



**Ngeno v The County Assembly of Kericho & another (Petition
E004 of 2021) [2022] KEELRC 1279 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1279 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
PETITION E004 OF 2021
ON MAKAU, J
JULY 7, 2022
IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF
ARTICLE 1(1), 1(3), 2(1), 2(4), 3(1), 10, 23(3), 25(C), 35, 47(1), 50(1) & (2) (B),
165(6), 236, 258(1) & (2) AND 259 (1) OF THE CONSTITUTION OF KENYA 2010.
AND
IN THE MATTER OF SECTIONS 40(2) & (3) OF THE COUNTY GOVERNMENT ACT.
BETWEEN
BARNABAS K. NGENO PETITIONER
AND
THE COUNTY ASSEMBLY OF KERICHO 1ST RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KERICHO 2ND RESPONDENT

RULING

1. This ruling relates to the 2nd Respondent/Applicant's Notice of Motion dated 11th March, 2022 brought pursuant to Article 159(2) of *the Constitution*, section 1A, 1B & 3A of the *Civil Procedure Act*, Order 9 Rule 9 & 10, Order 50 Rule 6 of the *Civil Procedure Rules* and Section 7, 74 and 75 of the *Appellate Jurisdiction Act*, seeking the following Orders;
 - a) Spent.
 - b) Spent.
 - c) That this Honourable Court be pleased to enlarge time so as to allow the 2nd Respondent/Applicant to file an appeal out of time from the judgement delivered on December 21, 2021 in the suit herein.



- d) That the annexed Notice of Appeal be deemed to have been done within time as of the date of filing hereof.
- e) That costs of the Application be in the intended Appeal.
2. This application is based on the grounds that Applicant is aggrieved by the judgement delivered on the December 21, 2021 in favour of the Petitioner and wishes to appeal against the entire judgement and further change its advocates on record; that the delay in filing the appeal is attributed to their previous advocate on record who allegedly failed to promptly act on the instruction given to appeal against the said judgment; and that the Application has been made at the earliest time possible without any unreasonable delay.
3. The application is also supported by the affidavit of Dominic Rono, the Speaker of the County Assembly of Kericho and the Applicant herein. The affidavit reiterates the grounds set out in the Notice of Motion above.
4. The Petitioner has opposed the Application vide the Grounds of Opposition dated March 23, 2022. In brief he states that the Notice of Motion presently before this Court is lacking in substance, an abuse of Court process and ought to be dismissed with costs; that the application is an afterthought and a reaction to the Petitioner's Party and Party Bill of Costs dated January 11, 2022 filed in Kericho ELRC Misc. Application No. E002 of 2022 Barnabas K. Ngeno & Another –vs- The County Assembly of Kericho & Another and scheduled for Ruling on April 6, 2022.
5. The Petitioner further contended that the Judgement in this matter was delivered on December 21, 2021, but the Applicant failed to file and serve a Notice of Appeal within 14 days in accordance with Rule 75 as read together with Rule 77 (1) of the Court of Appeal Rules, 2010; that in addition, the Applicant has not filed or served the Petitioner with any letter requesting for certified copy of proceedings in accordance with the provisions of Rule 82 of the Court of Appeal Rules, 2010; and that the Applicant has not illustrated any good and or sufficient cause for the Court to exercise discretion to extend the time for lodging an Appeal since the allegation that the Applicant's current Counsel was unable to act on instructions to file the appeal before expiry of time is baseless.
6. Again the petitioner contended that the inordinate delay of over 90 days from 21st December 2021 is inexcusable; that there must be an end to litigation and this Court has jurisdiction to exercise its discretion cautiously under Section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya; that the Applicant has not filed any Notice of Change of Advocates or obtained consent after Judgement was delivered on December 21, 2021 as this contravenes the provisions of Order 9 Rule 9 (b) of the Civil Procedure Rules, 2010.
7. Also the Petitioner contended that the Applicant has failed to identify with certainty which law-firm intends to come on record in the place of SMS Advocates LLP; that this Court should disregard the undated supporting Affidavit sworn by Dominic Rono for contravening Section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya; that the Applicant has not met the threshold for enlargement and/or extension of time for filing an appeal as set out by the Supreme Court in Mombasa County Government versus Kenya Ferry Services & another (2019] eKLR; and that the application is misconceived, bad in law and is a gross abuse of the Court's process.
8. The application was disposed of by way of written submission. The Applicant filed his on the May 26, 2022 while the Petitioner filed on the May 31, 2022.



Applicant's Submissions

9. It was submitted for the Applicant that this Court has unfettered discretion to enlarge time within which a party can file their Appeal as provided under Section 95 of the [Civil Procedure Act](#) as read together with Order 50 Rule 6 of the Civil Procedure Rules. It was argued further that Section 7 of the [Appellate Jurisdiction Act](#) expressly donates powers to the High Court and by extension this Court to extend time within which a litigant can appeal the decision of a superior Court.
10. It is the Applicant's submissions that the Court has to consider the issues whether there is reasonable cause for the delay and whether the application has been brought without undue delay before the Court can exercise its discretion and enlarge time to file the appeal.
11. On sufficient cause, it was submitted that the reason for the delay is attributable to the inaction of the Applicant's former Advocates who failed to execute instruction to file Notice of Appeal immediately Judgement was delivered. He cited the case of [Kenya Industrial Estates Limited v Samuel Sand and another](#) [2008] eKLR.
12. On undue delay, it was submitted that the Application herein was filed within a span of 2 months, which delay the Applicant argued is not inordinate. It was further argued that inordinate delay is not merely measured by the number of days or months the delay has occurred but by circumstances of the case. To fortify that view, the Applicant cited the case of [Charo v Mwashetani & 3 others](#) [2014] KLR-SCK.

