



**Simiyu v Protective Custody Limited (Employment and Labour Relations
Miscellaneous E002 of 2025) [2025] KEELRC 1497 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1497 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS MISCELLANEOUS E002 OF 2025
ON MAKAU, J
MAY 16, 2025**

BETWEEN

FRANCIS ISAIAH SIMIYU APPLICANT

AND

PROTECTIVE CUSTODY LIMITED RESPONDENT

RULING

1. Before me is a Notice of Motion dated 7th February 2025, seeking the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to grant the applicant leave to appeal and file memorandum and record of appeal out of time against the judgement and decree delivered by Honourable Magistrate Court (Hon. Lubia N. Mercyline) (SRM) in Nyeri CMELRC Cause No. E031 of 2023 Francis Isaiah Simiyu vs Protective Custody Limited on 5.9.2024.
 - c. That the costs of this application be provided for.
2. The motion is supported by the affidavits sworn on 7th February 2025 by the applicant and his legal counsel Mr. Duncan Waweru Macharia and it is opposed by the respondent vide a Replying Affidavit sworn by its Regional Manager Mr. Rodgers Nyumbile Isaac on 19th February 2025.
3. In brief the applicants case is that he was aggrieved by the judgment of the lower court delivered on 5th September 2024 and instructed his counsel to appeal; that the counsel sought certified copies of the court proceedings and judgement by the letter dated 9th September 2024; that that the said documents were not supplied immediately and the counsel missed the timelines for filling a Memorandum of Appeal by filing the same on 28th October 2024 as ELRCA No E032 of 2024; that on 3rd December 2024, the counsel was supplied with copies of the proceedings and the judgment and filed a record of appeal on 3rd December 2024; that when the counsel realized the mistake, he filed an application dated



16th December 2024 seeking leave for admission of the appeal out of time since the record of appeal had been filed within the required time; that on 6th February 2025, the counsel withdrew the appeal and brought the instant motion.

4. It is further applicant's case that the delay was not deliberate but due to an honest mistake by counsel; that the applicant has been vigilant to ventilate his appeal save for the said procedural hiccup; that the delay of 24 days is not inordinate and was due to honest mistake by counsel; that the application for leave has been made without unreasonable delay; and that granting the leave sought will not prejudice the respondent.
5. On the other hand, respondent's case is that the Application is an abuse of court process for reasons that the judgement was delivered on 5th September 2024 in the presence of the Applicant's counsel; that the Applicant requested for certified copies of proceedings, judgement and decree to enable file an appeal on 9th September 2024 and thereafter filed an appeal on 3rd December 2024; that the Applicant filed this Application before withdrawing the earlier appeal; and that having been aware of the delivery of judgement, the Applicant had no reason for not filing a Memorandum of Appeal within 30 days from the date of judgment. Therefore, the respondent contended that the Application was without merit and ought to be dismissed with costs to the Respondent.

Submissions

6. It was submitted for the applicant that under Rule 18 and 80 of this Court's Procedure Rules, the court is permitted to order extension of time of filing of appeals. It was submitted that the delay was due to a mistake by counsel and the same should not be visited upon the applicant. Further that after the mistake counsel acted with diligence including withdrawing the late appeal number ELRC E032 of 2024 and filed the instant application. Consequently, the court was urged to exercise discretion and grant the leave.
7. For emphasis, reliance was also placed on the case of *Nkorui vs Meru South Farmers Cooperative Society Ltd* (Miscellaneous Application E007 of 2023) [2024] KEELRC 781 (KLR) (12 April 2024) (Ruling).
8. On the other hand, it was submitted for the respondent that no plausible reason was proffered as to why the initial appeal was filed out of time and why the Applicant should now be granted leave to file Memorandum and Record of Appeal out of time.
9. It was further submitted that the application is an afterthought as no plausible reason was proffered as to why it took the applicant five months from the date of the impugned judgment, to file the instant motion yet he was duly represented by counsel.
10. To fortify its case, reliance on the case of *Devki Steel Mills Limited vs Mbai Moki* ELRC Appeal No. 13 of 2015 where the court struck an appeal because it was filed out of time without leave and before withdrawing an earlier appeal before the High Court. Consequently, the court was urged to dismiss the application herein with costs.

Analysis

11. Having considered the Application, the response by the Respondent, and the rival submissions, the issue for determination is whether the Applicant has met the legal threshold for extension of time for filing an appeal.



12. The threshold for the award of leave to appeal out of time was set out in the case of *Nicholas Kiptoo Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR where the Supreme Court held that:

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

13. The Supreme Court went on to enumerate the following principles to guide the Courts when entertaining applications for extension of time:

- i. 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

14. In *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR Odek J, rendered himself as follows with respect to a court faced with a request for extension of time:

“Nevertheless, it ought to be guided by consideration of factors stated 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.”

15. It follows that a party seeking extension of time appeal out of time must to the satisfaction of the Court that a reasonable reason exists for the delay, that there was no undue delay in the filing of the Application and the intended Appeal and that the Respondent shall not suffer prejudice.



Undue delay

16. There is no dispute that the applicant applied for certified copies of proceedings and judgment four days after the impugned judgment and filed his appeal on 28th October 2024. The appeal was late by 24 days and the applicant's counsel has explained that he made an honest mistake on the timelines for filing the memorandum of appeal in the initial appeal. He had filed the record of appeal within the prescribed time only to realize that he had made a mistake by filing the Memorandum of Appeal out of time. He urged the court not punish the applicant for the mistake of counsel.
17. He further argued that the after discovering the blunder, he acted with diligence to remedy the same because the applicant was keen on pursuing the same. He demonstrated how he withdrew the appeal and filed the instant motion within four days. Having considered the explanation given and confirming with the court record, I am satisfied that the instant application and the earlier withdrawn motion for extension was brought without undue delay. The counsel discovered the mistake of the counsel in December 2024 and filed the motion for extension of time but then withdrew it on 6th February 2025 together with appeal and brought the instant motion on 10th February 2025.

Reasonable reason

18. For the court to give extension of time, the applicant must explain the reason for the delay to the satisfaction of the court. In *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) the Court of Appeal defined excusable delay as follows:

“Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party's control.”
19. In the instant case, the Applicant attributed the delay in filing the appeal to the delay by the lower court in the processing of certified copies of the proceedings and judgement and due to a mistake on the part of his counsel to file the Memorandum of Appeal within the stipulated timelines. In deed the Advocate admitted his mistake and brought it to the Court's attention, an indication of his truthfulness.
20. It is a fact that counsel requested for the said documents on 9th September 2024, just 4 days of the date of the judgement. Thereafter he filed a record of appeal and fixed it for directions. This shows the that he was eager to prosecute his appeal were it not for the mistake by his counsel. I am satisfied by the explanation that the delay in filing the memorandum of appeal within the required time was not deliberate but due to an honest mistake by counsel. The said explanation is reasonable and I will not visit the counsel's mistake on his innocent client.

Whether the Respondents will suffer prejudice

21. The Applicant argued that the Respondent stand to suffer no injustice if the Application is granted. The Respondent on the other hand has also not shown that it will suffer any kind of prejudice if the orders are issued; that could not be compensated by way of costs.
22. In view of the reasons highlighted above, I find and hold that the Application has merit and it is allowed on the following terms:
 - i. The appeal shall be filed within 30 days of this ruling.
 - ii. The applicant shall pay the respondent throw-away costs of Kshs 10,000 within 45 days of this ruling.



DATED, SIGNED AND DELIVERED AT NYERI THIS 16TH DAY OF MAY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

