



**Onyango v Bukuria Schools Limited (Miscellaneous Case E086 of 2024)
[2024] KEELRC 13351 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13351 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CASE E086 OF 2024
JK GAKERI, J
DECEMBER 5, 2024**

BETWEEN

RICHARD ODONGO ONYANGO APPLICANT

AND

BUKURIA SCHOOLS LIMITED RESPONDENT

RULING

1. Before the Court for determination is the Applicant's Notice of Motion dated 19th August, 2024, filed under Certificate of Urgency seeking Orders that;
 1. Spent
 2. The Honourable Court be pleased to grant leave to the Applicant to appeal out of time against the judgment of Hon. Moses O. Obiero (SPM) delivered on 30th April, 2024 in Kehancha ELRC Cause No. E001 OF 2023 Richard Onyango Odungo V Bukuria Schools Ltd.
 3. Costs of this Application be provided for.
2. The Notice of Motion is expressed under Section 1A, 3A, 65, 78 and 79G of the *Civil Procedure Act* and Article 59 of *the Constitution* of Kenya and is based on the grounds set out on its face and the Supporting Affidavit of Mr. Nicodemus Ouma Advocate who deposes that he received instructions on 9th May, 2024 and the Appellant had been indisposed for about one (1) month and had gone to Tanzania to receive treatment and could thus not file and appeal.
3. The Advocate deposes that he applied for typed copy of the proceedings on the same day and received the same in July, 2024 but the time within which an appeal ought to have been filed had lapsed and owing to bereavement of the Advocate handling the matter the appeal could not be filed.



4. The affiant deposes that the Applicant will be greatly prejudiced if the application is dismissed as he is out of employment having been summarily dismissed and the appeal will be rendered nugatory and the Respondent will suffer no prejudice.

Respondent's Case

5. An Affidavit of service filed on 4th September, 2024 shows that the instant application was served on the Respondent's Counsel on 23rd August, 2024 and via WhatsApp No. 0721385459 to an unnamed person.
6. A further Affidavit filed on 18th November, 2024 reveals that a Hearing Notice dated 11th November, 2024 was served on M/s MWITA KERARIO & CO. ADVOCATES on record for the Respondent and the same was received and stamped on 13th November, 2024.
7. Despite service, the Respondent neither responded nor attended the hearing of the Application. It is thus unopposed.

Analysis and determination

8. It is trite that the Court has discretion to extend time for a party to file an appeal out of time as held in *Leo Sila Mutiso V Hellen Wangari Mwangi* [1999] 2E.A. 231 and the discretion must be exercised judicially guided by the principles of law established in legions of decisions.
9. In *Nicholas Kiptoo Korir Arap Salat V I.E.B.C. & 7 others* [2015] eKLR, the Supreme Court addressed the principles in sufficient detail.
10. According to the Court, the relief of extension of time to file an appeal in is of an equitable nature the applicant bears the burden of proof and the decision is dependent on the circumstances of each case; the reason for the delay must be explained to the satisfaction of the Court which must also consider if granting the application prejudices the other party and the application must be brought without undue delay.
11. See *Muringa Co. Ltd V Archdiocese of Nairobi Registered Trustees Civil Application No. 190 of 2019* and *Fakir Mohammed V Joseph Mugambi & 2 Others* [2005] eKLR.
12. Concerning the length of the delay, the Court is guided by the sentiments of the Court of Appeal in *Andrew Kiplagat Chemaringo V Paul Kipkorir Kibet* [2018] eKLR that;

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 exercised".

13. In *Omar Shurie V Marian Rashe Yatar*, Civil Application No.107 of 2020, the Court of Appeal expressed itself as follows;

"...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."

14. In the instant, case judgment was delivered on 30th April, 2024 and the instant application was filed on 20th August, 2024, a delay of about 3 months, which in the Court's view and having regard to the circumstances of this case is neither long nor inordinate.



15. Concerning the reason or reasons cited as the cause of the delay the Advocate stated that he received instructions in May, 2024 and requested for certified typed proceedings on 9th May, 2024 and received them on 31st July, 2024.
16. According to the Advocate, the client had been unwell and travelled to Tanzania to receive treatment.
17. A copy of a letter addressed to the Senior Principal Magistrate, Kehancha Law Courts shows that Counsel acted with reasonable dispatch in preparation for the filing of the appeal, though he could have filed the Memorandum of Appeal earlier pending the typed proceedings.
18. Equally, the fact that counsel received certified typed proceedings demonstrates that the litigant has shown interest in his case as held in *Rajesh Rughani V Fifty Investments Ltd & Another* [2016] eKLR.
19. Similarly, the fact that the Respondent has not Responded to the instant application despite service would appear to suggest that it does not foresee any prejudice in the event the leave sought herein is granted.
2. Flowing from the foregoing, it is the finding of the Court that the Applicant has discharged the burden of proof to unlock the flow of the Court's discretionary favour.
20. The Notice of Motion dated 19th August, 2024 is merited and it is accordingly granted.
21. The Applicant shall file and serve the appeal within 21 days.
22. There shall be no Orders as to Costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 5TH DAY OF DECEMBER, 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

