



**Kiriinya v Kariuki & another (Miscellaneous Application
E006 of 2023) [2024] KEELRC 222 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 222 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
MISCELLANEOUS APPLICATION E006 OF 2023
ON MAKAU, J
FEBRUARY 9, 2024**

BETWEEN

PATRICK KIRIINYA CLAIMANT

AND

LAWRENCE KARIUKI 1ST RESPONDENT

**MERU SCHOOL (THROUGH THE BOARD OF MANAGEMENT) 2ND
RESPONDENT**

RULING

1. This Ruling relates to the Applicant’s Chamber Summons Application dated 16th May 2023. It is brought under sections 3A, 75,78,79G and 95 of the [Civil Procedure Act](#) and Order XLII rule 1 (3) of the Civil Procedure Rules. Basically, the Applicant seeks the following orders that:
 - a. Leave to file appeal out of time against the judgement made by the Hon. D.K Njagi Marete delivered on 31st October 2022 in ELRC Cause No. 7 of 2021.
 - b. The cost of this application be provided for.
 - c. Any other orders that meet the ends of justice.
2. The Application is supported by the applicant’s Affidavit sworn on 16th May 2023. In brief, the Applicant’s case is that he was dissatisfied with the Judgement in ELRC Cause No. 7 of 2021(the cause) delivered on 31st October 2021 and he intends to appeal against it. He deposed that the delay was due to the time taken to prepare the typed proceedings and the judgement. He averred that the Court has the power to allow the Applicant to appeal out of time.
3. The Application was opposed by the Respondents through the Affidavit of Lawrence Kariuki Kiwara sworn on 8th June 2023. The Respondents’ case is that, the Court lacks the powers to extend time save for filing of Notice of Appeal; that the applicant has not explained the failure to file notice of appeal;



that the typed proceedings were not a prerequisite for the filing of Notice of Appeal and hence there was no proper explanation for the delay; that the Applicant obtained copy of judgement on 22nd November 2022 and then thereafter wrote a letter dated 10th March 2023 requesting for the proceedings; that the delay to file the Application after receiving the proceedings has also not been explained or supported by a certificate of delay; and that the application ought to have been filed in the main file.

4. The application was canvassed by way of written submissions.

Applicant's submissions

5. The Applicant submitted that as at the time he received the typed proceedings on 10th March 2023 the time for appeal had already lapsed. He submitted that the court has jurisdiction to grant the leave sought by dint of section 7 of the *Appellate Jurisdiction Act*.
6. For emphasis, reliance was placed on the decision of the Supreme Court in the case of *Mombasa County Government v Kenya Ferry Services & Anor* (2019) eKLR. He also relied on *Clemensia Nyanboka Kinaro v Joyce Nyansiaboka Onchomba* [2021] eKLR and *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR to urge the Court to grant the application as no prejudice would be suffered by the Respondent.

Respondents' submissions

7. The Respondents submitted that, the Applicant ought to show good and sufficient cause for the court to grant the leave sought. For emphasis, reliance was placed on the case of *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the discussed the principles for extension of time for filing an appeal.
8. The respondent further submitted that the delay by the Applicant was inordinate as the Application was brought 8 months after the entry of judgement; that a notice of appeal ought to have been filed within 14 days and the record of appeal within 60 days; and that the Application lacks clarity as to whether the same is on notice of appeal or the record. The respondent basically reiterated the averment in its Replying affidavit that the applicant has not demonstrated good and sufficient cause for the failure to file the Notice of Appeal within 14 days. It maintained that the Applicant did not require the copies of the judgement and the proceedings to file the same.
9. The case of *Noah Asanga Okaya v County Assembly of Vihiga & another; (Interested party) County Public Service Board* [2021] eKLR was cited to urge the Court to disregard the Application.
10. Finally, the respondents submitted that the Applicant did not approach the Court with clean hands; that he is guilty of laches and hence not worth of the Court's discretion. In support, reliance was placed on the case of *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 others* [2019] eKLR.

