



Nyakongo v Kenya Forestry Research Institute (KEFRI) (Cause E018 of 2024) [2025] KEELRC 2000 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2000 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E018 OF 2024**

JK GAKERI, J

JULY 3, 2025

BETWEEN

SETH OTIENO NYAKONGO CLAIMANT

AND

KENYA FORESTRY RESEARCH INSTITUTE (KEFRI) RESPONDENT

RULING

1. Before this court is the Applicant's Notice of Motion dated 21st May, 2025 filed under certificate of urgency under Section 1A, 1B, 3, 3A, 79G and 95 of the Civil Procedure Act, Order 50 Rule of the Civil Procedure Rules, 2010, Rule 4 of the Court of Appeal Rules Section 7 of the Court of Appeal Act and Article 48 and 159(2) of the Constitution of Kenya, 2010 seeking Orders that:
 1. Spent.
 2. The Honourable Court be pleased to grant leave to the Applicant hereinto file an appeal out of time against the judgment of this Honourable Court delivered on 4th March, 2025.
 3. Costs of this application be in the cause.
2. The application is premised on the grounds set out on its face and further supported by the affidavit sworn by the applicant on 21st May, 2025.
3. The applicant's case is that he is dissatisfied with the judgment delivered by this court on 4th March, 2025 and intended to appeal the same and did not file a Notice of Appeal as by law required and thus did not appeal in time owing to indisposition and hospitalization and having slightly recovered, instructed counsel to appeal the judgment delivered on 4th March, 2025 but the prescribed duration lapsed and is seeking extension of time and the appeal is meritorious with chances of success.



4. The affiant further deposes that he will be highly prejudice and suffer loss and damage if leave is not granted and in any event the delay was neither intentional nor inordinate and it was interest of justice that leave to be granted.

Respondent's case

5. By a Replying Affidavit sworn on 11th June, 2025, Mr. Phillip M. Kichana deposed that the applicant had not provided sufficient reason(s) for the failure to appeal on time having being aware of the date the judgment was delivered and the evidence of the indisposition related to a pre-existing condition and did not show any hospitalization or incapacitation.
6. The affiant further deposed that since judgment was delivered the claimant had visited the affiant on two occasions following up on payment of the award and costs and the judgment award and costs to the claimant were paid on 11th June, 2025 and the instant application was an afterthought and neither a letter requesting for typed proceedings nor a draft Memorandum of Appeal had been filed and the application ought to be dismissed with costs.
7. By 23rd June, 2025, five (5) after directions on the filing and exchange of submissions were issued, only the respondent had filed submissions.

Respondent's submissions

8. Counsel for the respondent submitted that the court's discretion under Rule 4 of the Court of Appeal Rules to extend time for filing an appeal was subject to the terms of the grant being just as held in [*Fakir Mohamed v Joseph Mugambi & 2 Others*](#) [2005] eKLR where the Court of Appeal was emphatic that:

The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors".

9. Finally, counsel submitted that the claimant did not deny having approached the respondent for payment and did not file anything for the court to consider whether the intended appeal was meritorious and the respondent had already paid the decretal sum.

Counsel contended that there should be an end to litigation.

Analysis and determination

10. The only issue for determination is whether the applicant's notice of motion dated 21st May, 2025 is merited.
11. It is common ground that the applicant sued the respondent in Kisumu ELRC No. E018 of 2024 and the suit was heard on 11th February, 2025 and judgment delivered on 4th March, 2025 in favour of the claimant.
12. It is also not in dispute that on 30th March, 2025 the applicant's counsel filed the Bill of costs dated 3rd March, 2025 and filed a request for certified copies of proceedings vide letter dated 8th April, 2025, more than one (1) month after delivery of the judgment.



