs.946.162.17 as well as costs of the suit to the Respondent. The applicant also states that the



- 14 day period within which the respondent was ordered to undertake clearance and his terminal clues processed was scheduled to lapse on 20<sup>th</sup> October, 2022 which was a public holiday and thus expired on 21<sup>st</sup> October, 2022.
3. The applicant averred that it filed a notice of appeal and requested for typed proceedings to enable it lodge an appeal on 14<sup>th</sup> October, 2022, and on the same day, it filed an application seeking a stay of the orders of the superior court, wherein interim orders were issued by the superior court pending inter parte hearing. However, the respondent opposed the application for stay of execution vide replying affidavit and counsel for the respondent stated that they were never served with a notice of appeal as had been claimed by the applicant.
  4. Further, the applicant stated that upon going through the e-mail correspondence, it established that on 14<sup>th</sup> October, 2022 when the stay of execution application was served upon the respondent's counsel, though a copy of the filed Notice of Appeal was included as an annexure to the application, it was inadvertently not served upon the firm of J. A. Guserwa & Company Advocates as a separate document within 7 days of the filing thereof as envisaged under Rule 79 (1) of the *Court of Appeal Rules, 2022*. That the Notice of Appeal was served upon the respondent's advocate on 7<sup>th</sup> November, 2022 which was 17 days outside the 7 days period set out in rule 79(1) of this *Courts rules*.
  5. The applicant also states that its intended appeal raises arguable points of law as set out in the draft memorandum of appeal. Therefore, unless this Court grants the orders sought, the applicant will suffer a grave miscarriage of justice and it will be deprived of its right of appeal in the circumstances of an inadvertent omission.
  6. The application was not opposed. The respondent neither filed a replying affidavit nor written submissions despite being served with a hearing notice by the registrar of this Court on 30<sup>th</sup> November, 2022 at 2:03 PM. The respondent was equally served with the instant application by the applicant as evidenced in the affidavit of service sworn on 11<sup>th</sup> November, 2022 by Caroline Mueni Mbithi who is the applicant's duly licensed process server.
  7. The applicant in its written submissions dated 5<sup>th</sup> December, 2022 filed by its counsel on record, reiterated the contents of its affidavit in support of the application. Regarding delay, the applicant submitted that it timeously filed the Notice of Appeal on 14<sup>th</sup> October, 2022. The applicant also submitted that the instant application is made in good faith and has demonstrated its intention to have the issues in the appeal expeditiously ventilated. The applicant urged that in deciding on an application for leave, this Court is enjoined to exercise its discretion judiciously for the furtherance or substantive justice.
  8. In conclusion, the applicant submitted that the respondent has not demonstrated what prejudice he stands to suffer if this Court grants the leave sought, yet the applicant stands to suffer serious prejudice should the application for leave be declined, since the superior court was in error in finding that the respondent's termination was unlawful. Consequently, the applicant urged this Court to extend time for effecting service of the Notice of Appeal to 7<sup>th</sup> November 2022 and to deem such service to have been duly effected. It cited *Dakawou Transporters Limited v National Land Commission & 3 Others* [2021] eKLR where this Court allowed an application for leave to serve a Notice of Appeal out of time holding that the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law.
  9. I have considered the grounds as presented in the notice of motion, the facts deponed in the affidavit supporting the motion, the written submissions and authorities cited.



10. Under the provision of rule 4 of this Court's rules, this Court has power to enlarge time required for the performance of any acts set out in the Rules notwithstanding that the said time has expired. It therefore follows that whether to extend time is a matter of judicial discretion. The guiding principles were set out by the supreme court in *Nicholas Kiptoo arap Korir Salat v IEBC* [2014] eKLR where the supreme court pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration. (See. *National Hospital Insurance Fund Board of Management v Kenya Union of Commercial Food and Allied Workers* [2020] eKLR).
11. Rule 77(2) of this *Court's rules* mandates a party desirous of an appeal from a superior court to this Court to lodge a notice of appeal within 14 days of the date of the impugned decision. However, this mandatory period may be extended for good reason with leave of the court on application under rule 4.
12. In the present application, the delay in filing the Notice of Appeal is attributed to an inadvertent mistake made by counsel for the applicant who admitted a mistaken belief that the respondent counsel had been served with a copy of the notice of appeal as an annexure to the application seeking stay of execution of the judgment of the superior court vide the applicant's email 14<sup>th</sup> October, 2022, instead of being served upon the respondent as a separate document.
13. The Supreme Court of Kenya in the *Nicholas Kiptoo Arap Korir Salat*, (*supra*) stated that that a party seeking extension of time has the burden to lay a basis to the satisfaction of the court why the court's discretion should be exercise in his favour and delay should be explained to the satisfaction of the court.
14. Similarly, in *Abdul Azizi Ngoma v Mungai Mathayo* [1976] Kenya LR 61, 62, this Court held:

“We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”
15. Considering the circumstances of this case, and the fact that the respondent did not file a replying affidavit to controvert the factual issues raised by the applicant herein, I find no reason to doubt the genuineness of the assertion by the applicant especially on the inadvertence and mistake by counsel. It is also noteworthy that when the applicant discovered the mistake of failing to serve the respondent with a copy of the notice of appeal separately within 7 days after filing of filing, the applicant promptly filed this application. Consequently, I find and hold that the applicant has passed the first two tests of demonstrating that the delay was not inordinate and further, the delay of 17 days has also been explained to the satisfaction of this Court. I find and hold that the mistake by counsel for the applicant is innocent and therefore excusable. I would not penalize the applicant for it.
16. On the arguability of the intended appeal, the applicant contended that it has an arguable appeal as evidenced by the draft memorandum of appeal. Without going into the merits of the appeal as this will be determined by the full bench which will be seized of this appeal, I am satisfied that the intended appeal is arguable. See *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR where this Court stated:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its



decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”

17. As for prejudice to be suffered by the opposite party, should the relief be granted, the applicant being aggrieved by the judgment of the ELRC is desirous of appealing against the said judgment save that time for it to serve a notice of Appeal upon the respondent has since lapsed hence the current application. This Court in *Mbaki & Others v Macharia & Another* [2005] 2EA 206 stated inter alia that:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

18. In summation, I am satisfied that the applicant has satisfied the prerequisite for granting of a relief under rule 4 of this *Court's rules*. I therefore allow the application dated 10<sup>th</sup> November 2022 and orders as follows:

- a. Leave be and is hereby granted extending time within which the applicant is required to serve a notice of appeal upon the respondent.
- b. The period within which the applicant was required to service the notice of appeal upon the respondent be and is hereby extended to the date which the said notice of appeal was served upon the respondent.
- c. The notice of appeal filed on 14<sup>th</sup> October, 2022 is hereby deemed as properly served upon the respondent.
- d. There shall be no orders as to Costs.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER, 2022.**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

*signed*

**DEPUTY REGISTRAR**

