



REPUBLIC OF KENYA



KENYA LAW
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**Kabiru v Agricultural Society of Kenya (Cause 178 of 2019)
[2022] KEHC 10012 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10012 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 178 OF 2019
NZIOKI WA MAKAU, J
JULY 12, 2022**

BETWEEN

JOHN KABIRU CLAIMANT

AND

AGRICULTURAL SOCIETY OF KENYA RESPONDENT

RULING

1. The respondent/applicant filed a notice of motion application dated March 28, 2022 seeking for orders that this court be pleased to extend time for the respondent/applicant to appeal against the decision and order of this honourable court delivered on September 23, 2021, and for costs of this application to be provided for.
2. The application is premised on the grounds that this court by its decision dismissed the respondent/applicant's application dated May 19, 2021 on grounds that the same had not been paid for yet there was a receipt for payment that had been issued to the respondent's lawyers. The respondents assert that however by the time the respondent/applicant had secured a copy of the ruling, the time within which to seek leave to appeal had since lapsed and that it has solid grounds for seeking an appeal which also has high chances of succeeding. The applicant asserts that the delay in filing this application is therefore neither intended nor inordinate and that the claimant/respondent will not suffer any prejudice if the prayers sought herein are granted. The application is supported by the applicant's advocate's affidavit who avers that there was a breakdown of internet in their offices when the said ruling was being delivered on September 23, 2021 and it was read in their absence. That it was upon perusing the said ruling that they realised the grounds on which the court had dismissed their application and that the respondent/applicant is greatly aggrieved by the said decision as it was not accorded an opportunity to defend itself on the issue of non-payment of court fees before its application was dismissed. He avers that it is thus just and expedient that this court exercises its unfettered discretion and allows the instant application.



3. The claimant/respondent filed a replying affidavit sworn by his advocate Mr George Ogembo who avers that the application herein merely seeks for leave to appeal the said ruling of this court delivered on September 23, 2021 and that the applicant's counsel is not candid with what actually occurred. He states that the respondent/applicant was duly represented by one Mr Chesore before the court proceeded to deliver its ruling and that the records of the court will also confirm the same as the true position. That respondent was therefore aware of the reasons for dismissal of its application on the very day the ruling was delivered and that nothing prevented it to act accordingly and not wait to act half a year later. It is his averment that the respondent is indolent and does not deserve the discretion of the court and that the application herein is an afterthought and meant to clog the wheels of justice. That in any case, the appeal sought to be lodged is frivolous and would only result in delaying the course of justice and that the application should be dismissed with costs to the claimant.

4 **Respondent/Applicant' Submissions**

The applicant submits that order 43 rule 1(3) of the [Civil Procedure Rules](#) asserts that an application for leave to apply under section 75 of the act shall in the first instance lie with the court making the order sought to be appealed from, within 14 days from the date of such order. That however, order 50 rule 6 of the [Civil Procedure Rules](#) give the court powers to enlarge time upon such terms, if any, as the case may require. The respondent submits that in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others](#) [2014] eKLR, the Court laid down the principles for enlargement of time 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 a 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 respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.
5. The respondent submits that it is clear from the foregoing that a party seeking extension of time has to demonstrate three important aspects, namely, reasonable reason for delay to the satisfaction of the court, that no prejudice will be suffered by the respondents, and that the application is brought without undue delay. The applicant submits that it has deponed in the affidavit the delay was not deliberate but that it was as a result of circumstances beyond its control and it could not have made an application for leave to appeal without knowledge of the said decision. It submits that it has further brought this application without undue delay and demonstrated that it was only able to obtain a copy of the ruling of the honourable court on March 10, 2022. It relies on the case of [Vegpro Kenya Limited v Susan Wanja](#) [2017] eKLR where the court quoted the case of [Nicholas Kiptoo Arap Korir](#) (supra) stating that where a procedural infraction causes no injustice by way of injurious prejudice to a person,



such infraction should not have an invalidating effect. The respondent/applicant prays that this court considers the prejudice likely to be occasioned to the applicant and exercise its discretion in allowing the application herein. The applicant further submits that it has produced copies of the invoice, Mpesa payment details and receipt for Kshs 1,475/- all dated May 19, 2021, at pages 7 to 9 of this application to demonstrate that the impugned application subject of the ruling of this court on September 23, 2021, had been paid for at the time of filing contrary to the findings of the court. The respondent submits that it has established that that its intended appeal is based on serious matters that need to be addressed and not frivolous or unrealistic claims. On this submission it relies on the case of *Francis Mwanza Mulwa v Kanji Vagjiani & 2 others* [2018] eKLR, Odunga J quoted the decision in *Sango Bay Estates Ltd and Others v Dresdner Bank AG* [1971] EA 17 that:

“Leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where, as in the present case, the order from which it is sought to appeal was made in the exercise of judicial discretion, a rather stronger case will have to be made out.”

6 Claimant/ Respondent's Submissions

The claimant/respondent submits that the applicant bases its application on the provisions of *Civil Procedure Rules* and not on any provisions of the *Employment and Labour Relations Court (Procedure) Rules* nor the parent act. That comparably, section 17(1) of the *Employment and Labour Relations Court Act* is the operative provision and provides for appeals against decrees and orders emanating from this court, without the distinction found in the *Civil Procedure Rules*. For clarity, section 17(1) provides that appeals from the court shall lie to the Court of Appeal against any judgement, award, order, or decree issued by the court in accordance with article 164(3) of the *Constitution*. That to the extent that the respondent's application is purely premised on a prayer seeking leave to appeal and their written submissions entirely hinged on the said flaw, the entire application is incompetent and an abuse of the court process.

7. It is the claimant's submission that if indeed the applicant was aggrieved with the ruling, it ought to have filed their notice of appeal on or about October 7, 2021. That this court should only rule that the applicant's counsel has violated their cardinal role of assisting the court in achieving the overriding objective of dispensing justice and have instead chosen to deliberately mislead the court in a contemptuous manner. He relies on the case of *Nginyanga Kavole v Mailu Gideon* [2019] eKLR where the court found that the plaintiff was deemed to have been aware of the reasons why the case had been dismissed having been duly represented at the delivery of the judgment was thus under a duty to explain the five months' delay which in the court's opinion was an afterthought. The court went on to find the application unmerited and dismissed the same. The claimant/respondent urges this court to be guided with this said finding as it is on all fours with the circumstances of this case. That the respondent/applicant has previously been guilty of court's non-attendance leading to orders of dismissal on April 21, 2021 and is now guilty of gross indolence seeking to again revive the matter after a whole six months' lull.
8. Indolence is not a virtue. Equity aids the vigilant not the indolent. The respondent/applicant has been indolent in the conduct of these proceedings. Granted that the respondent did not apply the *Employment and Labour Relations Court (Procedure) Rules* 2016, the court is minded that the respondent may not be aware of the same. However, excusing that lapse, the court sees no merit in the motion as the court made the determination on the basis of the material before it and the fact that the respondent/applicant asserts it had paid when no such evidence was before the court is not grounds for the extension of time. There was no payment at the time the court checked the online portal and



this was sufficient for the striking out. application by the respondent/applicant is dismissed with costs to the claimant/respondent. The matter should be fixed for hearing as soon as possible as it continues to clog the justice system by being unconcluded 3 years after filing.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2022

Nzioki wa Makau

JUDGE

