



**Secretary Public Service Commission & 4 others v Omukanga (Miscellaneous Application E010 of 2024) [2025] KEELRC 223 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 223 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
MISCELLANEOUS APPLICATION E010 OF 2024**

**DN NDERITU, J  
JANUARY 28, 2025**

**BETWEEN**

**SECRETARY PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> APPLICANT  
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL  
GOVERNMENT ..... 2<sup>ND</sup> APPLICANT  
COUNTY COMMISSIONER, BUSIA COUNTY ..... 3<sup>RD</sup> APPLICANT  
DEPUTY COUNTY COMMISSIONER, TESO SOUTH ..... 4<sup>TH</sup> APPLICANT  
HONOURABLE ATTORNEY GENERAL ..... 5<sup>TH</sup> APPLICANT  
  
AND  
  
EMMANUEL WANJALA OMUKANGA ..... RESPONDENT**

**RULING**

**I. Introduction**

1. In a notice of motion (the application) dated 30th July, 2024 the applicants are seeking for the following orders –
  1. That this honourable court be pleased to admit out of time the appeal from the ruling dated 8<sup>th</sup> February, 2024 which was in respect to the application for review of the judgment dated 3<sup>rd</sup> February, 2021 in Busia Spm Cause No. 1 OF 2020.
  2. That the costs of the application be provided for.
2. The application is expressed to be brought under Sections 1A, 1B, 3, 3A, 79G, & 95 of the [Civil Procedure Act](#) & Section 12(3)(viii) of the [Employment and Labour Relations Court Act](#) and based on the grounds stated on the face of it. It supported with the affidavit of Kepha Onyiso, a state counsel in the office of the Attorney General, with several annexures thereto, sworn on even date.



3. In response to the application the respondent filed a replying affidavit sworn by himself on 20th August, 2024 with several annexures thereto. He is represented by J.P Makokha & Co Advocates.
4. Counsel for both parties addressed the court by way of written submissions. Mr. Onyiso for the applicants filed his written submissions dated 6th November, 2024 while Mr. Makokha for the respondent filed on 25th November, 2024.

## **II. The Evidence**

5. In the supporting affidavit it is deposed that the respondent was appointed the assistant chief II, Job Group F, of Aludeke Location, Teso South Sub-County, Busia County, vide a letter of appointment dated 2nd August, 2016 annexed to the affidavit.
6. It is further deposed that subsequent to the recruitment it was allegedly discovered and established that the respondent had used a forged national identity card in procuring the above appointment. It is deposed that the respondent was born on 15th April, 1988 and as such he had not reached the minimum age of 30yrs required for that position as per the advert for the vacancy. Annexed to the affidavit are correspondences from the National Bureau of Registration to the effect that the respondent was born on 15th April, 1988 not 15th April, 1980 as he submitted and alleged in his supporting documents, including the allegedly forged national identity card.
7. A copy of the advert for the vacancy is also annexed spelling out the minimum qualifications, including the targeted age-gap for the applicants set at between 30 – 44 years.
8. A report annexed to the affidavit indicates that the matter of the alleged forgery of the national identity card by the respondent is under investigation by the Directorate of Criminal Investigations (DCI).
9. Based on the foregoing background the respondent's appointment was revoked and the appointment terminated vide a letter dated 8th January, 2019 while the respondent was still on probation. The said letter of termination is exhibited as an annexure to the affidavit.
10. The respondent appealed the dismissal to the Public Service Commission (PSC) and a recommendation was made that disciplinary action be taken against the respondent. The 2nd applicant commenced disciplinary action against the respondent but before the matter could be heard and determined the respondent filed Busia CMCC ELRC No. 1 of 2020.
11. It is deposed that in a judgment delivered on 3rd February, 2021 the respondent was awarded Kshs450,360/= in basic pay, Kshs205,200/= in allowances, and Kshs12,000/= in leave allowance, but his prayer for reinstatement was denied.
12. It is deposed that on 17th February, 2022 the respondent applied for review of the above orders in the judgment and in a ruling dated 8th February, 2024 the said application was allowed and the lower trial court issued orders as prayed for in the application.
13. It is deposed that the above orders were issued in absence of counsel for the applicants who only came to learn of the ruling on 29th February, 2024 after the respondent wrote to the 2nd respondent informing of his intention to enforce the said ruling.
14. It is deposed that due to the bureaucratic nature of the 2nd respondent and the time taken to obtain the necessary directions and instructions from the Solicitor General it took some time for a decision to be made that an appeal be preferred against the above ruling.



