



**Gitau v Veew Distributors Limited (Miscellaneous Application  
E324 of 2024) [2025] KEELRC 832 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 832 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E324 OF 2024**

**SC RUTTO, J  
MARCH 14, 2025**

**BETWEEN**

**BERNARD KIMOTHO GITAU ..... APPLICANT**

**AND**

**VEEW DISTRIBUTORS LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is a Notice of Motion dated 8<sup>th</sup> November, 2024, expressed to be brought under Sections 1A, 1B, 3 and 3A, 63(e), 70G and 95 of the [Civil Procedure Act](#) and Rule 18 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2024](#).
2. The principal order sought by the Applicant in the Notice of Motion is leave to appeal out of time.
3. The Application is premised on the grounds on the face thereof and the Supporting Affidavit of Bernard Kimotho Gitau, the Applicant herein. Grounds in support of the Motion are that Judgment was delivered on 27<sup>th</sup> September, 2024 by Hon. Rawlings Liluma Musiega in MCELRC/E833 of 2020, which Judgment the Appellant is dissatisfied with and intends to appeal against.
4. That the period of filing the appeal (27<sup>th</sup> October 2024) has since elapsed hence this Application for leave to file an Appeal out of time.
5. It is further averred that the need to file an appeal out of time was caused by the fact that the Applicant received the copy of Judgment and Decree dated 29<sup>th</sup> October 2024 on 31<sup>st</sup> October 2024, by which time the period for filing the appeal had lapsed.
6. That the Application to appeal out of time has been brought without inordinate delay and the Applicant has a meritorious appeal with high chances of success.
7. The Application is strongly opposed. In this regard, the Respondent filed a Replying Affidavit sworn on 10<sup>th</sup> January 2025 by Gitau Waweru, who describes himself as a Director of the Respondent.



8. Mr. Gitau avers that the Applicant did not contemplate and/or envisage filing an Appeal in any way, shape, form, and/or construction of the word, for if he did, he ought to have filed a Notice of Appeal within 14 days from the date of Judgment.
9. That the 14 days granted as of right to file a Notice of Appeal lapsed on 15<sup>th</sup> October 2024. Mr. Gitau avers that this is indicative that no Appeal was preferred, contemplated and/or envisaged in any way, shape, form and/or construction of the word.
10. Mr. Gitau further avers that he is advised by his advocate on record, and whose advice he verily believes to be true, that the current Application and the resultant prayers sought are but a mere afterthought for the Applicant only requested for the Judgment, Decree and Certificate of Costs on 23<sup>rd</sup> October 2024 after time to file a Notice of Appeal had run out.
11. He is further advised by his advocate on record, and whose advice he verily believes to be true, that a Notice of Appeal can be filed without the need of attaching the Judgment, Decree and/or Certificate of Costs therein and as such there is no plausible reason as to why the Notice of Appeal was not filed in time nor is there a plausible reason why leave to file the Appeal out of time is being sought.
12. Mr. Gitau contends that the Applicant is guilty of laches only to now feign an implausible reason for granting of orders to file the Appeal out of time.
13. Mr. Gitau is further advised by his advocate on record, and whose advice he verily believes to be true, that extension of time to file an Appeal is not a right granted to a party and that it is an equitable remedy available to a deserving party and as such equity must apply.
14. He is further advised by his advocate on record, and whose advice he verily believes to be true, that a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Honourable Court, a burden which the Applicant has failed to discharge.
15. Mr. Gitau has further questioned what Judgment, if any, the Applicant received on 31<sup>st</sup> October 2024, as the one attached to his Supporting Affidavit, is not a certified copy as it was downloaded from the Case Tracking System portal. In Mr. Gitau's view, the Applicant is attempting to hoodwink the Court by manufacturing a reason for the delay to justify granting of orders sought where no such reason exists.
16. Mr. Gitau further avers that as per the Case Tracking System portal, the Judgment rendered by Hon. Rawlings Liluma Musiega was available and uploaded onto the portal on 27<sup>th</sup> September 2024.
17. He is further advised by his advocate on record, and whose advice he verily believes to be true, that the Appeal has little or no chance of success for the Applicant seeks to have a second bite at the proverbial apple after failing in his quest at the lower Court in getting an award for prayers not supported by any evidence.
18. That the Respondent has since paid the decretal amount and costs it was condemned to pay by the lower Court and based on Decree issued therein and allowing the Appeal would be punitive.
19. Mr. Gitau avers that the Respondent is apprehensive that the intended Appeal is not only punitive but meant to beat it into submission as well as burdening it with the legal costs associated with defending the Appeal should the same be allowed.
20. In response to the Respondent's Replying Affidavit, the Applicant filed a Further Affidavit dated 30<sup>th</sup> January 2025. The Applicant avers in the Further Affidavit that Judgment was read on 27<sup>th</sup> September 2024, and on 30<sup>th</sup> September 2024, and again on 23<sup>rd</sup> October 2024, they did request for copies of the Judgment, Decree and Certificate of Costs.



