



**University of Nairobi v Wanjiru Njuguna (Miscellaneous Civil Suit
E077 of 2022) [2022] KEELRC 3948 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3948 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CIVIL SUIT E077 OF 2022**

**JK GAKERI, J
SEPTEMBER 22, 2022**

BETWEEN

UNIVERSITY OF NAIROBI APPLICANT

AND

ROISE WANJIRU NJUGUNA RESPONDENT

RULING

1. By a Notice of Motion Application dated May 24, 2022 filed under certificate of urgency, the respondent/applicant seeks orders that:-
 - i. The application be certified urgent.
 - ii. The court grants leave to the applicant to file an appeal out of time against the whole judgement and decree in Nairobi CMEL no 1427 of 2019 delivered on September 10, 2021.
 - iii. The Memorandum of Appeal annexed to the application be deemed to be properly filed upon grant of leave.
 - iv. Costs of the application be in the intended appeal.
2. The application is expressed under sections 1A, 1B and 3A of the *Civil Procedure Act*, order 42, rule 6, order 50 rule 6, order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provisions.
3. The application is supported by the affidavit sworn by Donald B Kipkorir Advocate dated May 24, 2022 who depones that the applicant is aggrieved by the decision of Honourable D M Kivuti in Nairobi CMEL Case no 1427 of 2019 against it rendered on September 10, 2021 and has prepared a memorandum of appeal.
4. It is the applicant's case that the judgement was rendered on September 10, 2021 without any notice to the applicant and thus in the applicant's absence.



5. That the applicant received an incomplete copy of the judgement from the court administrator vide letter dated November 23, 2021 and despite requests, the full judgment was only received on March 11, 2021 by which time the time allowed to file an appeal had lapsed.
6. That the application has been made without undue delay and the respondent has paid the decretal sum to the respondent.
7. Counsel depones that the intended appeal raises triable issues with high chances of success.
8. That the applicant undertakes to lodge the intended appeal expeditiously as directed by the court upon grant of leave.
9. In the Replying Affidavit dated June 2, 2022, counsel for the respondent depones that the application by the respondent is incompetent, non-starter and abuse of the court process and also an exercise in futility and ought to be struck out with costs.
10. It is deponed that the deponent in this application is guilty of non-disclosure.
11. That judgement in this case was delivered onv September 10, 2021.
12. It is further deponed that the appeal referred to by the Applicant arose out of confusion owing to the fact that a number of files in that series had been dismissed and the appeal had been filed mistakenly.
13. That counsel realized that there was an error when he was notified that the matter was coming up for judgement and messages were sent to both parties and the matter was listed on the daily cause list and the claimant was notified of the judgement on September 14, 2021 when the respondents counsel demanded the decretal sum.

Determination

14. The sole issue for determination is whether the respondent/applicant's application for leave to file an appeal out of time is merited.
15. A copy of a judgement on record reveals that Hon D M Kivuti (MR), Principal Magistrate delivered judgment in CMEL no 1427 of 2019 Rose Wanjiru Njuguna V University of Nairobi on September 10, 2021.
16. The court found in favour of the claimant and awarded costs and interest from the date of judgement.
17. It is not in dispute that the respondent has already paid the decretal sum.
18. The respondent/applicant's undated Memorandum of Appeal raises eight (8) grounds of appeal.
 - a. That the learn trial magistrate misdirected himself and erred in law and fact by holding that –
 - i. The appellants applied an erroneous formula in computing gratuity.
 - ii. Interpreting the CBA between the parties as regards payment of 31% yearly back pay.
 - iii. He failed to consider the Memorandum of Understanding dated October 16, 2018 and internal memo dated April 5, 2019.
 - iv. He ignored the appellants submissions and authorities cited.
 - v. He failed to uphold precedent and the doctrine of stare decisis.
 - vi. The impugned judgement contravenes and contradicts established case law.



vii. The tenor of the judgement discloses a corrupt judgement.

