



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njeri (Suing on Behalf of the Estate of Everlyne Nyambura Ndungu)  
v University of Nairobi (Employment and Labour Relations Appeal  
E033 of 2025) [2025] KEELRC 2337 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2337 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**EMPLOYMENT AND LABOUR RELATIONS APPEAL E033 OF 2025**

**JW KELI, J**

**JULY 30, 2025**

**BETWEEN**

**JACQUELINE NJERI (SUING ON BEHALF OF THE ESTATE OF EVERLYNE  
NYAMBURA NDUNGU) ..... APPELLANT**

**AND**

**UNIVERSITY OF NAIROBI ..... RESPONDENT**

**RULING**

1. The Appellant/Applicant vide Notice of Motion application dated the 5<sup>th</sup> of February 2025 brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*; Rule 18 of the Employment and Labour Relations Court (Procedure) Rules and all enabling provisions of law, sought the following orders:-
  - a. That this Honourable court be pleased to grant leave to the applicant to file an appeal out of time against the whole judgement and decree issued by Hon. Aziza Ajwang (SRM) on 3rd December 2024.
  - b. That the Memorandum of Appeal filed herein be deemed properly filed upon grant of leave.
  - c. That this Honourable court be pleased to make such further orders to meet the end of justice.
  - d. That costs of the application be in the appeal.

**Ground of the application**

2. That the Applicant being dissatisfied with the judgement and decree intends to Appeal against the whole judgement rendered by Hon. Aziza Ajwang (SRM) 3/12/2024.



3. That the time allowed to file an appeal has run out and this application has been filed without undue delay.
4. That the intended appeal raises arguable issues with high chances of success.
5. That the Applicant undertakes to prosecute the appeal expeditiously within such time as this Honourable Court may order upon requisite leave being granted.
6. That the Respondent is unlikely to suffer any prejudice.
7. That it is in the interest of justice to allow the instant application.
8. The applicant filed supporting affidavit sworn by her advocate Onenga C. Omongo dated 5<sup>th</sup> February 2025 in which he annexed copies of the impugned judgment, Decree and the memorandum of appeal.
9. The application was opposed by the Respondent through Replying Affidavit sworn by Kenneth K. Sawe on 1<sup>st</sup> April 2025 in which he urged that the application was incompetent for being brought under affidavit of the advocate and not the applicant. That whether the applicant is aggrieved with the judgment or not is a factual matter which cannot be deponed by the applicant's advocate.
10. The applicant filed a supplementary affidavit dated 8<sup>th</sup> April 2025 in response and stated, inter alia that his advocate was conversant with the facts and circumstances of the case, that the trial court in the judgment erroneously computed the late Everlyne's gratuity which issue was not apparent on the face of the judgment.

#### **Determination**

11. The application was canvassed by way of written submissions. Both parties complied.
12. The court identified the issue for determination as follows:-Whether the Court should grant leave to the Intended Appellant to file its appeal out of time against the judgment delivered on 3<sup>rd</sup> December 2024.

#### **The appellant's submissions**

13. The power of this Honourable Court to grant leave to appeal out of time is derived from:- Section 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Rule 18 of the Employment and Labour Court Rules and the inherent jurisdiction of the Court to prevent injustice.
14. The application for extension of time are governed by judicial discretion, which must be exercised judiciously upon consideration of all relevant factors. The Court of Appeal has restated the well-established principles that guide courts when determining applications for extension of time:
  - a) Length of delay - whether the delay is inordinate
  - b) Reasons for delay; whether there are sufficient reasons for the delay
  - c) Chances of success whether the intended appeal raises arguable points.
  - d) Prejudice - the degree of prejudice that each party would suffer
15. These factors are not exhaustive, and the overriding consideration is always the interests of justice. The statutory time for filing an appeal lapsed on 9th January 2025, being 30 days from the judgment date of 3rd December 2024. The present application was filed on 5th February 2025, making the delay 23 days only. The rules do not set out the number of days that may be considered as inordinate. Each case



is to be determined on its own facts, as held in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR in which the Court of Appeal stated as follows:- "The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.". The delay of 23 days is minimal and not inordinate by any standard. The delay was Inadvertent and not deliberate, arising from practical difficulties in obtaining necessary court documents.

