



**Midega v Kenya Electricity Generating Company Limited (Petition  
E196 of 2021) [2023] KEELRC 2658 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2658 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E196 OF 2021  
MN NDUMA, J  
OCTOBER 26, 2023**

**BETWEEN**

**JOHN OUMA MIDEGA ..... CLAIMANT**

**AND**

**KENYA ELECTRICITY GENERATING COMPANY LIMITED ... RESPONDENT**

**RULING**

1. Respondent/Applicant filed a Notice of Motion dated 31/5/2023 seeking for an Order that:-
  1. Spent
  2. This Honourable Court be pleased to grant the Respondent extension of time for filing the Notice and Memorandum of Appeal against the judgment of Hon. Justice Mathews N. Nduma delivered on 13<sup>th</sup> April, 2023.
  3. The Honourable Court upon the grant of extension of time for filing the Notice and Memorandum of Appeal be pleased to grant an Order that the Notice of Appeal dated 18<sup>th</sup> May, 2023 and filed herein be deemed properly filed within time.
  4. The costs of this Application do abide the outcome of the Application.
2. The application is premised on grounds (a) to (r) set out on the face of the notice of motion and buttressed in the supporting affidavit of George Odhiambo Ominde to wit; that the Court delivered judgment dated 13/4/2023 in favour of the Respondent/Petitioner; that the Respondent had violated Regulation 70(1) (b) of the Public Service Commission Code of Regulations which required a person with disability to retire at the age of 65. On this basis, the Court directed that the petitioner's retirement age should be extended from 60 years to 65 years.



3. That there is a conflicting decision by Hon. Justice Mbaru, in [\*Henry Nyabuto Oyano -vs- Kenya Electricity Generating Company PLC and Another\*](#) (2021) eKLR in which the Court had a different interpretation on application of Regulation 70(1) (b) of the Public Service Commission Code.
4. That the respondent has an arguable appeal based on a legal opinion given to them by their advocates.
5. That failure to lodge the notice of Appeal on time was occasioned by the need to seek comprehensive legal opinion.
6. That the judgment herein raises key legal issues relating to the rights of persons living with disabilities which need to be settled by the Court of Appeal.
7. That the application is not visited by inordinate delay.

### **Replying Affidavit**

8. The application is opposed vide a replying affidavit of the petitioner/respondent.
9. That the applicant has not placed any sufficient justification for extension of time to file an appeal. That indeed the applicant has no arguable appeal to warrant extension of time. That in the event extension of time is granted, the applicant be compelled to provide security for costs of the Appeal in the sum of Kshs.5,000,000.
10. That the Human Resource Manager has already demonstrated disobedience of the Court by failing to ensure all benefits due to the petitioner are accorded to him. That the application lacks merit and it be dismissed.
11. The parties filed written submissions which the Court has carefully considered together with the deposition by the parties.
12. The Respondent's prayer for extension of time for filing the Notice of Appeal out of time is premised on Section 7 of the [\*Appellate jurisdiction Act\*](#) which provides that:-

“7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

13. The Court is guided by the provisions of Section 95 of the [\*Civil Procedure Rules\*](#) in exercise of its discretion to extend time which provides:-

“Enlargement of time

“ 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.”



14. In *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* Nairobi CA No. 255 of 1997 which was affirmed in *Kenya Breweries Limited -vs- Lawrence Ndutu & 6000 Others* [2014] eKLR the Court held:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are:- first the length of the delay; secondly, the reason for the delay; thirdly, possibly the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

15. In the present matter, judgment was delivered on 13<sup>th</sup> April, 2023. The application was filed on 31/5/2023. Ordinarily, an appeal ought to be filed within 30 days. The delay in filing in the present case is by about 17 days. This delay cannot be said to be inordinate.

16. The crux of the matter is whether there is a reasonable explanation for the delay. The applicant states that the delay was occasioned by the need to seek legal opinion from another firm of advocates different from the advocates on record due to existence of a conflicting judgment from a Court of equal jurisdiction as the present one.

17. Seeking an opinion is prudent but by itself not a bar to a party desirous of filing an appeal to file a notice of appeal within the prescribed time. If the Court has to approve this as a justifiable reason for not adhering to a mandatory rule of practice, then it would open floodgates to every litigant with a different opinion from that contained in the judgment not to note the intended appeal timeously while seeking 3<sup>rd</sup> party opinions elsewhere. To me, this is not a sufficient and justifiable reason to hinder a party intending to file an appeal to file a notice of appeal and take other necessary steps to obtain certified copies of the proceedings and judgment of the trial Court.

18. In the present matter, there is no indication from the deposition by the applicant that any steps have been taken to secure certified copies of proceedings and judgment pending the filing of the intended appeal.

19. Furthermore, the decision of the Court relates to the date of retirement of the claimant being a person with disability. The issue being whether the applicant was right to retire the claimant at 60 years of age, instead of at 65 years of age. Time for the implementation of the decision of Court is of essence and the petitioner stands to suffer immense prejudice if the order sought herein is granted by the Court.

20. The applicant in their own words desire the appeal Court to settle the issue which constituted the ratio decidendi of the judgment of the Court having been advised that there is a conflicting decision on the point in a judgment of a Court of concurrent jurisdiction. This desire by the applicant is noble but cannot be pursued at the expense of the petitioner who is entitled to enjoy the fruits of his judgment by being retired at age 65 instead of 60 years.

21. The Court finds that the application lacks bona-fides and merit and is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI VIRTUALLY THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

