



Lolwerikoi v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & another (Cause E364 of 2021) [2022] KEELRC 12763 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12763 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E364 OF 2021
JK GAKERI, J
OCTOBER 6, 2022**

BETWEEN

PAUL CLEMENCE LOLWERIKOI CLAIMANT

AND

**CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK &
FISHERIES 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. This is the Respondents Notice of Motion Application dated 16th June, 2022 seeking leave to file a response to the Memorandum of Claim out of time and the same be deemed as duly filed and costs of this application be provided for.
2. The application is expressed under Article 22, 23, 25, 50, 159 and 165 of *the Constitution* of Kenya, 2010, Section 3(c) of the *Judicature Act* and the inherent power of the court and all enabling provisions of the law.
3. The application is supported by the Affidavit of Ernest Kioko Advocate dated 16th June, 2022.
4. The Affiant states that the Office of the Attorney General was served with a Notice of Summons on 24th May, 2021 and the file was allocated to one Ms Leah Odhiambo, Senior State Counsel, Office of the Attorney General, Nairobi, who sought instructions from the Ministry of Agriculture, Livestock and Fisheries by letter dated 13th May, 2021 and the file was returned to the Registry.
5. It is further deponed that the said Ms Leah Odhiambo had since left the office and the matter was inadvertently left out in the handover report and was therefore not re-allocated on time for further action and as a consequence, the respondent did not comply with the Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016. That the error/oversight and



attendant consequences should not be visited upon the Ministry of Agriculture, Livestock and Fisheries and a response has now been drafted.

6. It is the affiant's case that it is in the interest of justice and dignity of the court that the application be allowed as no prejudice will be occasioned to the Claimant.

Applicant/Respondent's submissions

7. Counsel for the applicant submits that the error of the advocate on record ought not be visited upon the client by denying the respondent an opportunity to canvass their defence on merit.
8. The applicant underscores the importance of filing of a defence within 14 days of service but contends that this procedural requirement does not go to the root or substance of the matter and is a mere procedural technicality.
9. It is submitted that the omission is curable under Article 159(2)(d) of *the Constitution* of Kenya, 2010. That regardless of the shortcomings of the defence, the court is obligated by rules of natural justice and Article 50 of *the Constitution* of Kenya, 2010 to hear and determine each case on its merit and a litigant should not be driven out of the seat of justice unheard.
10. The decision in *Martha Wangari Karua v Independent Electoral & Boundaries Commission & others* is relied upon to reinforce the submission.
11. It is the applicant's case that the proposed defence raises triable and important issues for adjudication.
12. Finally, it is submitted the claimant stands to suffer no prejudice if the application is allowed.

Claimant's submissions

13. The Claimant raises four issues for determination, namely; plausibility of the reasons for the delay, prejudice to the Claimant, timing of the application and whether the intended defence raises any triable issues.
14. As regards the reasons relied upon by the applicant, the claimant submits that extension of time is a discretionary power not a right. That the applicant has not attached evidence in support of the reason relied upon, including when the one Ms. Leah Odhiambo left office.
15. The Claimant submits that applicant has no reason for the delay. The decisions in *Beatrice Wairimu Kamuri v John Kibira Muiruri* (2016) eKLR and *Julius Kitbaka Kamau v Waruguru Kithaka Nyaga & 2 others* (2013) eKLR are relied upon to buttress the submission that the applicant is required to provide sufficient reason.
16. The respondent contends that the delay by the applicant was intentional and no plausible reason has been given.
17. Finally, the decision in *Utalii Transport Co. Ltd & 3 others v NIC Bank Ltd & another* (2014) eKLR is cited to urge that the delay herein is excessive.
18. As regards prejudice to the Claimant, it is submitted that the Claimant has invested time and finances in this matter and has complied with the law and allowing the application is an abuse of the rules of natural justice. The decision in *Leo Sila Mutiso v Hellen Wangari Mwangi* (1999) 2 EA 23 is relied upon to highlight the circumstances to be taken into account in exercising the courts discretion.



