



**Mufuma v British Army Training Unit Kenya (Cause E980 of 2023)
[2025] KEELRC 35 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 35 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E980 OF 2023
SC RUTTO, J
JANUARY 17, 2025**

BETWEEN

DOMINIC AMBISAI MUFUMA CLAIMANT

AND

BRITISH ARMY TRAINING UNIT KENYA RESPONDENT

RULING

1. What comes up for determination is an Application dated 15th August 2024, through which the Claimant/Applicant prays for the following orders:
 1. Spent.
 2. That the plaintiff (sic) be granted leave to file an appeal out of time.
 3. That upon prayer (a) being allowed the annexed memorandum of appeal herewith be deemed to be duly filed upon payment of requisite fees.
 4. That the costs of this Application be provided for.
2. The Application is premised on the grounds appearing on its face and the Supporting Affidavit of the Claimant/Applicant herein, Mr. Dominic Ambisai Mufuma.
3. Mr. Ambisai deposes that he was dissatisfied with the Ruling of this court and he instructed his advocate Mr. Wachakana to immediately proceed to file an application for enlargement of time to file the suit.
4. He avers that being dissatisfied with the Ruling and orders of this Honourable Court delivered on 5th April 2024, he intends to seek a review against the entire ruling and order.
5. He further avers that in dismissing the application to file the suit out of time, the trial judge erroneously made a fundamental mistake and was wrong and failed to note that the cause of action arose from the



date he was terminated from his employment yet the Respondent suspended him without pay until the criminal case No. 295 of 2010 & 2217 of 2009 in the High Court Misc No. 129 of 2010 Republic v Muneer Haroon Ismael was concluded.

6. In response to the Application, the Respondent filed Grounds of Opposition dated 17th September 2024 in which it contends inter alia, that the Application has been brought over 4 months from the date the Ruling the Claimant is seeking to appeal against was delivered. That no explanation has been given by the Claimant for the delay of over 4 months in filing the Application for leave to appeal out of time. It is the Respondent's further contention that the Claimant has not demonstrated any extenuating circumstances that can enable the court to exercise its discretion in his favour and grant leave to file the appeal out of time.

Submissions

7. The Application was canvassed by way of written submissions. Both parties complied and the court has considered the said submissions.
8. On his part, the Applicant has submitted that the delay was occasioned by the criminal proceedings that they were yet to receive. That after receiving the proceedings the Applicant instructed his Advocate to file the application for enlargement of time.
9. Citing the decision in *Del Monte Kenya Limited vs Patrick Njuguna Kariuki (2015) KLR*, the Applicant submits that he has met the threshold of leave to file an appeal out of time and that the same should be granted, so as to allow his constitutional right to a fair hearing and to meet the ends of justice.
10. The Respondent on the other hand submits that the typed proceedings in the criminal matter were not produced in the application for leave to commence proceedings out of time which was dismissed.
11. It is further submitted by the Respondent that the criminal proceedings have no bearing on the Applicant's filing a notice of appeal against the decision of 5th April 2024. That the Applicant has not explained the nexus between the typed proceedings in the criminal case and the failure to file a notice of appeal within 14 days.
12. In the Respondent's view, the typed proceedings in the criminal case have no relevance on the Applicant's failure to file a notice of appeal against the decision of 5th April 2024.
13. Referencing the cases of *Utalii Transport Company Limited, Veronica Ndindi Musyimi and Justus Kimau Musyimi (Administrators of the Estate of Stephen Musyimi) vs NIC Bank Limited and Kanini Haraka Enterprises Limited (2014) KEHC 7255* and *AGIP (Kenya) Limited vs Highlands Tyres Limited Civil Case No. 249 of 1997*, the Respondent has submitted that the application for leave was brought 4 months and 26 days after the Applicant should have filed his notice of appeal. The Respondent contends that no reasonable explanation has been given for this delay.
14. It is the Respondent's position that the delay in filing the application for leave is inordinate and inexcusable. In its view, the explanation by the Applicant does not constitute a sufficient reason for the court to exercise its discretion in his favour.
15. It is the Respondent's further contention that if the Application is allowed, it will suffer prejudice as it does not have any witness that would plead its case, because of the delay by the Applicant. That it will not have an opportunity to fully present its case and agitate its dispute.



Analysis and Determination

16. I have given due consideration to the Application by the Applicant, the Grounds of Opposition as well as the rival submissions and to my mind, the main issue for determination is whether the Applicant's prayer for extension of time should be granted.
17. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR enunciated the principles that govern the exercise of discretion in applications for extension of time as follows: -

“The underlying principles a court should consider in exercise of such discretion should include:-

- a) Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e) Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f) Whether the application has been brought without undue delay.
18. Further, in the case of Paul Musili Wambua vs Attorney General & 2Others [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following: -".....it is now settled by a long line 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 whim or caprice.

In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of 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."

19. Applying the aforementioned principles to the instant Application, it is necessary to consider at the outset whether the Applicant has tendered a satisfactory explanation for the delay in filing the Notice of Appeal.
20. It is worth pointing out that in his Application, the Applicant did not proffer any reason as to why he did not file the Notice of Appeal within the prescribed timeline.
21. Notably, it is only in his submissions that the Applicant has stated that the delay in filing the Appeal was occasioned by the criminal proceedings that he was yet to receive. With due respect to the Applicant, the court considers this reason an afterthought as he did not indicate in his Application let alone suggest that he had challenges obtaining the typed criminal proceedings he has alluded to in his submissions.



Even so, the Applicant has not brought out the correlation between the delay in obtaining the said typed proceedings and the delay in filing the Notice of Appeal within the prescribed period.

22. In addition to the foregoing, it is this court's view that the delay in bringing the instant Application was inordinate. Here is why. The Ruling which the Applicant intends to appeal against was delivered on 5th April 2024. Pursuant to Rule 77(2) of the Court of Appeal Rules, 2022, the Applicant was required to file a Notice of Appeal within 14 days after the delivery of the Ruling. As such, by simple arithmetic, the period for filing the Notice of Appeal lapsed on or about 19th April 2024 while the instant Application was filed on 15th August 2024. This was approximately 4 months outside the limited time for filing a Notice of Appeal. In the circumstances, the delay was inordinate. Coupled with that, the reason for the delay has not been explained.
23. In light of the foregoing, I am not persuaded that this is a case that merits the exercise of the court's discretion in favour of the Applicant.
24. In the circumstances, the Application dated August 15, 2024 is declined with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2025.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Wakasa Were instructed by Mr. Wachakana for the Claimant/Applicant

Mr. Mosobera instructed by Mr. Ondiek for the Respondent

Millicent Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

