



Kenya National Private Security Workers Union v James & another (Miscellaneous Case E070 of 2024) [2024] KEELRC 2862 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2862 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E070 OF 2024
JK GAKERI, J
NOVEMBER 20, 2024**

BETWEEN

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION APPLICANT

AND

MCTOUGH JAMES 1ST RESPONDENT

MODERN SECURITY 2ND RESPONDENT

RULING

1. Before the Court for determination is the Applicant's Notice of motion dated 3rd May, 2024 seeking orders that: -
 1. The Honourable be pleased to grant the Applicant leave to lodge an Appeal out of time against the judgment delivered on 3rd May, 2023 by Hon. D. Onyango, CM in Kisumu CMCELRC No.180 of 2020.
 2. The Memorandum of Appeal annexed herewith be admitted and deemed to be properly on record and to have been so filed within the stipulated time.
 3. The costs incidental to this application be costs in the intended appeal.
2. The Notice of Motion is expressed under Section 12(3)(viii) & 20 of the *Employment and Labour Relations Court Act*, provisions of the *Civil Procedure Act*, the Civil Procedure Rules and Article 159 of *the Constitution* of Kenya.
3. The Notice of Motion is based on the grounds set out in its face and the supporting Affidavit of Wycliffe Andiabi who deposes that sometime in February 2024 he visited his advocates office in relation to Kisumu ELRC CASE NO.18 of 2020 to inquire about progress of the case and was informed that the suit was dismissed on 3rd May, 2023 on account of being res judicata and the union office confirmed as much.



4. The deponent deposes that the said judgment was not communicated to him or other grievants and had he been notified earlier, he would have issued instructions on filing of the appeal and the delay in visiting the advocates offices was occasioned by lack of transport and work engagements being a guard and no free time is given at the work place.
5. The affiant deposes that the Respondent stands to suffer no prejudice as they will be accorded time to defend the appeal.
6. The affiant further avers that as the prescribed period of filing an appeal has lapsed leave is necessary to file the appeal which has high chances of success.
7. Finally, the affiant deposes that the mistake of Counsel ought not be visited on the grievants, and the instant application is made in good faith.

Respondents case

8. The Respondent filed Grounds of Opposition dated 13th August, 2024 contending that the Applicant had not provided sufficient cause for failing to lodge an appeal within the timeline provided by Section 79G of the *Civil Procedure Act* and the application is misconceived, vexatious, an afterthought and abuse of the Court process.
9. That the Respondent shall suffer great prejudice if the application allowed. The Respondent prays for dismissal of the application with costs.

Applicant's Submissions

10. The Applicant submits that although judgment was delivered on 3rd May, 2023, the advocate on record did not inform him and as the grievants are employed as guards, their work schedule and financial challenges delayed the filing of the appeal on time.
11. Reliance was made on the sentiments of the Court in Paul Njage Njeru V Karija K. Mugambi [2021] eKLR on the discretionary powers of the Court to extend time and the factors to be considered as enumerated by the Court of Appeal in Omar Shurie V Marian Rashe Yafar, Civil App. No. 107 of 2020, namely; length of delay, reason, chances of the appeal succeeding if application granted and degree of prejudice to the Respondent.
12. The Applicant argues that his advocate is to blame for the delay, appeal has chances of success were high as the case was not determined on merit and res judicata was not pleaded or evidence given and the facts have not been disputed citing Paul Njagi Njeru V Karija Mugambi (Supra) on prejudice. The Claimant submits that the Respondent did not file a Replying Affidavit or plead prejudice if the application is allowed and the grievants will suffer more prejudice if the application is denied.

Respondent's Submissions

13. Reliance was made on the Supreme Court decision in Nicholas Kiptoo Korir Salat V IEBC & 7 Others [2014] eKLR as well as Paul Musili Wambua V Attorney General & 2 Others [2015] eKLR on the principles applicable in the determination of an application for leave to appeal out of time to submit that the delay is inordinate, inexcusable and has not been explained and no evidence was filed to prove the allegations made of having been busy at work and financial challenges.
14. On the alleged Counsel's conduct reliance was made on the decision in Rajesh Rughani V Fifty Investments Ltd & Another [2016] eKLR and Tana & Athi Rivers Development Authority V



Jeremiah Kimigho Mwakio & 3 Others [2015] on the duty of a client to follow up their cases when represented by a Counsel.