16. The Applicant's advocates diligently pursued the matter by:- Persistently following up on obtaining the court's decree from January 2025. Only receiving the decree on 4th February 2025 (see OCO2). Filing the application immediately on 5th February 2025.
17. The judgment delivered on 3rd December 2024 contained computational errors in the gratuity calculation that were not apparent on its face, necessitating scrutiny of the formal decree. That the delay was entirely due to administrative challenges beyond the Applicant's control, (securing the decree) and action was taken immediately upon receipt of the decree.
18. That the intended appeal raises substantial and arguable points of law, specifically:-
  - a) Erroneous computation of gratuity The trial court employed a mode of computation that is "alien and not known in law" (paragraph 4 of supporting affidavit)
  - b) Jurisdictional and procedural errors in the determination of employment benefits
  - c) Substantive rights arising from the specific employment terms and institutional policies applicable during the deceased's tenure
19. The Applicant has prepared a comprehensive Memorandum of Appeal (OCO3) addressing these substantive issues, demonstrating genuine grounds for appeal. The test is not whether the appeal will succeed, but always whether it raises arguable points. 18. The appeal raises substantial and arguable points of law with reasonable prospects of success.
20. No prejudice to the Respondent if leave is granted-The delay of 23 days is minimal and does not affect the Respondent's position. The Respondent's rights to defend the appeal remain fully protected. On the other hand it is evident that severe prejudice will be visited to the Applicant if denied the opportunity to appeal in that:-
  - a) The estate of the deceased will be deprived of rightful benefits due to computational errors.
  - b) Justice requires that substantive rights be protected over procedural technicalities
21. In this case it is evident that the applicant faces irreparable harm while the other suffers minimal prejudice, the scales of justice favour granting the extension. The balance of prejudice heavily favours the Applicant.
22. The overriding objective in civil proceedings is to facilitate the just, expeditious, proportionate and affordable resolution of disputes (Article 159 of *the Constitution* and Section 1A of the *Civil Procedure Act*). The Applicant undertakes to prosecute the appeal expeditiously within such time as this Honourable Court may order upon requisite leave being granted. The comprehensive Memorandum of Appeal has already been prepared, demonstrating readiness to proceed.

### **Respondent's submissions**

23. From the provisions of Rule 12 and 15 of the Employment and Labour Relations Court (Procedure) Rules 2024, the Applicant ought to have filed the Memorandum of Appeal within thirty days from 3rd



December 2024. Thereafter the Applicant had sixty days from 3rd December 2024 to file the Record of Appeal. For the Applicant to file a Memorandum of Appeal, all that was required was the judgment. The Applicant did not require the Decree to file the Memorandum of Appeal. The Applicant has not stated that she did not receive the judgment on 3rd December 2024. Having been in possession of the judgment from 3rd December 2024, nothing stopped the Applicant from filing the Memorandum of Appeal within the thirty days as she waited for the Decree and typed proceedings to file the Record of Appeal.. At paragraph 7 of the Applicant's submissions, the Applicant has submitted that "the statutory time for filing an appeal lapsed on 9th January 2025 being 30 days from the judgment date of 3rd December 2024."

