



REPUBLIC OF KENYA



Manyasa v Chairman, Secretary, Board of Management Our Lady of Mercy Girls Secondary School Busia (Civil Application 194 of 2020) [2021] KECA 9 (KLR) (23 September 2021) (Ruling)

Neutral citation: [2021] KECA 9 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 194 OF 2020
DK MUSINGA, JA
SEPTEMBER 23, 2021**

BETWEEN

DOMINIC MATANGWE MANYASA APPLICANT

AND

**CHAIRMAN, SECRETARY, BOARD OF MANAGEMENT OUR LADY OF
MERCY GIRLS SECONDARY SCHOOL BUSIA RESPONDENT**

(Being an application for extension of time to file and serve the Notice and memorandum of appeal out of time in an intended appeal against the Judgment of the Employment and Labour Relations Court of Kenya at Kisumu (Maureen Onyango, J.) dated 12th October 2018 and delivered on 25th October 2018 by Nderi Nduma, J. in ELC Cause No. 240 of 2015)

RULING

1. Before this Court is a notice of motion dated 4th January 2021 brought under sections 79G and 95 of the *Civil Procedure Act* and Order 49 rule 5 of the *Civil Procedure Rules*. The applicant is seeking leave to appeal out of time against the judgment of Maureen Onyango, J. dated 12th October 2018 and delivered on 25th October 2018 by Nderi Nduma, J.
2. By the said judgment, the Employment and Labour Relations Court dismissed the applicant's claim against the respondent for wrongful termination. It was her finding that the only money due to the applicant was Kshs.50,747.30/= and having been paid Kshs.221,566/= by the respondent, no further payment was due to him.
3. Dissatisfied and being desirous of challenging on appeal that decision, the applicant lodged a notice of appeal on 8th November 2018 within the time frame and served upon the respondent on 13th November 2018. The applicant is however time barred in filing his appeal, hence the instant application.



4. The application is supported by the grounds set forth on the face of the application together with those laid down on the supporting affidavit sworn by the applicant on 4th January 2021.
5. It is the applicant's case that the delay in filing the intended appeal was not deliberate as he fell sick and was undergoing treatment for psychological problems which included lack of sleep and depression, at Mumias Model Health Centre. Secondly; that he was at the time financially incapable of proceeding with the matter. In conclusion, the applicant states that the respondent will not suffer any prejudice if the application is allowed.
6. In opposing the application, the respondent filed a notice of appointment, appointing the Attorney General to act on their behalf together with grounds of opposition. It is the respondent's contention that the application is without merit, incompetent and brought under wrong provisions of the law.
7. The respondent contends that the applicant has not raised any basis for the grant of the orders sought; that the delay in filing the instant application is unreasonable and no sufficient explanation for it has been advanced; that the intended appeal has no merit; and that the respondent will suffer great prejudice if the extension is granted.
8. The matter proceeded by way of written submissions. The applicant filed his submission dated 2nd May 2021 while the respondent's is dated 3rd May 2021. The applicant has raised the same arguments as contained in his supporting affidavit and prays that the annexed notice of appeal and memorandum of appeal be deemed as duly filed and served.
9. On the other hand, the respondent maintains that the delay in filing the appeal and the instant application is not explained. The respondent argues that although the applicant might have suffered economically due to loss of employment, that is no reason for delay in filing his appeal. On the issue of the applicant's sickness, the respondent contends that there is no proof that the applicant was sick from 8/11/2018 to 4/1/2021 when he filed the instant application. Thus, a delay of over two (2) years is inordinate.
10. I have carefully considered the notice of motion, supporting affidavit, the grounds of opposition together with the rival written submissions and the legal authorities cited by the parties. There are two main issues for my determination:
 - a) Whether the application is incompetent for being brought under the wrong provisions of the law, and
 - b) Whether the applicant has met the threshold to warrant this Court to exercise its discretion and grant him extension of time to file an appeal out of time.
11. On the first issue, I agree with the respondent that the instant application is brought under wrong provisions of the law. The applicant grounded his application on provisions of the Civil Procedure Act and Rules instead of this Court's Rules. However, that per se is not sufficient to warrant dismissal of the application. Article 159(2)(d) of the *Constitution of Kenya* requires courts to administer justice without undue regard to procedural technicalities. See *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others*.
12. Moving on to the substantive issues for consideration, rule 4 of the *Court's Rules* gives this Court discretion to extend time on such terms as it thinks just. The discretion must be exercised judicially, not on whim, sympathy or caprice. See *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others*.
13. It is well established that this Court in doing so must consider the length of the delay; the reason for the delay; possibly the chances of the appeal succeeding if the application is granted; and lastly, the degree



of prejudice to the respondent if the application is allowed. See *Leo Sila Mutiso v Rose Hellen Wangari ; Muringa Company Limited v Archdiocese of Nairobi Registered Trustees* .

14. It is not in contention that the impugned judgment was delivered on 25th October 2018 and notice of appeal filed on 8th November 2018, well within the fourteen (14) days' time frame. However, the instant application was filed 2 years and 50 days late. That delay was no doubt inordinate.
15. The reasons proffered for the delay is that the applicant fell sick. Secondly; that after his termination from employment, he was financially incapable of proceeding with the matter. The applicant has attached three (3) medical notes dated 15/11/2018, 17/12/2018 and 18/1/2019 but there is nothing to show that he was sick between 18/1/2019 and 4/1/2021 when he filed the instant application. The applicant is silent on that period. In the case of *Peter Maina Munyua v Damaris Njoroge* , this Court ruled that:

“Clearly, there is an inordinate delay which has not been explained at all. For these reasons the application fails. When there is no explanation there can be no indulgence.”
16. Lack of financial resources is not a sufficient reason for inordinate delay in filing an appeal. If the applicant was keen on filing an appeal against the impugned judgment, he ought to have found a way of raising the necessary amount of money to enable him do so.
17. Lastly; on the issue of prejudice that the respondent is likely to suffer if the application is allowed, I hold the same sentiments as expressed by this Court in *Abdul Azizi Ngoma v Mungai Mathayo* that:

“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.”
18. In view of my finding that there is no sufficient reason for extending time, I shall not proceed to consider any other factor under rule 4. I find this application unmerited and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