13. By this application, the applicant is seeking this court's leave to file an appeal out of time before the Court of Appeal on the ground that the applicant was unwell and hospitalized and could not issue instructions an allegation vociferously contested by the respondent for want of evidence because the document furnished as evidence of the indisposition and hospitalization is a letter dated 5th March, 2025 addressed to 'whoever it may concern' and signed by one Dr. Eugene Nyangire stating that the applicant was on treatment and follow up at the Jaramogi Oginga Odinga Teaching & Referral Hospital (JOOTRH) Orthopaedic outpatient client and medical outpatient clinic for fracture of left Tibiofibular and Hypertension respectively having been involved in an accident in 2013, required surgery and his blood pressure was fluctuating and required monitoring by a physician.
14. The doctor recommended bed rest for 2 weeks and a visit in 3 weeks time.
15. As correctly deposed by Mr. Phillip Kichana in his Replying Affidavit, the letter dated 5th March, 2025 reveals that the applicant had been on medication prior to the instant visit on account of pre-existing conditions, was not admitted in hospital and no incapacitation was noted. Evidently, the applicant took himself to the hospital a day after the judgment and went back home.
16. The letter dated 5th March, 2025 contradicted the applicant's Supporting Affidavit that he was hospitalized. It reveals that the applicant was not truthful as he was not hospitalized and his indisposition could not have prevented him from giving instructions to his advocate to file an appeal against the court's decision. A mere call would have sufficed and if the advocate required a face to face meeting, nothing would have prevented him from visiting the client's home as the bed rest did not bar the applicant from consulting friends and other persons.
17. The provisions of Section 7 of the *Appellate Jurisdiction Act* and section 95 of the *Civil Procedure Act* confer upon the court jurisdiction to extend time for giving notice of intention to appeal from a judgment of the High Court. However, these provisions are reticent on the circumstances in which the court may exercise its discretion favourably to the applicant.
18. Order 50 Rule 6 of the *Civil Procedure Rules* adopts a similar phraseology but for the addition of the requirement that the terms in which the enlargement of time are given must be just.
19. Notably, Section 79E of the *Civil Procedure Act* relates to appeals from subordinate courts to the Courts of equal status and the *Court of Appeal Rules* 2022 apply to the Court of Appeal and Rule 4 of the Rules confer upon the Court of Appeal discretion to extend time where it is limited by the Rules or a decision of the Court or of a Superior Court.
20. Section 7 of the *Appellate Jurisdiction Act* provides that:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.
21. More significantly, for purposes of the instant application, Rule 4 of the *Court of Appeal Rules* provides that:

The court may, on such terms as may be just, by order, extend time limited by these Rules, or by any decision of the Court or of a Superior Court, for the doing of any act authorised or required by these Rules, whether before or after the doing of the act, and in reference in these Rules to any such time shall be construed as reference to that time as extended.



22. It is unclear to this court why the applicant is seeking extension of time to lodge an appeal out of time before this court yet the court to determine whether or not the appeal is properly before it for purposes of hearing and determination is the Court of Appeal, the fact that the law appears to sanction it notwithstanding, and as adverted to elsewhere in this ruling, the Court of Appeal has similar powers under its Rules and which the applicant could have invoked. What if the Court of Appeal would not have extended time in such circumstances, is the court's extension binding upon the Court of Appeal?
23. The foregoing', coupled with the fact that Mr. Philip Kichana confirmed on oath that the applicant had visited him on two occasions following up on the payment of the judgment award and costs and payment was effected on 11th June, 2025, reveals that the applicant's case is fairly weak.
24. The court is being called upon to exercise its discretion.
25. It is trite law that the principle's that govern extension of time to enable a party file an appeal out of time are settled.
26. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1977] eKLR the Court of Appeal stated thus:
- 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 the length of the delay; secondly, the reason for the delay; thirdly, (possibly); the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted."
27. Clearly, the Court of Appeal considers the application in totality and makes a determination.
28. In *Njuguna v Magichu & 7 Others* [2003] KLR 507, Waki JA stated:
- The discretion exercisable under Rule 4 of this court's Rules is unfettered. The main concern of the court is to do justice between the parties.
- Nevertheless, the discretion has to be exercised judicially, that is on sound factual and legal basis".
28. Similarly, in *Karny Zaharya & another v Shalom Levi* Civil Appeal No. 80 of 2018 Koome JA (as she then was) stated *inter alia*
- Some of the considerations to be borne in mind while dealing with an application for extension include the length of the delay... the need to protect a party's opportunity to fully litigate its dispute against the need to ensure timely resolution of disputes; the public interest implicated on the appeal; and whether prima facie the intended appeal has chances of success or is a mere frivolity..."
29. See also *Imperial Bank (Ltd in Receivership) & another v Alnasir Popat & 18 others* [2018] eKLR, and *Abdul Azizi Ngoma v Mungai Mathayo* [1976] KLR 61.
30. Finally, the parameters a court ought to take into consideration in exercise of its discretion were re-emphasized by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independednt Electoral & Boundaries Commission & others* [2014] eKLR.
31. From the foregoing and other sentiments of courts, it is discernible that the most appropriate court to make the determination as to whether or not to extend time for the lodgement of an appeal is the court with jurisdiction to entertain such appeal.



32. In *Hillary Kipruto & others v Dinah Jepkemboi & another* [2024] KECA 607 (KLR), where judgment was delivered on 28th September, 2023 and the application was filed in January 2024, the Court of Appeal declined to exercise discretion in favour of the applicants.
33. In the instant application although the delay is not exceedingly inordinate, the applicant has not provided any sustainable justification for the delay. This is because the alleged indisposition and hospitalization was not demonstrated to have been a bar to giving instructions to the advocate to lodge a notice of appeal or file the appeal.
34. Flowing from the foregoing, it is discernible that the applicant's Notice of Motion dated May 21, 2025 is for dismissal and it is accordingly dismissed.
35. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 3RD 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