24. However, between 3rd December 2024 and 9th January 2025, no action had been taken by the Applicant as regards the process of lodging an Appeal. No request of any document had been made in Court as at 9th January 2025 when the time for filing the appeal lapsed. 17. Hence the submission at paragraph 11 to the effect that the "delay was inadvertent and not deliberate, arising from practical difficulties in obtaining necessary court documents" is factually incorrect. As at the date that the time for filing the appeal lapsed, no request for any court document had been made in court. In the case of Andrew Kiplagat Chemaringo -Vs- Paul Kipkorir Kibet [2018] eKLR, the court was of the view that: "The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."
25. Having demonstrated that the delay to file the Appeal is not attributable to the "alleged delay in securing a Decree from court", it leads to the inescapable conclusion that the reason for the delay in filing the appeal has not been explained. The excuse tendered by the Applicant for not filing the Appeal on time is that the Applicant was awaiting a copy of the Decree. However, no request for the Decree had been made as at 9th January 2025 when the time for filing the appeal lapsed. The request for the Decree was made five (5) days after the time for filing the appeal had lapsed. No evidence has been adduced on when the letter dated 14th January 2025 was filed in court. It can thus not be concluded with certainty that the request for the Decree was presented in court on 14th January 2025. No plausible reason has been advanced for the delay in filing the appeal. Whereas the period of 23 days may not be termed as inordinate delay, the reasons for the delay have not been satisfactorily explained to the court as required by the law. In the case of Eastleigh Route Sacco Ltd & 2 Others-Vs- Wairimu [2025] KEHHC 7523 (KLR), the High Court declined to allow an appeal to be filed out of time on the ground that the applicants had not given "any plausible explanation on the reasons for the delay." The Respondent urged the court to make an identical finding and dismiss the Applicant's motion.
26. Further, the chances of the Applicant's Appeal succeeding are minimal in that the judgment of the Chief Magistrates Court in CMELRC NO. E886 of 2023-Jacqueline Njeri -Vs - University of Nairobi is in line with the decision of the Employment and Labour Relations Court in ELRC No. E722 of 2022-University of Nairobi -vs- KUDHEIHA & 74 Others and ELRCA No. E047 of 2022-University of Nairobi -Vs- Bernard Nyamai Ileva where the Employment and Labour Relations held that the provisions in the 2013-2017 Collective Bargaining Agreement between the University of Nairobi and KUDHEIHA cannot be applied retrospectively and that the effective date of the 2013-2017 CBA is 1st July 2013. Hence computation of gratuity at the rate of 31% of the basic salary is only applicable with effect from 1st July 2013 and not from 9th March 1979 when the applicable was employed at the Respondent as urged by the Applicant. The issues as captured by the Applicant in the draft Memorandum of Appeal have already been addressed by the Employment and Labour Relations Court in ELRC No. E722 of 2022-University of Nairobi -vs- KUDHEIHA & 74 Others and ELRCA No. E047 of 2022-University of Nairobi -Vs- Bernard Nyamai Ileva. It is the same CBA (2013—



2017 CBA) that was the subject of determination in the aforesaid 2 suits. The Applicant's intended appeal is premised on the interpretation of the 2013-2017 CBA between University of Nairobi and KUDHEIHA which interpretation was given by this Court in ELRC No. E722 of 2022-University of Nairobi -vs- KUDHEIHA & 74 Others. In rendering the judgment in CMELRC No. E886 of 2023, Jacqueline Njeri -Vs- University of Nairobi, the Chief Magistrates Court adhered to the doctrine of judicial precedent by rendering its judgment in line with the judgment of the Employment and Labour Relations Court in ELRC No. E722 of 2022-University of Nairobi -vs KUDHEIHA & 74 Others and ELRCA No. E047 of 2022-University of Nairobi -Vs Bernard Nyamai Ileve. There is thus the need to save scarce judicial time by not allowing the Employment and Labour Relations Court to address an issue that it has already made a determination on.

## Decision

### **Whether the Court should grant leave to the Intended Appellant to file its appeal out of time against the ruling delivered on 20th September 2024.**

27. The Intended Appellant filed a draft Memorandum of Appeal annexed to their Notice of Motion application dated 5<sup>th</sup> February 2025.
28. Section 12 of the Employment and Labour Relations Court (Procedure) Rules 2024 provides that:-
- “(1) Where a written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified under that written law.
- (2) Where an appeal is from a magistrate’s court or where no period of appeal is specified in the written law referred to in subrule (1), the appeal shall be filed within thirty days from the date the decision is delivered.” The condition of 30 days to appeal is also stated in Section 79G of the *Civil Procedure Act* 2010, which provides:-
- “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.” An appeal of the impugned decision should have been filed before the Court within 30 days of the decision.
29. The Intended Appellant justifies their failure to file their appeal in good time by stating that the delay was only 23 days, that there was delay in issuing the Decree, that they had an arguable case on computation of the gratuity which she states was based on unknown law.
30. On other hand the respondent stated that the delay was unjustified as the decree was not necessary for purpose of filing the memorandum of appeal and that the judgment was solid and based on decisions of the court.



