



REPUBLIC OF KENYA



**Bsinde v Teledata Technologies Limited Delta Energy Systems (K) (Appeal E318 of 2024) [2025] KEELRC 217 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 217 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E318 OF 2024  
DKN MARETE, J  
JANUARY 29, 2025**

**BETWEEN**

**JOSPHAT LWANGA BSINDE ..... APPLICANT**

**AND**

**TELEDATA TECHNOLOGIES LIMITED DELTA ENERGY SYSTEMS  
(K) ..... RESPONDENT**

**RULING**

1. This is an application dated 5th November, 2024 and seeks the following orders of court;
  1. That this Application be certified as urgent and service be dispensed with in the first instance.
  2. That this Honourable Court be pleased to grant the Applicant leave to file an Appeal out of time against the Judgment delivered on 3rd August 2022.
  3. That upon grant of leave, the Applicant be granted 21 days to file and serve the Record of Appeal.
  4. That costs of this Application be provided for.
2. The Application is grounded on the fact that the applicant's former advocates, M/S Omongo Gatune & CO. Advocates abdicated their responsibility to file an appeal on time despite receiving instruction and payment to file the same.
3. It is also the applicant's case that the appeal is highly meritorious and raises substantial point of law regarding wrongful termination of employment and the terminal benefits payable thereof.
4. Again, the applicant stands to suffer substantial prejudice should he not be granted leave as prayed in this application. Moreover, no prejudice is sufferable by the Respondent in the event of such grant.



5. The Respondent in a Replying Affidavit sworn on 26th November, 2024 opposes the application and avers that this is an abuse of the process of court and an afterthought in that this judgment was delivered on 3rd August, 2022 and the inordinate delay of two years and three months is not explained.
6. Further, the Respondent avers that following the judgment of court and in satisfaction of the decree, she on 27th July 2023 forwarded a cheque No. 002660 for Kshs.25,6999.00 to counsel for the Respondent. This therefore is an attempt by the applicant to have second bite of the cherry.
7. The Respondent further posits and submits as follows; That the applicant did not pay his advocates fees for appeal. The applicant has not demonstrated what action he has taken against his advocates. That litigation must come to an end and this amounts to opening old wounds.
8. The Respondent further raises Grounds of Opposition where he opposes the application on grounds that the delay in filing the appeal has not been sufficiently explained. Further, equity would not come in to aid the indolent, the applicant having been aware of the judgment of the lower court since 2022 and failing to act.
9. Lastly, the Respondent posits that the application is an after thought and a waste of precious judicial time.
10. The applicant in a further Affidavit sworn on 4th December, 2024 answers the Respondent and denies notification of the payment cheque. It is his case that indeed, he has filed a complaint against his former advocates with the Advocate’s Complaint’s Commission.
11. The Applicant submits that he would suffer grave prejudice if the orders sought in this application are not granted with a view to rectifying the glaring injustice that happened at the trial court. He again denies that this application is afterthought and claims that he acted promptly on learning of the eventualities of his appeal.
12. The Applicant in the penultimate seeks to rely on the authority of *Paul Musili Wambua vs Attorney General 7 2 others* (2015) eKLR where in a situation like we are in, the court observed as follows;

“...it is now well settled by a long time of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted...”
13. The Respondent in opposition to the application sought to rely on the authority of *Edith Gichungu Koine v. Stephen Njagi Thoitini* [2014] eKLR where the court of appeal on the subject observed as follows;

“There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons” Nevertheless, it ought to be guided by consideration of factors sated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance, amongst others – see *Fakir Mohamed V Joseph Mugambi & 2 Others*, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under Sections 3A and 3B of the Appellate Jurisdiction Act to ensure that the factors



considered are consonant with the overriding objective of civil litigation, that is to say, the just expeditious, proportionate and affordable resolution of disputes before the Court.”

14. The Respondent submits that even with instructions to his advocates to file the appeal, the circumstances and the facts of the case point to laxity and an indolent litigant on the part of the applicant.

15. Again, the Respondent submits thus;

14. For a considerable period of time, parties have abused the believe that as long as they may blame their advocates for a mistake in court proceedings, the court will exercise its discretion in their favour. The phrase “mistake of counsel should not be visited on his client”, became the norm in applications seeking to either set aside judgment or extend time.

16. She further buttresses her case in opposition by relying on authority of *Joseph Odide Wabome V. David Mbadi Akello* [2022] eKLR where the court held thus

“Regarding the length of delay, it is evident from the pleading on record herein that the judgment that the applicant is seeking to appeal against was delivered on the 25<sup>th</sup> March 2021. The instant application was filed on the 23<sup>rd</sup> November 2021. This is a delay of over 7 months and two days shy of eight months. What then is the excuse for this delay?

It follows that even if the delay was occasioned by his advocates as the applicant has falsely claimed through a deposition on oath, it is worth noting that the court of Appeal in the case of *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR held, inter alia that while mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude. The Court relied on the case of *Mwangi v Kariuki* [1999] LLR 2632 (CAK) where Shah, JA, held that “mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.”

The import of the *Tana & Athi Rivers Development Authority* (supra) case was that while the mistake of counsel was excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned....”

17. The Respondent’s case in the circumstances overwhelms that of Applicant. This court does not find it befitting to exercise its unfettered discretion in favour of this application. This is because as submitted by the Respondent, there is inordinate delay in bring up the application and also an element of the application being an afterthought. It is not deserving of consideration.

18. It would not be in the interest of justice or good practice to allow this application. It would cause undue havoc and disarray to the due process of the law.

19. I am therefore inclined to dismiss the application with orders that each party bears their costs of the same.

**DELIVERED, DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF JANUARY 2025.**

**D. K. NJAGI MARETE**



## **JUDGE**

### Appearances:

1. Miss Wavinya instructed by Caroline Wavinya and Company Advocates for the Applicant
2. Mr. Mutua instructed by E. K. Mutua & Company Advocates for the Respondent.

