



**Okomba v Bachulal Popatlal Ltd (Miscellaneous Case E046 of 2025)
[2025] KEELRC 2064 (KLR) (14 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2064 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E046 OF 2025
JK GAKERI & JK GAKERI, JJ
JULY 14, 2025**

BETWEEN

PAULINE ADHIAMBO OKOMBA APPLICANT

AND

BACHULAL POPATLAL LTD RESPONDENT

RULING

1. The Applicant, vide Notice of Motion dated 12th May, 2025 file under Certificate of Urgency and expressed under Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 79 of the [Civil Procedure Act](#) and Rule 18 of the Employment and Labour Relations Court (Procedure) Rules, 2024 sought the following Orders.
 1. Spent.
 2. That the Applicant be granted leave to file an appeal out of time against judgment delivered on the 22nd January, 2025 by Hon. Dickson Onyango, CM, in MCELRC No. E155 of 2024 Pauline Adhiambo Okomba V Bachulal Popatlal Ltd and; or
 3. That the draft Memorandum of Appeal annexed herewith be deemed as duly filed upon the application being allowed.
 4. That the costs of this application be in the cause.
2. The Notice of Motion is based on the grounds set out on its face and the Supporting Affidavit of the Applicant who deposes that the Judgment sought to be appealed against was delivered on 22nd January, 2025 and the delay in filing the appeal was attributable to financial constraints owing to unstable source of income and the resources the applicant had gathered from friends financed the earlier suit whose decision she did not agree with, but could not raise the requisite fees on time and is the sole bread winner of the family and moved to court in earnest after her financial position improved.



3. The applicant deposes that she had previously requested for counsel's advise on legal fees in order to make arrangements to pay the same by instalments and was now ready to lodge the appeal.

Respondent's response

4. The respondent averred that the applicant's financial challenges was not a sufficient cause for delay in filing an appeal and had not demonstrated her financial position with any documentary evidence and the law provided for the lodgement of an appeal as pauper.
5. The affiant stated that the applicant's explanation for the four (4) months delay was insufficient.
6. Finally, the respondent stated that the instant application was misconceived, incompetent and an abuse of the court process and was for dismissal with costs.

Applicant's submissions

7. To buttress his case, counsel for the applicant cited the decision in Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, to urge that extension of time to file an appeal was discretionary and the court is guided by several parameters such as length of delay, reason for the delay, chances of the appeal succeeding, prejudice to the respondent and promptness upon discovery of the delay.
8. Counsel further submitted that as the applicant was unemployed, it took time for her to mobilize resources.
9. Reliance was placed on the decision in Gerald M'Limbine V Joseph Kangangi [200] eKLR where the court recognized financial hardship as a valid explanation for delay where the delay was neither prolonged nor inordinate, to urge that the applicant acted promptly.
10. On arguability of the appeal, counsel submitted that it was arguable as the trial court dismissed the claimants claim for overtime and the respondent did not avail records and the court misinterpreted Section 90 of the *Employment Act* on leave days, overtime and house allowance citing, Stantely Kahoro Mwangi & 2 Others V Kanyamwi Tranding Co. Ltd [2015] eKLR on the test of arguability of an appeal.
11. Counsel urged that the respondent stood to suffer no prejudice that cannot be compensated in money's counted and it was in the interest of justice that the court exercised discretion in favour of the applicant.

Analysis and determination

12. The singular issue for determination is whether the applicant's Notice of Motion is merited.
13. Regulation 18 of the Employment and Labour Relations Court (Procedure) Rules, 2024 confer upon the court discretion to grant leave to a party to file an appeal out of time.
14. The rule provides:
The court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.
15. In this case, the prescribed duration is 30 days from the date the decision was delivered in consonance with the Rule 12(2) of the Rules.
16. Similarly, the proviso to Section 79G of the *Civil Procedure Act* 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.

17. This provision presupposes that the appeal has already been filed and the only thing outstanding is admission. See *Gerald M'Limbine V Joseph Kangagi* (Supra).
18. Finally, Section 95 of the *Civil Procedure Act* provides for enlargement of time in circumstances in which any period is fixed or granted by the court for the doing of any act prescribed or allowed under the Act.
19. The instant application is an invitation to the court to determine whether the applicant has demonstrated a case for the grant of leave to file an appeal out of time.
20. It is trite law that applications of this nature involves the exercise of the court's discretion, which must be exercised judicially.
21. In *Joseph Odide Walome V David Mbadi Akello* [2022] Eklr the court stated as follows:

...It is trite that 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. That discretion however, must be exercised judiciously”.