31. The jurisdiction of this Court to enlarge time derives from Rule 18 of the Employment and Labour Relations Court (Procedure) Rules 2024 which provides: “The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.”

32. Section 79G of the *Civil Procedure Act* as set out above, which is also applicable, states 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.”

33. It also derives from Order 50 Rule 6 of the Civil Procedure Rules 2010 which provides that:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

34. The above means that the threshold which the Intended Appellant ought to meet is that they must satisfy the court that they had a good and sufficient cause for failing to file the appeal in time; and they must show that the justice of the case favours the extension of time. The court reads this to mean they ought to demonstrate they have an arguable appeal.

35. The Honourable Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & Others [2014] eKLR, considered at length and re – stated the principles which should guide a Court considering an application for leave to extend time. It stated: -

“From the above caselaw, 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.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of 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.”

36. In *Kenya Ports Authority v Silas Obengele Civil Application No Nairobi 297 of 2004* [2006] 2 KLR 112 the Court held that:

“Whereas it is now settled that whenever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted where there was material before the single judge from which he could and did conclude that the delay or the periods of delay...the full bench will not interfere”

37. Applying the factors set out by the Supreme Court in the *Nicholas Salat* case (supra) in relation to this application the delay in the present case spans about 23 days. The court took into account of the period when time does not run as per order 50 of the Civil Procedure Rules to wit:- “When time does not run [Order 50, rule 4.]

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction. “The court finds that the delay was based on lack of decree. This was not a necessity for purpose of filing appeal. The delay was not inordinate nevertheless. In the Court of appeal decision in *Butt -vs Rent Restriction Tribunal (1982) KLR 417* it was held that –“ The discretion should be exercised in such a way as not to prevent an appeal.” The court has considered the memorandum of appeal and noted one of the grounds is that the trial magistrate erred in fact and law in adopting alien mode of computing gratuity not known in law. The court also noted the challenge to the decision on the applicability of the CBA 2013-2017 retrospectively, to which the respondent returned as follows:- ‘c) The chances of the Applicant’s Appeal succeeding are minimal in that the judgment of the Chief Magistrates Court in *C MELRC No. E886 of 2023 Jacqueline Njeri (Suing on behalf of the Estate of Everlyne Nyambura Ndungu)-Vs- University of Nairobi* is in line with the decision of the Employment and Labour Relations Court in *ELRC No. E722 of 2022, University of Nairobi -Vs- KUDHEIHA and ELRCA No. E047 of 2022 Bernard Nyamai Ileve -Vs- University of Nairobi* rendered judgments on 17th November 2023 and 16th November 2023 where the Employment and Labour Relations held that the provisions in the 2013-2017 CBA cannot be applied retrospectively and that the effective date of the 2013-2017 CBA is 1st July 2013. Hence computation of gratuity at the rate of 31% of the basic salary is only applicable with effect from 1st July 2013 and not from 9th March 1979 when the applicable was employed at the Respondent as urged by the Applicant.” The court opines there is an arguable appeal taking in to consideration the ground of appeal that the trial magistrate erred in fact and law in adopting alien mode of computing gratuity not known in law.

38. In the upshot, the applicant is granted leave of 60 days to appeal out of time. The memorandum of appeal is deemed as duly filed. Costs of the application to the respondent.

39. Mention on 17<sup>th</sup> September 2025 to confirm the status of the appeal and issue further directions.

40. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY, 2025.**

**J.W. KELI,**



**JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant/Applicant : - Achila h/b Onenga

Respondent: Omondi

