



Makari v Kenya Hospital Association Limited t/a the Nairobi Hospital (Civil Suit E331 of 2021) [2025] KEELRC 875 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 875 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL SUIT E331 OF 2021**

**JW KELI, J
MARCH 14, 2025**

BETWEEN

ELIZABETH REBECCA OWANO MAKARI APPLICANT

AND

**THE KENYA HOSPITAL ASSOCIATION LIMITED T/A THE NAIROBI
HOSPITAL RESPONDENT**

RULING

1. The Applicant vide Notice of Motion application dated 6th November 2024 brought under the provisions of sections 1A,1B,3 and 3A of the *Civil Procedure Act*, Order 50 (1), 21(12)(2) of the Civil Procedure Rules, section 20(1) of the Employment and *Labour Relations Act* and all provisions of the law sought the following orders:-
 - a. Spent
 - b. That the notice of appeal filed on the 8th day of October 2024 be deemed to be properly filed and from part of the pleadings herein.
 - c. That cost of the application be provided for.
2. The application was premised on the ground of interest of justice and that due to the prevailing urgency the said Notice of appeal was filed by the newly appointed advocates who had not been given leave by the Court to represent the applicant and no prejudice would be suffered by the respondent if the notice of appeal is deemed as properly filed. The applicant filed affidavit in support of the application on the same grounds.
3. The application was opposed by the respondent vide grounds of opposition dated 16th December 2024 to the effect that the said notice of appeal dated 8th October 2024 was filed by a stranger and the same is null and void, that the orders issued on 31st October 2024 allowing the present firm to come on record



for the claimant cannot act retrospectively, that the court has no powers under the Employment and Labour Relations Court to make legal what was illegal in the first place. The cited *Civil Procedure Act* and rules are inapplicable before the court and there was no application before the court to extend time to enable the applicant lodge notice of appeal out of time under rule 18 of the Employment and Labour Relations Court (Procedure) Rules.

4. The application was canvassed by way of written submissions. Both parties filed.

Decision

5. The applicant in submission contended that the application was to regularise the filed notice of appeal before the law firm had leave to file the same. The notice of appeal was filed together with application by current law firm to come on record at appeal stage. Does the court have jurisdiction to deem the said notice of appeal as proper?
6. The respondent contended the notice of appeal was filed by a stranger and the leave issued subsequently could not operate retrospectively, and there was no application to extend time. That this court has discretionary powers to allow an appeal to be filed out of time but not for someone to file an appeal out of time and seek the court's discretion to have the same validated by an order of the court. That is unprocedural as was found by the Supreme Court in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR "We are in total agreement with the respondent that an appeal filed in this Court out of time without leave of this Court is irregular and this Court will not invoke such 'novel' principles as urged by applicant so as to validate that petition and deem it as properly filed. We buttress this Court's position in *Nicholas Salat* when this Court stated thus: "...In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed. What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the least (sic) he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record."
7. In submissions the applicant invoked rule 4 of the Court of Appeal Rules (2022) which states: -"The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended." The applicant stated the court has jurisdiction



to grant the prayer sought in the application and further relied on the decision of the Court of Appeal in County Government of Narok & another v Mwavali (2024)e KLR. The court agreed with the respondent that there was no application for an extension of time under which the Court would have considered the application under Rule 18 of Court (Procedure) Rules 2024 to wit:- “18. The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.”

8. The court returned that it had no jurisdiction to extend time under Rule 4 of the Court of Appeal Rules 2022. The court under the said Rule 4 is the Court of Appeal. The impugned decision is of this court and hence only the Court of Appeal can decide whether or not there is an arguable appeal as one of the basis of extension of time (Njoroge v Kimani 2022 e KLR). The Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR declined to deem an appeal filed out of time without leave of the court as properly filed and held :-“By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.” The court, for the foregoing reasons, returns that it has no jurisdiction to grant the Order sought. The applicant is at liberty to seek an extension of time from the appellate court on the notice of appeal.
9. The application is dismissed with costs to the Respondent.
10. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MARCH , 2025.

**J.W. KELI,
JUDGE.**

In The Presence Of:

Appellant /applicant – Wanyanga

Respondent – Sigei