15. It is deposed that in the circumstances the delay of five months in filing the appeal is excusable and not inordinate as the same has been explained as above. It is deposed that the application is filed in good faith and that no prejudice will be suffered by the respondent if the same is allowed.
16. It is further deposed that the intended appeal has high chances of success and a draft copy of the intended memorandum of appeal is annexed.
17. In the replying affidavit it is deposed that since the ruling delivered on 8th February, 2024 the applicants did not take any steps towards filing of the now intended appeal. It is further deposed that the applicants were served with the ruling vide a letter by the respondent's counsel dated 19th February, 2024 and yet no action was taken by the applicants.
18. It is deposed that no sufficient cause has been demonstrated by the applicants for the delay in filing the intended appeal within the time allowed. It is deposed that the applicants never took the matter seriously hence the inordinate and inexcusable delay on their part in filing the now intended appeal.
19. It is deposed that the applicants have displayed blatant and untamed contempt of the orders issued by the trial court by failing to either reinstate or compensate the respondent as ordered. It is deposed that the vacancy formerly occupied by the respondent was advertised and filled yet the applicants have failed to compensate him as ordered by the court.
20. It is thus deposed that the application is made in bad faith as the applicants are in court with dirty hands and in blatant contempt of express court orders as alluded to above.

### **III. Submissions By Counsel**

21. Counsel for the applicants reiterated the reasons for the delay in filing of the appeal as stated in the supporting affidavit as discussed in the foregoing part of this ruling. It is restated that the ruling intended to be appealed was delivered in the absence of the applicants and or their counsel and that the bureaucratic nature of government operations and decision making caused further delay as explained in the affidavit.
22. It is submitted that the court has powers and the discretion to enlarging the time within which an appeal may be filed under Section 79G of the *Civil Procedure Act*. Counsel cited Vincent Sunday Yier V Foam Mattress Ltd (2004) eKLR and Raila Odinga V Independent Electoral and Boundaries Commission (2023) eKLR in demonstrating that the court should exercise its discretion in allowing such an application based on the reasons given by the applicant and the explanation for the delay. It is further submitted that the court should avoid being too mechanical and procedural and instead apply the primary objective of the broader interest of justice.
23. It is further submitted that the application has been filed in good faith and that the applicant has approached the court with equitable clean hands. It is further submitted that the respondent should not be allowed to benefit from his allegedly criminal conduct of forging a national identity card that he used to fraudulently and unlawfully gain employment. It is submitted that in the interest of justice the applicants ought to be allowed to appeal out of time based on the reasons alluded to in the application.
24. Further, it is submitted that the delay of about five months is neither inordinate nor prolonged considering the bureaucratic nature of decision-making process in government. Counsel cited Almas Hauliers Ltd V Abdulnasir Abucar Hassan (2017) eKLR and George Kiptabut Lelei & Another V Fanikiwa Ltd (2010) eKLR wherein delays of four and seven months respectively were held not to have been inordinate.