Issues for analysis and determination

11. Having considered the Application, the affidavits and the submissions by the parties, the following issues fall for determination:
 - a. Whether the court has jurisdiction to extend the time for filing an appeal.
 - b. Whether the Applicant's Application meets the threshold for extension of time.
 - c. Whether the Applicant is entitled to the prayers sought.



Jurisdiction

12. The respondent argued that the Court lacked the powers to extend time for filing an appeal in the Court of Appeal, since its power is limited to extending the time for filing a notice of appeal. It further observed that the Applicant has not moved the Court properly under the [Appellate Jurisdiction Act](#) and the Court of Appeal Rules but has invoked [Civil procedure Act](#) which apply to appeals from the Subordinate Courts. I cant agree more with the respondent.
13. The correct law here is Section 7 of the [Appellate Jurisdiction Act](#) which provides as follows:

“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:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”
14. On the other hand, the [Court of Appeal Rules](#) under Rule 4 clarify on the powers of the Court of appeal as follows:

“The Court may, on such terms as it thinks 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.”
15. Section 7 above gives this court with the power to extend the time within which a party can file a notice of appeal. The applicant has not asked the court to exercise that power. Even if the court had the power to grant the leave sought, the appeal cannot be filed without a notice of appeal. Consequently, without any prayer for leave to file a notice of appeal out of time, the application is incompetent and without merits.

The threshold for extension of time

16. Assuming that the application is for leave to file notice of appeal out of time, the applicant must meet certain thresholds. In the case of [Leo Sila Mutiso v Rose Hellen Wangari Mwangi](#), (Civil Application No Nai 255 of 1997) (unreported) the Court of Appeal expressed itself as follows:

“It is now well 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”.
17. More recently, the Supreme Court in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR established the principles to guide the Courts when entertaining applications for extension of time as follows:



- 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.”
18. In a nutshell, where a party wishes for the Court to exercise its discretion in such matters, it ought to prove to the satisfaction of the Court that; that an excusable reason exists for the delay, that there was no undue delay in the filing of the Application and that the Respondent shall not suffer prejudice.
 19. The Applicant told the Court that the reason for delay in filing of the Notice of Appeal was due to the delay in the acquisition of typed proceedings and judgement of the Court. I find the said explanation to be inexcusable because he did not need copies of the typed proceedings to lodge an appeal. He was represented in court when the impugned judgment was delivered and all that he needed to do to initiate appeal process was to file a Notice of Appeal. Typed proceedings and certified copy of the judgment are requested thereafter. However, he chose to sit pretty and let time pass without taking any action.
 20. The Court in *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) 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.”
 21. In the instant case, the delay in filing a notice of appeal was not beyond the applicant’s control. Although he alleged that the file delayed in Nyeri after delivery of the judgment, there is no such evidence tendered to support that allegation.
 22. Even assuming that the court file was not available in Meru and that the typed proceedings and the judgement were only supplied on 10th March 2023, the applicant has not explained why he delayed the filing of the application until 16th May 2023. In the circumstances, the delay of 2 months after the supply of the proceedings was undue delay.
 23. Without belabouring the point, I am satisfied that the Applicant has not demonstrated any reasonable cause for the failure to file a notice of appeal within the statutory period. I also find that the application has been made after an undue delay.

Conclusion

24. I have found that the application is incompetent for seeking orders which are beyond the jurisdiction of this court. The application is also brought under the wrong provisions of the law. I have further found that, even if the applicant intended to seek leave to file notice of appeal out of time, the application



does not meet the threshold for enlarging the time for filing a notice of appeal. For the foregoing, I find that the Application lacks merit and dismiss it with costs to the Respondents.

25. As a parting shot, I agree with the respondent that, the application herein ought to have been filed in the primary suit and not as a miscellaneous application. This trend of opening miscellaneous files when there is still a primary file must cease forthwith.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF FEBRUARY, 2024.

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