15. Counsel urges that the Applicant's carelessness and inactivity was the cause of the delay as the Claimant's case closed on 21st September, 2022 and the Respondent's 30th November, 2022 and the Claimant's officials were indolent and the delay is inordinate and unexplained and the Court was bound to balance competing interests as held in *M/S Portreitz Maternity V James Karanga Kabia Civil Appeal No. 63 of 1997*.
16. Finally, Counsel urges that the intended appeal has low chances of success as per the grounds raised and is not arguable and the Court should award costs to the Respondent.

Analysis and determination

17. It is common ground that the Court has discretion to extend time to enable a party file an appeal out of time. See *Leo Sila Mutiso V Hellen Wangari Mwagi [1997] 2EA 231*.
18. Equally not in contest is the principle that the discretion to extend time must be exercised judiciously and in accordance with established principles of law as set out by the Supreme Court in *Nicholas Kiptoo Korir Arap Salat V IEBC & 7 Others (Supra)* and restated in legions of decisions.
19. These principles include the equitable nature of the relief, burden of proof is borne by the applicant, decision is dependent on the circumstances of each case, reason for the delay be explained to the satisfaction of the Court, prejudice to the Respondent, application brought without undue delay among others.
20. The Supreme Court made no reference to the chances of the appeal succeeding. See also *Muringa Co. Ltd V Archdiocese of Nairobi Registered Trustees Civil Application No. 190 of 2019 Fakir Mohammed V. Joseph Mugambi & 2 Others [2005] eKLR*.
21. On the length of the delay, the Court is guided by the sentiments of the Court of Appeal in *Adrew Kiplagat Chemaringo V Paul Kipkori Kibet [2015] eKLR* that:
22. 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".
23. Similarly, in *Omar Shurie V Marian Rashe Yatar (Supra)* the Court of Appeal stated 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".
24. The delay in the instant application is over one (1) year as judgment was delivered on 3rd May, 2023 and the instant application was filed on 5th July, 2024.
25. The applicant has not contested the delay as it is evidently inordinate.
26. On the reason or reasons for the delay in filing of the appeal, the decisions cited herein above are unambiguous that they must be plausible and satisfactory.
27. Regrettably, the Applicant deposes that the grievants are employed as guards and had neither time nor financial wherewithal to visit their advocate's office.



28. This averment is not supported by any evidence as to where the grievants are employed, how much they earn or where they reside vis-à-vis their former advocates office.
29. Relatedly, no evidence has been adduced to show that attempts to contact the advocate by phone or mail was unsuccessful.
30. If indeed the Claimant's case closed on 21st September, 2022 and the Respondent's on 30th November, 2022, the grievants delay in following up their case has not been explained satisfactorily for the Courts discretionary favour to flow.
31. As held in *Rejesh Rughani V Fifty Investments Ltd & Another (Supra)*, it is the duty of a litigant to show interest in their case by following up for status update.
32. The grievants present themselves as persons who could do nothing before 20th February, 2024 when Mr. Wycliffe Asila visited Counsels office and did not explain how he travelled and from where.
33. Needless to emphasize, an advocate is an agent of the client with authority to perform various duties and his or her failure to perform implicates the principal's liability as *qui facit per alium facit per se* (he who acts through another acts himself).

See *Bains Construction Co. Ltd V. John Mzare Ogowe [2011] eKLR*.
34. Finally, although the Respondent adduce no evidence to demonstrate the prejudice it stands to suffer, the fact that it would be defending a suit concluded more than 11/2 years earlier is prejudicial.
35. As to the chances of the intended appeal succeeding, the Court finds it extremely difficult to assess the chances as neither of the parties availed a copy of the judgment sought to be appealed against.
36. The Memorandum of Appeal dated 3rd May, 2024 per se is insufficient for that purpose.
37. Flowing from the foregoing it is the finding of the Court that the Applicant has failed to discharge the burden of proof to unlock the flow of the Court's discretionary favour.
38. The Applicant's Notice of Motion dated 3rd May, 2024 is for dismissal and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 20TH DAY OF NOVEMBER, 2024.

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