21. That Judgment, Decree and Certificate of Costs were received on 30<sup>th</sup> October 2024 and a Draft Memorandum of Appeal done on 8<sup>th</sup> October 2024 together with the Application for extension of time, 8 days later.
22. The Applicant has further averred that the Appeal from the Lower Court to the High Court is within 30 days and is by way of Memorandum of Appeal and not a Notice of Appeal. That the 30 days lapsed on 28<sup>th</sup> October 2024 and as such, the delay was only for 10 days.
23. He now knows that the Judgment was uploaded in the Case Tracking System portal.
24. In a rejoinder, the Respondent filed a Further Replying Affidavit sworn on 17<sup>th</sup> February 2025 by Gitau Waweru. Mr. Waweru avers that after reading the Applicant's submissions, he is convinced that the only reason the instant Application was filed was because of the financial capability of the Respondent company to pay the decretal amount it was condemned to pay by the subordinate court.

### **Submissions**

25. Pursuant to the directions issued by the Court on 11<sup>th</sup> December 2024, the Application was canvassed by way of written submissions. Both parties complied and the Court has given due consideration to the said submissions.
26. The Applicant submitted that pursuant to Section 79G of the *Civil Procedure Act*, he had up to 27<sup>th</sup> October 2024, to file a Memorandum of Appeal. That he filed the Application for extension of time on 8<sup>th</sup> November 2024, 12 days later. In the Applicant's view, 12 days delay is not inordinate. To buttress his submissions, the Applicant placed reliance on the case of *Tonui v National Bank of Kenya* (Miscellaneous Civil Appeal E002 of 2022) [2022] KEHC 2977 (KLR) (20 June 2022) (Ruling).
27. The Applicant further submitted that he received the copy of the Judgment and Decree on 30<sup>th</sup> October 2024 and that he took 8 days to prepare, file and serve the current Application and the draft Memorandum of Appeal. According to the Applicant, he has given reasonable and sufficient reasons for the delay.
28. On arguability of the Appeal, the Applicant submitted that he had pleaded the claims with respect to underpayments and off days in the Memorandum of Claim, but the same were dismissed by the Trial Court. In support of his submissions, the Applicant sought to rely on the case of *Kenya Union of Commercial Food Allied Worker v Fralet Agencies* (Employment and Labour Relations Claim 29 of 2023) [2023] KEELRC 2208 (KLR) (22 September 2023) (Judgment).
29. It was the Applicant's further submission that the Respondent has not indicated any prejudice it will suffer if extension is granted. In his view, the Respondent will have a chance to argue and challenge the appeal and be heard on merit.
30. The Applicant further posited that the Respondent has paid out the full amount of the Judgment sums awarded and not in contest, so is well capable to pay all the other sums should the appeal succeed.
31. On the other hand, the Respondent has submitted that the period of delay is inordinate. Referencing case of *Paul Njage Njeru v Karija K Mugambi* (2021) eKLR, the Respondent submitted that the Applicant is guilty of laches and as such, his delay should not be rewarded by granting him the prayer sought for enlargement of time to file the Appeal.
32. Placing reliance on the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR, the Respondent further submitted that the reason for the delay is not reasonable.



33. As to the chances of success of the intended Appeal, the Respondent submitted that the Trial Court in its Judgment gave its reasoning as to why the Applicant's claims for underpayment and off days were dismissed as the same could not be sustained based on evidence adduced therein.
34. It was the Respondent's view that the Trial Court applied its mind and found that the issue of underpayment and off days was not proven and thus dismissed the same. On this score, the Respondent argued that this Court will equally, upon applying its mind, reach the same conclusion.
35. Citing the case of *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR, the Respondent further submitted that it will suffer a great deal of prejudice, harm and/or damage if the prayers sought are granted.

