



REPUBLIC OF KENYA



**KENYA LAW**  
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**Akeno v A.I.C Moi Girls Secondary School Samburu & another (Appeal E002 of 2023) [2023] KEELRC 1275 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1275 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**APPEAL E002 OF 2023**  
**ON MAKAU, J**  
**MAY 25, 2023**

**BETWEEN**

**JANE AKENO ..... APPELLANT**

**AND**

**A.I.C MOI GIRLS SECONDARY SCHOOL SAMBURU ..... 1<sup>ST</sup> RESPONDENT**

**THE BOARD OF MANAGEMENT A.I.C MOI GIRLS SECONDARY SCHOOL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated January 16, 2023 the applicant seeks the following orders:-
  - a. That the appellant herein be granted leave to appeal out of time and the filed appeal be deemed as duly filed with the leave of court.
  - b. That costs of this application to abide the appeal.
2. The respondents have objected to the motion by the Replying Affidavit sworn on April 11, 2023 by Ms.Alice Gituro.
3. The facts of the case are that the applicant was employed by the respondents from 1<sup>st</sup> February 2011 to 31<sup>st</sup> January, 2020 when her employment ended. Thereafter she filed suit No.3 of 2020 at the Chief Magistrate's court at Nanyuki and a judgment was delivered in her favour by Hon.B.M.Mararo on August 10, 2021.
4. By a letter dated August 23, 2021, she applied for certified copies of typed proceedings and judgment but they were not supplied within the period allowed by the law to lodge an appeal. On February 18, 2022 she paid the requisite fees for the proceedings and on April 15, 2022 she wrote a reminder to the court to be supplied with the typed proceedings and judgment.



5. The proceedings were ready on 8<sup>th</sup> June 2022 when they were certified and given to the applicant thereafter. On 31<sup>st</sup> January, 2023 she filed the present motion seeking for leave to appeal out of time. She did not file any certificate of delay from the trial court although she blames the court for delay in lodging her appeal.
6. The respondents admit that the applicant requested for certified copy of typed proceedings and judgment on August 23, 2021 but they see no justification for the failure by the applicant to file her appeal within the required 30 days after the impugned judgment since the law allows for filing of the memorandum of appeal without the typed proceedings. Further, the law allows for amendment of the memorandum of appeal without leave at any time before directions are given under the Rules.
7. The respondents further contend that the application has been filed after an unreasonable delay from the time the typed proceeding and judgment were supplied to the applicant. The said delay lacks concrete reasons and it is therefore inexcusable.
8. The application was also described as an abuse of the court process because the intended appeal is not tenable. In the respondent's view the appeal is an attempt to conduct a retrial of matters which have been fully determined on the basis of the evidence on record. Further, the claim of Kshs.2,000,000.00 being sought in the intended appeal is not only outrageous but also an outright injustice to the school.

### **Analysis and determination**

9. Having carefully considered the application and the rival affidavits, the only issue for determination is whether the court should grant the leave sought by the applicant to lodge an appeal out of time. There is no denial that the applicant applied for certified copies of typed proceedings and judgment within two weeks after delivery of the impugned judgment but the same was not supplied until after the 30 days allowed by the law to lodge an appeal had lapsed.
10. The respondents contend that there was no justification for the failure by the applicant to lodge his memorandum of appeal within the required time since the law allows a party to lodge the memorandum of appeal without the typed proceedings and judgment and then file the same after they are supplied to him by the trial court.
11. The relevant law to consider is rule 8 of the [ELRC Procedure Rules](#) which provides that:-
  - “(1) where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.
  - (2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.
  - (3) A memorandum of appeal shall be in Form 1 set out in the First Schedule with necessary modifications.
  - (4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.



Provided that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.”

12. The above provision permits a party to lodge a memorandum of appeal without the typed proceedings and judgment and then file same within a reasonable time after they are supplied by the trial court. In this case the applicant has not demonstrated why she never filed the Memorandum of Appeal while waiting for the typed proceedings and judgment to be supplied.
13. Besides, after the applicant was supplied with certified copy of the typed proceedings and judgment by the court on February 18, 2022 or after April 15, 2022, (because it is not clear in paragraph 3 of her supporting affidavit), she took no steps towards lodging the appeal by applying for leave. She never filed any certificate from the trial court to confirm that the proceeding were not ready before the time to lodge an appeal lapsed. In fact there is no evidence that after submitting the application letter on 23<sup>rd</sup> August 2021, she made any follow up for the proceeding before the time to file the appeal lapsed.
14. It follows that the failure to lodge an appeal within 30 days as provided under rule 8 of the [ELRC procedure Rules](#) was not justified. Further, the delay in making the instant application for leave to lodge late appeal has not been explained to the satisfaction of the court. From February 18, 2022 when she received the typed proceedings or June 8, 2022 when the proceedings and the judgment were certified to January 31, 2023 when the instant application was filed is 11 and 8 months respectively. The applicant has failed to explain why it took her that time to apply for the leave to appeal out of time.
15. Whereas the court appreciates that the applicant was not represented by a counsel, there is no doubt that the law places equal obligation in all the parties to comply with mandatory procedures in litigation. Deciding otherwise would mean that the rules of procedure would only apply to the litigants who have the benefit of counsel.
16. Having said that, I must hold that no sufficient cause has been demonstrated upon which this court can exercise its discretion in favour of the applicant. The delay in lodging the appeal and indeed the application for leave to appeal out of time, is without explanation and as such unreasonable. Consequently, I reject and dismiss the notice of motion dated January 16, 2023 with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 25TH DAY OF MAY, 2023.**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties 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**

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