



Wanjala & another v Agencies (Miscellaneous Application E089 & E090 of 2024 (Consolidated)) [2024] KEELRC 13455 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13455 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E089 & E090 OF 2024 (CONSOLIDATED)
M MBARÚ, J
DECEMBER 16, 2024**

BETWEEN

RENSON MWASI WANJALA 1ST APPLICANT

LAMECK MAYU 2ND APPLICANT

AND

WINYMAN AGENCIES RESPONDENT

RULING

1. Applications in Misc. Appl. No E089 of 2024 and No E090 of 2024 are consolidated as they relate to the same cause of action and respondent.
2. Application under Misc. Appl. E089 of 2024 is the lead file.
3. The applicant filed an application dated 13 August 2024 seeking the following orders;
 1. Spent.
 2. The court is pleased to extend the time and grant leave for the applicant to file an appeal out of time against the whole of the judgment delivered by Hon. M. S. Kimani on 19 June 2024 in Mariakani MCELRC E017 of 2022—Renson Mwasi Mwanjala v Winyman Agencies.
 3. The court be pleased to grant the applicant leave to file a Memorandum of Appeal and serve out of time.
 4. The Memorandum of Appeal annexed hereto be deemed as duly filed upon payment of the requisite fees and thereafter served upon the respondent.
 5. Costs be in the cause.



4. The applicant is supported by the affidavit of Babra Ayieko, the applicant's advocate, on the grounds that the trial court delivered judgment on 19 June 2024 while counsel had been on maternity leave from February 2024 until 3 July 2024. Due to complications, the advocate could only fully return to active practice on 29 July 2024, when she received instructions to file an appeal on 30 July 2024.
5. Ayieko Advocate avers that the applicant has an arguable appeal with high chances of success and will suffer substantial loss if leave to file appeal out of time is not granted.
6. The respondent responded and filed the Replying Affidavit of Gibran Kilambo Mzee, the supervisor, and granted authority to respond herein. He avers that the applicant has always been represented by an advocate. The matter went to full trial at Mariakani Magistrates Court, after which judgment was delivered. The delay in filing this application has yet to be demonstrated. The fact that instruction to file an appeal was issued on 30 July 2024 and something needs to be done indicates that the application herein is filed as an afterthought and should be dismissed with costs.
7. Ms Ayieko also filed a Supplementary Affidavit averring that the advocate attending to this matter while on maternity leave resigned soon after the judgment was delivered and did not take instructions concerning filing an appeal. Immediately after counsel resumed work, instructions were received to file this application.
8. The applicant filed skeleton submissions.
9. Both parties attended and made oral submissions, which are addressed in the findings.
10. The trial court delivered judgment on 19 June 2024.
11. The applicant argues that no appeal was filed because the counsel was on maternity leave from February 2024 to 3 June 2024. Another advocate was attending but resigned immediately, and no appeal was filed.
12. If the judgment was issued on 19 June 2024 and the counsel resumed duty from maternity leave on 3 June 2024, the time from 3 June 2024 to 19 June 2024 needs to be accounted for. Further, from 19 June 2014, when the judgment was delivered, and the attending advocate resigned, the applicant had 30 days to file his appeal as of right under Section 17 of the *Employment and Labour Relations Court Act*.
13. Time to file an appeal lapsed on 31 July 2024 through the application of time under Order 50 of the *Civil Procedure Rules* read together with Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*. No appeal was filed within the required timelines.
14. Within this period, Advocate Ayieko, who had supported the instant application, was back to work. Nothing accounts for this lapse.
15. The draft Memorandum of Appeal is dated 2 August 2024. However, the application seeking more time to file an appeal is dated 13 August 2024. Save to urge the court that counsel was recovering after maternity leave, no substantive reasons are given for the lapse.
16. If the attending advocate resigned, the applicant would have been represented by another advocate instead of Ms Babra Ayieko in these proceedings. Indeed, the applicant has an array of advocates at his disposal.



17. Whether to extend the time to file an appeal out of time is purely discretionary. The court should not act on a whim but on sound judicial principles in exercising discretion. These must be applied judicially as held in *Patrick Maina Mwangi v Waweru Peter* [2015] KEHC 1099 (KLR) that;

An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he explains the default.

18. Fundamentally, the applicant, Renson Mwasi Mwanjala has not filed his affidavit on his circumstances and when he gave instructions to have the appeal filed. He is the right-holder in this case and not his advocate. Such right does not dissipate because he is represented.
19. The applicant does not urge his case at all. It cannot be discerned if indeed he is interested in filing any appeal. The appeal does not relate to the circumstances of his advocate but his.
20. The court is denied crucial material upon which to apply its discretion.
21. Application dated 13 August 2024 is without merit and is hereby dismissed with costs to the respondent.
22. Ruling to apply in Misc. Appl. E090 of 2024.

DELIVERED IN OPEN COURT AT MOMBASA THIS 16 DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