25. It is submitted that the intended appeal has high chances of success considering the entire circumstances and facts of the dispute. It is submitted that if the application is not allowed the applicants shall suffer prejudice. It is submitted that the respondent should not be allowed to benefit from his own misconduct. It is submitted that any imputed loss or damage to the respondent that may be caused by the application being allowed can be quantified and compensated in monetary terms and or award of costs.
26. The court is urged to be guided by Sections 1A and 3A of the *Civil Procedure Act* and Article 159(2)(d) of *the Constitution* and apply the overriding objective of doing justice over the procedural technicalities. In that regard the court is urged to be guided by the holdings in *Shabbir Ali Jusab V Annar Osman Gamrai & Another* (2013) eKLR and *Nicholas Kiptoo Arap Korir Salat V Independent Electoral & Boundaries Commission* (2014) eKLR.
27. The counsel for the respondent submitted on two broad issues – that the application does not demonstrate sufficient cause for not filing of the appeal within time; and, that the applicants have not come to court with clean hands.
28. It is submitted that while the law, Section 79G of the *Civil Procedure Act*, allows the court to extend time for filing an appeal beyond 30 days, such extension shall be granted for good and sufficient cause and not as a matter of course. The court is urged to follow the reasoning in *Chemaringo V Paul Kipkorir Kibet* (2018) eKLR.
29. The court is urged not to allow the alleged bureaucracies within the applicants to obscure its view in doing justice to all parties and treating both parties equally and fairly in accordance with Article 159 of *the Constitution*.
30. Further, it is submitted that since they learnt of the outcome of the case on 29th February, 2024 the applicants neither appealed nor complied with the lower court orders in the judgment. It is submitted that instead of complying with the judgment by either reinstating or compensating the respondent, the applicants were quick in filing the vacancy created by the dismissal of the respondent which they completed by 30th July, 2024. Yet, due to alleged bureaucracies, the applicants could not make a simple decision on whether or not to appeal within the time allowed in law. It is submitted that this double standard by the applicants demonstrates clear bias and lack of good faith. It is further submitted that the Human Resources Management Advisory Committee of the PSC seats at least once a month yet there is no evidence that the subject matter hereof was ever presented for consideration for the period from February to June, 2024.
31. It is further submitted that the intended appeal has no chances of success as the draft memorandum of appeal does not challenge the judgment but rather the order of review. It is submitted that prima facie the intended appeal is a non-starter with not even remote chances of success.

#### **IV. Issues For Determination**

32. In my considered view there is only one main issue for determination in this application – Should the court allow the application as prayed and hence allow the applicants to appeal out of time?
33. Upfront, it is important to make it clear that this court (ELRC) is created under Article 162(2)(a) of *the Constitution* and operationalized under the *Employment and Labour Relations Court Act* and the rules of procedure made thereunder. Under Section 12(1) of the above Act, “The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other law which extends jurisdiction to this court relating to employment and labour relations”.



34. Section 27 of the above Act allows the making of rules of procedure for the court. The current rules are the Employment and Labour Relations Court (Procedure) Rules 2024. The previous rules that are now revoked and replaced with the above were promulgated in 2016. Rule 11 of the current rules provides that an appeal to this court from a magistrate's court shall be filed within 30 days of delivery of the judgment or ruling appealed. That was the period allowed even under the now revoked 2016 rules.
35. Rule 18 of the (current) 2024 Rules provides as follows "The Court may, if circumstances justify, extend time prescribed for the filing of an appeal or any other document relating to an appeal."
36. This court takes the considered view that except where it is so specifically provided for the *Civil Procedure Act* and the rules made thereunder do not apply to this court. This is so because the constitutive Act of this court and the rules made thereunder, alluded to above, adequately provide for the substance and procedure applicable in hearing and determination of matters that come before it. This view is buttressed by the specific provisions in the rules of this court that invite specific application of the Civil Procedure Rules. For example, Rule 10(2) of the Rules provides that "Any person who wishes to institute judicial review proceedings shall do so in accordance with Sections 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules." Likewise, Rule 73(2) provides that "Rules on execution or stay of execution of an order or decree of the court shall be in accordance with the Civil Procedure Rules."
37. The point made here is that the law intended that as a specialized court dealing with employment and labour relations matters only, the ELRC has its own special and unique procedure which, to a large extent, is devoid of the technicalities that may apply in other courts under the *Civil Procedure Act* and the Rules thereunder.
38. Therefore, in an application for extension of time to file an appeal, the applicable law in this court is Rule 18 of the Employment and Labour Relations Court (Procedure) Rules 2024 cited above and not Section 79 of the *Civil Procedure Act* upon which the application herein is premised. The condition upon which the court may exercise its discretion in favour of an applicant is stated as "if circumstances justify". This condition actually, and reasonably so, resonates with the proviso in Section 79 of the *Civil Procedure Act* that "Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."
39. In my considered view, the two phrases above boil down to one and the same thing. For an applicant or an intending appellant to be granted time to appeal out of time (s)he has to advance and demonstrate good, sufficient, and justifiable reasons and explanation for failure to file the appeal within the time allowed. Those are the circumstances that may justify the court in granting the request. Of course, each such a request is based on its own unique or peculiar circumstances and merits and shall be considered on case to case basis. Obviously, it shall be a waste of precious judicial time for a court to allow an application for such extension or enlargement of time where the intended appeal, prima facie, has no merits.
40. The above scenario calls for consideration of more or less the same factors that counsel for both parties submitted on although their arguments were majorly based on the assumption that the applicable law was Section 79 of the *Civil Procedure Act*. The court thus has to consider the reasons given for the delay, the amount of time in the delay, and the prima facie merits of the intended appeal.
41. In my understanding of the application and the arguments by counsel for the applicants they are blaming the delay on the bureaucratic nature of government operations. It is presented that it took too long for the Solicitor General to offer advice on the way forward. In my considered view this is not a good reason at all for the delay. If the court were to allow this line of argument even private entities