Respondent's Submissions.

13. The Respondent on the other hand submitted on one the issue being whether the Applicant should be granted more time to file its Appeal. It was argued that the principles which guide this Court on determining whether to enlarge time or not were set out by the Supreme Court in the case of [Mombasa County Government v Kenya Ferry services and another](#) [2019] eKLR.
14. The Respondent submitted that the delay in filing this Application is inordinate considering that the judgement in this matter was delivered on the December 21, 2021 and this Application filed on March 11, 2022 about 90 days later. He contended that the delay has not been explained. For emphasis he relied on the case of [Evans Mungasia Annob v Sierra Flora Limited](#) [2022] eKLR where the Court found a delay of 2 months to be inordinate considering that a Notice of Appeal had not been filed and the explanation given was not satisfactory.
15. The Respondent submitted that the reason given for blaming the advocate cannot suffice because it is the client who is the driver of the litigation and therefore the Applicant was not vigilant and keen in filing the appeal. For emphasis, he cited the case of [Maree Ahmed & Another v Leli Chaka Ndoro](#) [2017] eKLR.
16. It was further submitted that the client having been aware that judgement was delivered ought to have ensured that they filed at the very list, the Notice of Appeal was filed within the 14 days in accordance with the rules. It was then urged that ignorance of the law is no excuse as was held in [Martin Otieno and another v Thomas Mwita Marwa](#) [2021] eKLR
17. For the foregoing reasons, the Respondent prayed for the Application to be dismissed with costs.

Analysis and Determination.

18. Having considered the application, the response thereto and the rival submissions it is a fact that the Applicant did not lodge a Notice of Appeal within 14 days after delivery of the impugned judgment as



required under rule 75 of the [Court of Appeal Rules](#) 2010. The only issue for determination is therefore whether the application herein meets the legal threshold for this Court to enlarge the time for filing an appeal.

19. Section 7 of the [Appellate Jurisdiction Act](#) provides the instances where the High Court can extend time for instituting an appeal as follows: -

“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.”

20. The above provision clearly shows that the High Court and by extension this Court has jurisdiction to extend time required to institute an appeal emanating from it to the Court of Appeal in three instances:

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- a) Giving notice of intention to appeal from the judgement of the Court.
- b) Making an application for leave to appeal.
- c) Certify that a case is fit for an appeal.

21. In [Trimborn Agricultural engineering Limited v David Njoroge Kabaiko and Another](#) (2000) eKLR, Shah J.A. held that:

“The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of Peter Njoroge Mairo vs Francis Gicharu Kariri & another, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of Edward Allan Robinson & 2 others vs Philip Gikaria Muthami, (Civil Application No. Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus: ‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal. (emphasis added)”

22. As illustrated in the case above, the powers donated to the High Court under Section 7 of the [Appellate Jurisdiction Act](#) are clear and limited. This Court can only come to the aid of a litigant who is desirous of filing a Notice of Appeal for the first time after running out of the stipulated timelines. The power to enlarge time is discretionary and must be exercised judiciously. The Applicant must therefore convince the Court that there was good reason for the failure to comply with the timelines.



23. The Principles that guide the Court in the exercise of the discretion to extend time were clearly set out in the Supreme Court decision of *Nicholas Kiptoo Arap Korir Salat -v- IEBC & 7 Others* (2013) eKLR where the court held that:

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

... we derive the following as the underlying principles that a court should consider in exercising such discretion:

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 if the extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petition, public interests should be a consideration for extending time.”

24. The Applicant explained the failure to file the appeal in time to be caused by his former advocate on record who failed to execute the instructions to file the Notice of Appeal. He argued that after Judgement was delivered he immediately instructed his advocate to lodge an appeal but the said advocate failed to do so forcing him to appoint another advocate. However, by the time his new advocate wanted to file the said Notice of Appeal, time within which to lodge the same had lapsed forcing him to make this Application.

25. The Courts have 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 this case the Applicant has not filed any documentary evidence to substantiate the allegation that he indeed instructed his former advocate to appeal immediately the impugned judgment was rendered. He also never applied for typed proceedings to enable him file the intended appeal. There is also no correspondence exhibited to prove that the Applicant made follow-up with the said advocate on the alleged instruction for filing appeal. The Applicant has not even stated what method he used to communicate the instructions to the former advocate.

26. In the circumstances of this case, the Applicant has both the legal and evidential burden of proving that he is innocent but his former advocate is to blame for the failure to execute the instructions to file Notice of Appeal within the required time. He cannot just make mere allegation that he is an innocent litigant without any proof that he indeed instructed the advocate who failed to execute the instructions



as alleged. I am not satisfied with the explanation given by the Applicant for the failure to file the notice of Appeal within the statutory timelines.

27. I have also considered the time taken to make the application herein being 80 days from the date of the impugned judgment. The said delay has not been explained. He has also not told the Court when he decided to change the advocate to enable the Court to consider whether the prolonged delay was caused by the administrative exercise of changing the advocate. Therefore I find and hold that a delay to make the application for 80 days after the impugned judgment without any plausible explanation has rendered the said delay unreasonable.
28. In light of the reasons herein above, the application dated March 11, 2022 is dismissed with costs save for the leave already granted to the applicant to change his advocate.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 7TH DAY OF JULY, 2022.

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 15th 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

