



**Adino & another v Mlongo (Miscellaneous Cause E092 of 2024)
[2024] KEELRC 2657 (KLR) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2657 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CAUSE E092 OF 2024
NZIOKI WA MAKAU, J
OCTOBER 28, 2024**

BETWEEN

CHRISTINE AKINYI ADINO 1ST APPLICANT

BLOOTEX CO LTD 2ND APPLICANT

AND

BERNARD ODUOR MLONGO RESPONDENT

RULING

1. The Court deferred delivery of a Ruling in respect of the motion dated 23rd August 2024 by the Applicants as the said application was bare. The Respondent seemed to be blasé about the decision to appeal and offered no resistance. Nevertheless, in the interests of justice the Court ordered parties to file submissions. The Respondent did not file any submissions and the Court therefore relies on the submissions by the Applicants in coming to this decision.
2. The Applicants submitted that the motion sought leave to file an appeal out of time. It was indicated that the intended appeal was against the decision of the Siaya Chief Magistrates Court Employment and Labour Relations Court Cause No. E002 of 2024 delivered on 7th June 2024. The Applicants submit their application is premised on 8 grounds on the face of the application which are that, materially the Applicants were not aware when judgment in the trial court was delivered; the delay in filing the appeal within the prescribed time was inadvertently occasioned by an oversight on the part of the Applicants' previous counsel on record; the Applicants' previous counsel failed to lodge an appeal despite the Applicants instructing him to do so; the delay is minimal and not deliberate to obstruct the course of justice; the applicants appeal has high chances of success; the application has been made without unreasonable delay; no prejudice will be suffered by the Respondent if the application is allowed and that it is in the interest of justice to allow the application.



3. The motion was supported by the affidavit sworn by Christine Akinyi, the 1st Applicant herein and Director of the 2nd Applicant Company. The supporting affidavit reiterates the grounds in support of the application and emphasized that the application for leave was filed barely 1 month 2 weeks from the date of judgment in the trial court and that the delay was occasioned by their previous counsel failing to update them and file the appeal within the statutory timelines despite being instructed on time. The Applicants also annexed copy of the instructions email letter to its previous counsel; draft memorandum appeal; letter requesting for typed proceedings and proof of payment of the same among others.
4. The Applicants submit the following are the issues for determination in this application:-
 - a. Whether the Applicants should be granted leave to lodge an appeal out of time
 - b. Which party should bear the costs of the application.
5. As to whether the Applicants should be granted leave to lodge an appeal out of time, the Applicants submit that section 79G of the *Civil Procedure Act* upon which the instant application is anchored provides as follows with respect to time for filing appeals from the subordinate courts:

“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.”
6. It was submitted that further, section 95 of the *Civil Procedure Act* provides for the enlargement of time by stating as follows:“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
7. It was submitted that from a plain reading of the above provisions of the *Civil Procedure Act*, it is evident that this Court is clothed with the jurisdiction to extend time limited for lodging an appeal, as long as the party demonstrates that he had good and sufficient reasons for not lodging the appeal within the prescribed time. It was asserted that judgment in the subordinate court was delivered on 7th June 2024 (though erroneously typed as 11th April 2024 in the annexed copy of the judgment) without the knowledge of the parties as evident in the copy of the judgement. The Applicants submit that upon inquiring the status of the file from their previous counsel of record, M/s Ooro & Company Advocates, the said advocate informed the Applicants on 10th July 2024 that he had been served with the Respondent’s Bill of Costs dated 18th June 2024 slated for assessment on 23rd July 2024 which only meant that judgment in the matter had already been delivered. It was submitted that upon being informed of the judgment, the Applicants on 18th July 2024 instructed their former counsel to lodge an appeal to this instant court via email. It was submitted that however, the said firm of advocates failed to lodge an appeal as a consequence of which there was a breakdown of the Advocate-Client relationship leading to the said firm terminating their services as a result of which the Applicants were constrained to try and secure the services of another firm of Advocates within such limited time that by the time they appointed a new firm to come on record, the period of filing an appeal had already lapsed.
8. The Applicants submit that following the aforesaid breakdown of the Advocate-Client relationship and being dissatisfied with the manner in which the previous counsel handled the matter, they



instructed the firm of M/s Mbeka & Associates Advocates on 22nd August 2024 to take over the conduct of both the primary suit and the intended appeal. The new firm of advocates immediately obtained copies of the pleadings, requested and paid for certified copy of typed proceedings and judgment to facilitate the filing of the instant application and the intended appeal. The Applicants submit they are eager to prosecute their intended appeal as evidence in their draft memorandum of appeal dated 23rd August 2024 which has high chances of success as it seeks to challenge the trial court's decision declaring the Respondent to be unfairly terminating and further seek to set aside the maximum awards granted to the Respondent as compensation for the alleged termination which the Applicants strongly dispute.

