



**Munyua v Marie Stopes Kenya (Cause 866 of 2015)  
[2022] KEELRC 1353 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1353 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 866 OF 2015  
MA ONYANGO, J  
JULY 14, 2022**

**BETWEEN**

**CHARLES MUNYUA ..... CLAIMANT**

**AND**

**MARIE STOPES KENYA ..... RESPONDENT**

**RULING**

1. Vide notice of motion dated 30<sup>th</sup> June 2020, the Applicant seeks the following orders: -
  - i. Spent.
  - ii. That the Claimant/Applicant be granted leave to appeal out of time against the Judgement of the Hon. Justice Maureen Onyango, delivered online on 29<sup>th</sup> May, 2020, at Nairobi.
  - iii. That the Notice of Appeal annexed hereto be deemed as duly filed and served.
  - iv. That the costs of tills application be provided for.
2. The application is supported by the grounds on the face thereof and the affidavit of Charles Munyua, the Applicant.
3. In a nutshell, it is the Applicant's case that judgment in this suit was fixed for delivery on 26<sup>th</sup> June 2020 but was delivered earlier, on 29<sup>th</sup> May 2020. That his Counsel had no notice of the bringing forward of the date of judgment and therefore did not attend Court.
4. That his Counsel only learned that judgment was delivered earlier than scheduled on 26<sup>th</sup> June 2020.
5. That he was dissatisfied with the judgment and instructed his advocates to appeal against the same but the time for filing notice of appeal had lapsed.



6. That this Court has powers to enlarge the time for appeal. That it was not the Applicant's fault that judgment was delivered in his advocate's absence.
7. The Applicant states that the Respondent will not suffer any prejudice should the application be granted. That he filed this application without undue delay and the same should be allowed in the interest of justice.
8. The Respondent opposed the application through the replying affidavit of Elizabeth Munyefu, its Director, People and Development, who deposes that the Applicant had since inception of the suit conducted himself inequitably.
9. The Respondent avers that one only needs to peruse the file on the history of this matter to conclude that the applicant has conducted himself inequitably: That:
  - i. At the inception the applicant upon filing this suit made an application for the judgment on admission for which the Respondent was constrained to oppose and the same was dismissed with costs on the 21<sup>st</sup> September, 2015.
  - ii. Consequently, the matter was fixed for Hearing and on the 29<sup>th</sup> October, 2018 the Court dismissed the same on account of non-attendance on the part of the applicant.
  - iii. Arising from such dismissal, the applicant made another application to set aside the dismissal order. The Respondent was called upon again to respond to an application to set aside the dismissal.
  - iv. The suit was as a consequence to the setting aside of the dismissal set down on merits.
  - v. Arising from the hearing, the Honourable Court dismissed the applicant's case by its judgment delivered on the 29<sup>th</sup> May, 2020.
  - vi. The respondent proceeded to close its books of accounts and now it is confronted with a situation where it once more has to make provisions for a running litigation, a situation that is not good for its image with the donors who are funding its operations.
10. That it had taken the Applicant more than one year to prosecute the instant application and the Respondent would be prejudiced should the suit be reopened.
11. That the application ought to have been filed in the Court of Appeal so that the said Court can determine the chances of success of the appeal. The Respondent prays that the application be dismissed.
12. Directions were given that the application be disposed off by way of written submissions. Only the Applicant filed submissions.
13. I have considered the application, the replying affidavit and the submissions of the Applicant. The only issue for determination is whether the Applicant should be granted leave to appeal out of time.
14. The principles for extension of time have been enunciated in several decisions. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR the Supreme Court observed as follows: -
  1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.



2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
  3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
  4. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
  5. Whether there will be any prejudice suffered by the respondent of the extension is granted.
  6. Whether the application has been brought without undue delay; and
  7. Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
15. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR stated;

“Counsel who accepts full responsibility for noncompliance with the time in filing of the record of appeal is the same one who filed the application under consideration without factoring in a prayer for validation for the incompetent notice of appeal seeking for a requisite prayer either to have the notice deemed as properly filed or for a fresh one to be filed. This default is also attributable to his office.

In *Owino Ger vs. Marmanet Forest Co-operative Credit Society Ltd* [1987] eKLR; *CFC Stanbic Limited vs. John Maina Githaiga & another* [2013] eKLR; *Lee G. Muthoga vs. Habib Zurick Finance (K) Ltd & Another* Civil Application No. Nai 236 of 2009, and *Catherine Nioguni Kenya & 2 other vs. Commercial Bank of Africa Ltd* Civil Application No. Nai 366 of 2009, the Court variously declined to visit wrongs committed by advocates and their staff on innocent clients where it had been sufficiently demonstrated that clients were not to blame for such default.

In the circumstances of this application since counsel has taken full responsibility for noncompliance with the rules, it is my view that it would be not only unfair but unjust to pin responsibility on the client for noncompliance and use this as basis for withholding the exercise of discretion in the applicant’s favour. Second, the delay attributed to the applicants’ counsel is one (1) year, two (2) months and seven (7) days from the date of the decision and a period of three (3) months and fourteen (14) days from the date of capacitation with a Certificate of Delay of 8th November 2019 which in my view is far much below the period of time in the George Mwendu case [supra] which necessitated the Court therein to decline the exercise of its discretion in favour of the applicant therein, I find the same excusable.”

16. In *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015] eKLR the Supreme Court held inter alia that:
- i. Rules of procedure are handmaidens of justice;
  - ii. A court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case;
  - iii. The exercise of the jurisdiction under Article 159 of *the Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice;



17. As has been pleaded in the grounds and affidavit of the Applicant in support of the application, the judgment in this suit was delivered earlier than scheduled in the height of the Covid19 Pandemic. At this time there was minimal activity in the Court's due to Covid 19 protocols and the courts therefore had enough time to write and bring forward pending judgments after the Chief Justice had given directions to that effect.
18. It was thus not the fault of the Applicant or his Counsel that they were absent at the time of delivery of judgment. The Respondent has not contested the fact the Applicant did not attend Court on the date of judgment which was probably because he did not expect the judgment to come early and did not receive notice from the Court which was sent to the parties.
19. The application was filed on 30<sup>th</sup> June 2020, only four days from the initial date when the judgment was supposed to be delivered. This was the time that Counsel learned that the judgment had been delivered earlier. The Applicant is therefore not guilty of laches.
20. The Court notes that although the Respondent was present in Court at the time of delivery of judgment in the absence of the Claimant and was aware that the same had been delivered early, it did not bother to inform the Claimant about the same.
21. For the foregoing reasons, I find the application is merited. The Applicant is granted leave to file notice of appeal within 14 days.
22. There shall be no orders for costs of this application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF JULY 2022**

**MAUREEN ONYANGO**

**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> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**MAUREEN ONYANGO**

**JUDGE**