and or individuals shall come up with similar arguments and excuses. In any event, no explanation has been given as to how the bureaucracy took over five months to make that simple decision on whether or not to appeal. No systematic or chronological explanation has been offered to demonstrate let alone justifying the delay. The court finds no justifiable, reasonable, or plausible explanation for the delay.

42. The judgment of the lower trial court (P. A. Olengo (SPM)) was delivered on 3rd January, 2021 and reviewed on 8th February, 2024. The draft memorandum of appeal attached to the application indicates that the applicants are challenging the orders issued in the ruling of 8th February, 2024. Yet, in the orders sought, the applicants are seeking not only for the dismissal of the said orders of review but also for the dismissal of the entire cause in the lower court. Again, no appeal has been filed against the judgment of 3rd January, 2021. The question that then arises is whether the application herein is for leave to appeal against the judgment delivered on 3rd January, 2021 or the orders of review made on 8th February, 2024.
43. However, the prayers on the face of the application as outlined in the introductory part of this ruling are clear that the intended appeal is challenging the ruling of 8th February, 2024. It is admitted that the applicants became aware of this ruling on 28th February, 2024. As noted above, other than allegations of bureaucracy, no reasonable or plausible explanation has been offered for the delay in filing of the intended appeal or even the instant application for extension of time.
44. Other than an allegation that the alleged forgery of a national identity card by the respondent is under investigation by the DCI, no evidence has been offered as to why the respondent has not been charged since 8th January, 2019 when the respondent was terminated. That is now over five years ago!
45. This application demonstrates some serious lack of commitment and efficiency in some quarters within the applicants. The tragedy is that at the end of the day it is the taxpayer who shoulders the burden of settling the claim. If there was evidence of some criminal proceedings against the respondent for the alleged forgery, the court may, in the interest of justice, upon good and sufficient reasons being demonstrated, have allowed the applicants to appeal out of time even against the judgment to avoid rewarding criminal misconduct.
46. However, as presented, the application lacks merits on all fronts and dimensions. No criminal charges have been preferred against the respondent and hence no conviction. Further, no good explanation has been given for the inordinate delay in filing of the instant application and the appeal. The draft memorandum of appeal annexed does not demonstrate good grounds or prima facie chances of success of the intended appeal. Litigation has to come to an end and in my considered view this is not one matter that deserves precious judicial time beyond this point.
47. The application is thus denied.

## **V. Orders**

48. The court makes the following orders –
  - a. The notice of motion dated 30th July, 2024 is hereby dismissed for lack of merits.
  - b. No order as to costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT BUNGOMA THIS 28<sup>TH</sup> DAY OF JANUARY, 2025.**

**DAVID NDERITU**

**JUDGE**