9. The applicants contend that the delay for lodging the appeal against the judgment of the trial court was inadvertent and was occasioned by a breakdown in communication between the Applicants and their previous counsel on record. Additionally, there was a resultant break-down of the Advocate-Client relationship with the said firm of Advocates which left the Applicants with no option but to seek and retain the services of another firm to get proper legal advice on the possibility and chances of an appeal by which time the prescribed timelines of lodging the appeal had lapsed by 1 month and 2 weeks only. The Applicants further submitted that the Respondent would suffer no prejudice on account of the application being allowed as the appeal will be determined on merit after hearing both parties to the dispute and substantive justice will prevail. The Applicants submit that the Respondent's concession of the instant appeal affirms the Applicants position that he will not suffer any prejudice.
10. The Applicants cited the decision of the court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR which set out the guiding principles on applications concerning extension of time by stating as follows: "...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.

...we derive the following as the underlying principles that a Court should consider in exercising 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 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. Where there is a reasonable cause for the delay, the same should be expressed to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the Respondents, if extension is granted:
 - i. Whether the application has been brought without delay; and
 - ii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
1. In buttressing their argument, the Applicants cited the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR, where the learned judge relied on Mwangi



v Kenya Airways Limited [2003] KLR in which the court listed the factors that a court should consider before allowing such an application for extension of time. They are;

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted.

12. The Applicants submit that the above reasons and explanation given are sufficient to warrant this Honourable Court to exercise its discretion in their favour. The Applicants submit that they were not aware when judgment in the subordinate court was to be delivered and the same can be gleaned from the copy of the judgment wherein none of the parties were present when the same was delivered. The Applicants cited the case of Patriotic Guards Limited v James Kipchirchir Sambu [2018] eKLR cited with approval the decision of Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR and stated as follows: "From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."
13. The Applicants further cited the decision in Charles N. Ngugi v ASL Credit Limited [2022] eKLR where the court held as follows: "The judgment was delivered on 26th June 2021 while the present application was filed on 10th September 2021, two (2) months after the lapse of the 30 days stay of execution granted by the trial court. The appellant has submitted that the delay was occasioned by his former advocate's failure to act on his instruction. There is however no evidence on record to show that the applicant was not indolent and indeed followed up on the judgment with the registry. Nevertheless, I am inclined to allow the applicant leave to file his intended appeal noting that two (2) months is not inordinate."
14. The Applicants also relied on the authority of Scania East Africa Ltd & 2 Others v Patrick Mutisya Kioko [2022] eKLR which cited with approval the Supreme Court decision in Telkom Kenya Limited v John Ochanda & 996 others [2015] eKLR where the court held that delay of approximately three months is not inordinate considering that no notice was issued to the parties and the same was not disputed by the Respondent. The Applicants submit that the instant application was made without unreasonable delay as we moved with speed upon being instructed by the applicant. As a matter of fact, we have filed and paid for typed proceedings in the matter to enable us file the Record of Appeal within a short period of time as soon as this Honourable Court allows the instant application dated 23rd August 2024. As for the arguability of the appeal, the Applicants submitted that the draft memorandum of appeal outlines 6 arguable grounds of appeal which have high chances of success and that in regards to the degree of prejudice which could be suffered by the Respondent, the Applicants assert they have demonstrated that the Respondent will not suffer any prejudice if the application is allowed as they will participate fully in the appeal as they did in the trial court and the appeal will be determined on merit, as a result of which substantive justice to both parties would have been attained. The Applicants submitted that in their view they have met all the requirements for filing the instant application and it is interest of justice that the Applicants are granted leave to lodge an appeal out of time against the judgment of the subordinate court delivered on 7th June 2024.



15. As to which party should bear costs of the application, the Applicants submit that section 27 of the *Civil Procedure Act* provides that costs follow the event. The Applicants submit that they have satisfied all the requirements in an application for leave to appeal out of time and has demonstrated on a balance of probability that that the application is merited and that it is therefore in the interest of justice that the applicants are granted costs of this application.
16. The Court has considered the pleadings of parties as well as submissions in coming to this decision. The Respondent seemed to be blasé about the decision to appeal and offered no resistance therefore would be disentitled to costs on the motion should the motion fail. The Applicants filed the motion within 2 months of their discerning there was a decision against them. They blame previous counsel for the failure to move timeously. An appellant is required to abide the provisions of Part III of the Employment & Labour Relations Court (Procedure) Rules 2024 particularly Rules 11 to 22. The Civil Procedure Rules cited in aid by the Applicants therefore have no role in relation to appeals before this Court.
17. The Applicants in their quest, sought to implore the Court to grant them leave to file the appeal out of time. Granted the intended appellants seem to have suffered from miscommunication or poor legal services which derailed their effort to file an appeal on time, the Court will grant conditional leave to file an appeal out of time. The Applicants must deposit the entire decretal sum in Court within 14 days of the Ruling failing which the leave granted will automatically lapse. Matter will be mentioned on November 13, 2024 to ascertain whether there is compliance with the Ruling of the Court. There is no order as to costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF OCTOBER 2024

NZIOKI WA MAKAU, MCIARB.

JUDGE