### **Analysis and Determination**

36. The Court has given due consideration to the Notice of Motion, the Respondent's Replying Affidavit, the Further Affidavits filed by both parties as well as the rival submissions filed together with the cited authorities. From the said pleadings, it is evident that what arises for determination is whether time can be extended for the Applicant to file an Appeal.
37. Section 79G of the *Civil Procedure Act* provides for the time for filing appeals from subordinate courts as follows:

[79G] Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: 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.
38. In addition, Section 95 of the *Civil Procedure Act* states that where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.
39. And further, Rule 80 of the *Employment and Labour Court (Procedure) Rules, 2024* provides as follows: -

[80] The Court may, upon application or on its own motion, extend any time prescribed under these Rules or such time as may be stipulated in an order of the Court.
40. In view of the aforesaid provisions, it is apparent that in considering an application for enlargement of time, the Court exercises discretionary power.
41. It is also worth mentioning that the power to extend time within which to file an appeal is an equitable relief. As such, the same is not granted as a matter of course but available to a deserving party upon sufficient reasons being given to the satisfaction of the court.
42. Such was the determination by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the Apex Court further stipulated the following principles to guide Courts in exercising such discretion:
  - a. Extension of time is not a right of a 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 to 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 Respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
43. In the present case, the decision intended to be challenged was delivered on 27<sup>th</sup> September 2024. By simple arithmetic, the prescribed time for filing the Appeal lapsed on 27<sup>th</sup> October 2024. From the record, the instant Motion was filed on 8<sup>th</sup> November 2024, hence a period of 42 days had lapsed since 27<sup>th</sup> September 2024 when the impugned Judgment was delivered.
44. It is this Court's view that the said delay is reasonable and cannot be termed as inordinate. This takes me to the next issue, which is whether the Applicant has established a reasonable reason for the delay.
45. As was held by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (*supra*), the delay should be explained to the satisfaction of the Court.
46. In this case, the Applicant has attributed the delay in filing the Appeal within the prescribed timelines on the basis that he only received a copy of the Judgment and Decree dated 29<sup>th</sup> October 2024 on 31<sup>st</sup> October 2024 by which time the period for filing the appeal had lapsed.
47. Refuting the Applicant's assertions, the Respondent contends that the Notice of Appeal (sic) can be filed without the need of attaching the Judgment, Decree and/or Certificate of Costs therein and as such, there is no plausible reason as to why the Notice of Appeal (sic) was not filed in time.
48. The Respondent has further averred that the Judgment in the Applicant's Affidavit is not a certified copy as the same was downloaded from the Case Tracking System portal. In the Respondent's view, the Applicant is attempting to hoodwink the Court by manufacturing a reason for the delay to justify granting of the orders.
49. Further opposing the Application, the Respondent has contended that the Judgment delivered by Hon. Rawlings Musiega was available and uploaded on the Case Tracking System portal on 27<sup>th</sup> September 2024.
50. It is notable that the Judgment annexed to the Applicant's Supporting Affidavit is not a certified copy but rather is a copy downloaded from the Case Tracking System portal. As such, this discounts the assertions by the Applicant that they received a copy of the impugned Judgment on 30<sup>th</sup> October 2024.
51. Further and as can be discerned from the printout of the Case Tracking System portal, which was annexed to the Respondent's Affidavit, the impugned Judgment was uploaded on the portal on 27<sup>th</sup> September 2024, the same day it was delivered. In light of this, the Applicant's assertion in his Further Affidavit sworn on 30<sup>th</sup> January 2025 that he now knows that the Judgment was uploaded on the Case Tracking System fades.



- 52. As it is, the Applicant only needed a copy of the Judgment from the Trial Court to lodge the Memorandum of Appeal. Indeed, he did not require a certified copy of the Judgment or Decree for that fact.
- 53. Therefore, it is not accurate for the Applicant to assert that he failed to lodge the Memorandum of Appeal within the prescribed timelines on the basis that he was yet to obtain a copy of the Judgment he intends to appeal.
- 54. It has been held that a party invoking the Court’s discretion ought to place before the court genuine and credible reasons supported by evidence to explain the delay. In this case, it is evident that the Applicant has failed to do so. I say so bearing in mind that extension of time is not a right of a party and is an equitable remedy that is only available to a deserving party at the discretion of the Court.
- 55. In light of the foregoing, the Court finds that the reasons advanced by the Applicant for the delay as being unsatisfactory and not persuasive to make this Court invoke its discretion by enlarging time so that the Applicant can pursue his right of appeal.
- 56. Ultimately, the Court finds that the Application dated November 8, 2024 is devoid of merit and it is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH 2025.**

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**STELLA RUTTO**

**JUDGE**

In the presence of  
No appearance for the Applicant  
No appearance 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