19. It is urged that if the court grants the orders sought herein, the claimant's right to legitimate expectation shall be infringed.
20. On the timing of the application, it is submitted that time is of the essence.
21. It is submitted that the Applicant was jolted into action by information about the proposed formal proof despite prompt service.
22. It is urged that the applicant has not been vigilant and should therefore not benefit from equitable remedies since the application herein was an afterthought intended to delay the course of justice. The decision in [*Harun Osoro Nyamboki v Peter Mujunga Gathuru*](#) (2019) eKLR is relied upon to reinforce the submission.
23. Finally, on the propriety of the defense, it is submitted that defense consists of mere denials and no attempt has been made to respond to the issues raised.
24. That it does not pin-point nor challenge the issues.
25. It is submitted that defence attached to the application is evasive as observed by the court in [*George P.B. Ogendo v James Nandasa & 4 others*](#) (2006) eKLR.
26. The court is urged to decline the application.

Determination

27. The singular issue for determination is whether the application herein is merited.
28. The Court's power to enlarge time is based on Section 95 of the [*Civil Procedure Act*](#) and Order 50 Rule 6 of the [*Civil Procedure Rules*](#), 2010.
29. In the words of Kemei J. in [*Margaret Njoki Kamau v Reuben Ndivo Mwangi*](#) (2021) eKLR,

“Order 50 Rule 6 provides that where a specific time is fixed for doing an act or taking any proceedings, the court has powers to enlarge such time on terms notwithstanding that the application is brought after the time prescribed has lapsed. The courts power to enlarge time is unfettered. The discretion must however be exercised judiciously and not capriciously.”
30. The Court is bound and guided by these principles.
31. The principles that govern the exercise of discretion to extend time were authoritatively enunciated by the Supreme Court in [*Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others*](#) (2014) eKLR as follows;
 - a. 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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;



- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay.
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
32. In *Harun Osoro Nyamboki v Peter Mujunga Gathuru* (Supra), the court expressed itself as follows;
- “In determining such an application for time extension, the court has to consider whether the explanation given for any delay is reasonable and credible, whether there also exist extenuating circumstances to enable the court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an applicant has been slothful and filed such an application as an afterthought.”
33. The court is guided by these sentiments.
34. It is not in dispute that the Claimant filed the suit herein on 5th May, 2021 and served on 24th May, 2021. The Respondents did not respond to the suit but acknowledge that the suit was assigned to one Ms. Leah Odhiambo, a Senior State Council at the Office of the Attorney General who later left the office. It is unclear when the Counsel left office and why the file was not included in the handover report, possibly an inadvertently, negligently or erroneously.
35. It is not in dispute that the Applicant did not file its defense and other essential documents within the prescribed time and is thus seeking leave to file a defense out of time.
36. Although Article 159(2)(d) of *the Constitution* of Kenya, 2010 enjoins courts and tribunals to administer justice without undue regard to procedural technicalities, the Article does not oust procedural precepts necessary for the efficient and expeditious administration of justice. In any case, it is trite that procedure is the handmaiden of substantive law.
37. Needless to emphasize, the same Article is explicit that “justice shall not be delayed.”
38. These constitutional imperatives are further supplemented by statute law including the provisions of the Employment and Labour Relations Court Act, 2011.
39. The gravamen of the application is that it is in the interest of justice that the application be allowed since the delay though long is not inordinate and a basis has been established why the

Orders sought should be granted.

40. It is the applicant’s case that mistakes of an advocate should not be visited upon the client, the applicant in this case.
41. This position finds support in the sentiments of Apollo JA in *Philip Keipto Chemwolo & another v Augustine Kubende* (1986) eKLR as follows;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit . . . the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The



court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

42. It is the Applicant’s case that after the file was allocated to Ms Leah Odhiambo and she sought instructions from the Ministry of Agriculture, Livestock and Fisheries, the file was returned to the Registry and when Ms Leah Odhiambo left the office, she did not include the file in the handover report. The file was therefore not re-allocated. Evidently, this state of affairs was occasioned by counsel’s failure to include the file in her handover report.
43. Finally, the court is not persuaded that the claimant stands to suffer any prejudice if the application is allowed.
44. In light of the foregoing, the court is satisfied that the mistake or negligence of the advocate to whom the file had been assigned in 2021 should not be visited upon the applicants.
45. Consequently, the Notice of Motion Application dated 16th June, 2022 is merited and is allowed on terms that;
 - a. The Applicants/Respondents have leave to file and serve their response to the statement of claim and all other documents including witness statement(s) within 30 days from the date hereof failing which the suit shall proceed as undefended.
 - b. The 1st Respondent is liable for the costs of this application which shall be in the cause.
 - c. Parties to take a hearing date at the Registry after the 30 days herein above.
46. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF OCTOBER 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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI

JUDGE