19. From the documents on record, it is evident that the judgement was delivered on September 10, 2021.
20. A judgement date was first given on September 14, 2020 but it was not ready on October 16, 2020. It is unclear what transpired on October 23, 2020 or what happened thereafter until the judgement date on September 10, 2021.
21. On November 10, 2021, the applicant's advocate wrote to the executive officer, Chief Magistrate's Court, Milimani, requesting for a copy of the judgement since the respondent/claimant had already lodged an appeal Nairobi ELRC Appeal no 071 of 2020 dated November 3, 2020.
22. Intriguingly, on November 9, 2021, the claimant/respondent proclaimed the applicant/respondent's assets.
23. By letter dated November 23, 2021, the court administrator notified the applicant's advocates that the matter came up for pre-trial on November 21, 2021 and a mention was given on December 18, 2019.
24. That on August 10, 2020, consent was recorded that the matter proceeds by way of documentary evidence, affidavits and submissions.
25. Mention was slated for September 14 and a judgement date was given and judgement was delivered on September 10, 2021.
26. That the suit was not dismissed at any point.
27. The letter attached only 2 pages of the judgement.
28. By letter dated November 25, 2021, the applicant's counsel responded to the court administrator's letter complaining that the trial magistrate had rescheduled judgement from October 16, 2020 to October 23, 2020 and were not notified of the judgement date.
29. From the documents on record, the court is unable to decipher what happened between October 23, 2020 and September 10, 2021 when the judgment was delivered. But one item stands out, the claimant's appeal dated November 3, 2020. What judgement was the claimant appealing against? and why did it take over eleven (11) months to withdraw the appeal?
30. It appears to the court that the claimant's counsel was aware of the judgement date or became aware of it immediately after its delivery.
31. Relatedly, the court took too long to avail the full judgment to the applicant's counsel. A copy was supplied in March, 2022 and the application herein was lodged on May 26, 2022.
32. I will now proceed to examine the law on extension of time for purposes of filing an appeal.
33. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others*, the Supreme Court of Kenya expressed itself as follows;
 - i. "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.
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis.



- iv. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 - v. Whether there will be any prejudice suffered by the respondent if the extension is granted.
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petition, public interest should be a consideration for extending time.”
34. The court is bound by these sentiments.
35. In *Visbva Stones Suppliers Co Ltd v RSR Stone [2006] Ltd* [2020] eKLR, the Court of Appeal applied the foregoing principles and granted leave to the applicant to file a notice of appeal the delay of one (1) year, two (2) months and seven (7) days from the date of the decision and no memorandum of appeal had been annexed to the application notwithstanding.
36. The Court of Appeal *inter alia* emphasized that what matters is whether the appeal is arguable not whether it will succeed.
37. In *Edward Kamau & another v Hannah Mukui Gichuki & another* [2015] eKLR, the court underscored the significance of the right of appeal as follows;
- “The right to appeal, it has been held time and again, is a constitutional right which is the cornerstone of the rule of law. To deny a party that right would in essence be denying them access to justice which is guaranteed under Article 50(1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution. In my view, it has not been shown that the intended appeal is frivolous, or a sham and therefore it is only fair and just that the applicant’s be accorded an opportunity to ventilate their grievances where they are aggrieved by a decision of the lower courts to challenge before a superior court.”
38. Similarly in *Cecilia Wanja Wawira Kerugoya* Civil Appeal no 211 of 2013 [2018] eKLR the court held;
- “There is no set rule to what constitutes inordinate delay whether a party is guilty of inordinate delay depends on the circumstances of the case . . .”
39. Finally, in *Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Co Ltd* [2015] eKLR the court held;
- “A plausible and satisfactory explanation for the delay is the key that unlocks the courts flow of discretionary favour.”
40. The court is guided by these sentiments.
41. In the instance case, there is no dispute that judgement was delivered in the absence of the applicant. It is unclear why after a delay of almost one (1) year, notice of the judgement date was not given. If notice was given, no evidence has been provided.
42. Secondly, the circumstances were further exacerbated by the ‘appeal’ filed by the respondent in November, 2020 which appear to have disorganized the respondent/applicant for a long time.



43. Thirdly, there was unexplained delay in forwarding of the full judgement to the applicant despite requests.
44. Instructively, the applicant has attached a Memorandum of Appeal and it has not been shown that it does not raise triable issues or the intended appeal is frivolous or a sham.
45. For the above stated reasons, the court is satisfied that the applicant has made a satisfactory case for the exercise of the courts discretion in its favour.
46. Consequently, the Notice of Motion application dated May 24, 2022 is merited and is allowed.
47. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER 2022

DR JACOB GAKERI

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 March 15, 2020 and subsequent directions of April 21, 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.

DR JACOB GAKERI

JUDGE

