



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**MISC. CAUSE NO. E054 OF 2021**

**EDWIN ORINA ATEGE.....APPLICANT**

**VERSUS**

**GEORGE NYARIKI MONDA.....RESPONDENT**

**RULING**

1. Before court is a Notice of Motion application dated 21<sup>st</sup> July, 2021 and filed on 18<sup>th</sup> August, 2021. It is brought pursuant to Section 79G of the Civil Procedure Act, Rule 8(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules and Article 159(2) of the Constitution. The Applicant seeks the following orders:

- a. That this Honourable Court be pleased to extend time within which the Applicant may lodge an appeal against the judgment passed in Kisii Chief Magistrate Employment Cause No. 1 of 2020.
- b. That the attached memorandum of appeal be deemed duly filed and served upon payment of court fees within the prescribed time.
- c. That costs of this application do abide the appeal.

2. The application is supported by grounds on the face thereof and an affidavit sworn by **Herbert Nyamurongi**. The crux of the application, is that the court passed judgment in Kisii Chief Magistrate Employment Cause No. 1 of 2020 on 15<sup>th</sup> June, 2021 and the applicant being aggrieved by the judgment, wishes to lodge an appeal.

3. The Applicant states that time to lodge an appeal lapsed on or about 16<sup>th</sup> July, 2021 and hence the need for extension of time to appeal.

4. **Mr. Herbert Nyamurongi** the Counsel on record for the Applicant deposed that there was innocent oversight on his part to diarize the matter for bring up with a view to timely preparation and lodging of memorandum of appeal. He avers that inadvertent mistake of counsel should not be visited on the Applicant.

5. The Applicant states that allowing this application will afford the him the opportunity to avail himself of his constitutional right to justice through his appeal.

6. The application is opposed vide a Replying Affidavit sworn by **George Nyariki Monda**, the Respondent herein on 28<sup>th</sup> September, 2021 and filed on 29<sup>th</sup> September, 2021.

7. The Respondent's position is that the Applicant has not demonstrated sufficient cause for not filing his appeal within stipulated time. He further avers that the application herein is a fishing expedition.

8. The Respondent asserts that the application is only meant to frustrate his enjoyment of the fruits of the fair judgment, and further that the application does not portray any merit to justify the reopening of the case.

9. Parties sought to canvass the application through written submissions. Each party filed their submissions and which have been duly considered.

**Determination.**

10. I have considered the application and the submissions of the parties. The issue to be determined, is whether the court should extend time to allow the Applicant to lodge an appeal outside the time prescribed by law.

11. As correctly submitted by the Respondent, Order 50 Rule 6 of the Civil Procedure Rules gives the court power to enlarge time and allow a party to file an appeal out of time.

Order 50 Rule 6 Provides thus:

***“where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or summary Notice or by Order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”***

12. The aspects that guide the court in arriving at a decision to allow or disallow such an application are the length of the delay, the reason for the delay, the possible chances of the appeal succeeding if leave is granted and prejudice to the Respondent if the application is granted.

13. The Judgment subject of this application was delivered on the 15<sup>th</sup> June, 2021. The application herein is dated 21<sup>st</sup> July, 2021, but filed before court on the 18<sup>th</sup> August, 2021. The appeal was by law supposed to have been filed on or before 15<sup>th</sup> July, 2021, instead, the application to extend time was filed on 18<sup>th</sup> August, 2021, slightly after a month later than the time prescribed for the appeal.

14. The reason given for not filing the appeal within the prescribed time, is ***innocent oversight on the part of counsel to diarize the matter for bring up with a view to timely preparation and lodging of memorandum of appeal.***

15. The court’s power to extend time is discretionary and which discretion must be exercised judiciously. Extension of time is not a right, but an equitable remedy, and a party that seeks this extension, bears the burden of satisfying the court that his application is worthy of the court’s exercise of this discretionary power. (See ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others, SC Application No. 16 of 2014 (2014) eKLR.***)

16. The delay in issue is one month and which is attributed to the mistake of counsel. As submitted by counsel for the Applicant, courts have widely agreed that mistake(s) of counsel should not be visited upon the litigant. The Court of Appeal in the case of ***Lee G. Muthoga v Habib Zurich Finance (K) Limited & Another, Civil Application No. NAI 236 of 2009 held:***

***“It’s a widely accepted principle of law that a litigant should not suffer because of his advocates oversight”***

17. Being guided by the court decisions cited herein, I find and hold that a one-month delay to file an appeal, is not inordinate enough to deprive the Applicant his right to justice.

18. In conclusion, the instant application is allowed as follow:

i. That time is hereby enlarged and/or extended to allow the Applicant lodge an appeal against the judgment passed in ***Kisii Chief Magistrate Employment Cause No. 1 of 2020***, outside the 30 days period prescribed under the law

ii. That the Applicant shall file and serve his appeal within 30 days from the date of this ruling.

iii. That costs of this application shall abide the appeal.

19. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. Kebungo Present for the Applicant

Ms. Moguche present for the Respondent

Christine Omollo-C/A