22. Equally, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi Civil Application No. 255 of 1997* (unreported) the Court of Appeal stated:

It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first length of the delay; secondly, the reason for the delay; thirdly (possibly) chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent is the application is granted”.

23. Finally, in *Nicholas Kiptoo Korir Arap Salat V I.E.B.C & 7 others* [2015] eKLR, the Supreme Court addressed the basis on which a court ought to exercise its discretion in sufficient detail. The court stated that the applicant bears the burden of proof, the decision is dependent on the circumstances of each case, reason for the delay must be explained to the satisfaction of the court, application must be instituted without undue delay and the court is required to consider, if granting the leave prejudices the other party.

See also *Muringa Co. Ltd V Archdiocese of Nairobi Registered Trustees Civil Application No. 190 of 2019* and *Fakir Mohammed V Joseph Mugambi & 2 others* [205] eKLR, *First American Bank of Kenya Ltd V Gulab P Shah & 2 Others* [2002] eKLR, *Thuita Mwangi V Kenya airways Ltd* [2003] eKLR and *Njoroge V Kimani* [2022] KECA 1188 (KLR).

244. As held in *National Union of Mineworkers V Council for Mineral Technology* [1998] 2 ALAC 22, at paragraph 10 cited in *Adrew Kariuki Njoroge V John Paul Maina* (supra), the factors which the court must consider are interrelated and none of them is decisive and it is a matter of fairness to both parties and each case depended on its own facts.



25. As regards length of the delay, in *Andrew Kiplagat Chemaringo V Paul Kipkorir Kibet* [2018] KLR the Court of appeal held 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 the 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 exercised".

26. However, in *Omar Shurie V Marian Rashe Yatar* Civil Application No. 107 of 2020, the Court of Appeal expressed the view that:

...However, a prolonged and inordinate delay is more likely than not to disentitle the applicant leave. Likewise, the reason or reasons for the delay must be plausible".

27. In the instant case, the applicant cites financial inability to lodge the appeal on time and the fact that she was the sole bread winner of the family, and after the judgment was delivered she sought counsel's advice on how much it would cost to lodge an appeal and was notified.

28. Bearing in mind that the judgment sought to be appealed against was rendered on 22nd January, 2025, and the instant application was filed on 20th May, 2025, a delay of three (3) months, the court is satisfied that the delay was neither prolonged nor inordinate, as guided by the Court of Appeal decision in *Omar Shurie V Marian Rashe Yatar* (supra).

29. As regards the reason for the delay in filing the appeal, the court is equally persuaded that the explanation is plausible. Although the applicant did not avail evidence of how much she was earning while in employment until 2022, and how much she was earning as at the date of instructions to counsel. It is not in contest that legal services in Kenya are expensive and an unemployed person may find it challenging to access justice.

30. In sum, the applicant's explanation sounds plausible.

31. Concerning arguability of the appeal, the applicant is challenging refusal by the court to award overtime, leave days and house allowance and the court's application of Section 90 of the *Employment Act*.

32. It is trite law that arguability of an appeal is not tantamount to its success. As long as an appeal raises a matter that is not frivolous and which requires further consideration, it is arguable.

See *Stanley Kang'ethe Kinyanjui V Tony Keter & 5 others* [2013] eKLR, *Commissioner of Customs V Anil Doshi* [2017] eKLR and *Jospeh Gitahi Gachau & another V Pioneer Holdings (A) Ltd & 2 others*, Civil Application No. 124 of 2008.

33. For the foregoing reasons, the court is satisfied that the applicants appeal is arguable.

34. Finally, on prejudice to the respondent, the respondent did not plead that the 3 months delay in filing of the appeal has prejudiced it or it will be prejudiced in any particular manner if the leave sought herein is granted.

35. For the foregoing reasons, it is the finding of the court that the applicant's Notice of Motion dated 12th May, 2025 is merited and is granted in the following terms:

- a. The applicant shall file and serve the Memorandum of Appeal within 7 days, request for typed and certified copies of the proceedings and judgment in MCELRC No. E155 of 2024 and file and serve the Record of Appeal within sixty days.



- b. Mention on 18th September, 2025 to confirm compliance.
- c. Costs shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 14TH DAY OF JULY, 2025.

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

