



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MALINDI**

**MISCELLANEOUS APPLICATION NO 1 OF 2020**

**CHENGO KENGA KARISA.....APPLICANT**

**VERSUS**

**GRANCH MALINDI RESORT LIMITED.....RESPONDENT**

**RULING**

1. The current application is brought pursuant to the provisions of the Employment and Labour Relations Court Act and Rules. It is also expressed to be premised on article 159 of the Constitution.
2. By it, the Applicant seeks leave of the court to file an appeal against the decision of Hon. Wasike delivered in Malindi CMC ELRC No. 12 of 2019 out of time. The impugned judgment was delivered on 27<sup>th</sup> November 2019.
3. The application is opposed. The Respondent has filed a replying affidavit dated 22<sup>nd</sup> September 2021.
4. On 29<sup>th</sup> September 2021 the parties agreed to prosecute the application through written submissions. Although the Applicant filed his submissions, the Respondent had not done so as at the time of writing this ruling.
5. The gist of the Applicant's submissions in support of the application is that he was unaware of the court's decision as he was out of reach when it was delivered. He only came to learn of it when he came back to Malindi town on around 19<sup>th</sup> January 2021.
6. The Applicant avers that the reason for his failure to get details of the decision is that he was out of reach having had no access to electricity at his rural home to recharge his phone.
7. The Respondent disputes this reason. In the Respondent's director's view, the Applicant's home area is well served with phone connectivity. Further, the area is connected to the national power grid and anyone without power generates it either through generators or solar panels.
8. It is however to be noted that although the Respondent makes the foregoing averments, it does not address the specific issue of whether the Applicant's home has power connectivity. It is therefore perhaps surprising for the Respondent to aver that the Applicant was merely misleading the court when he asserted that he could not communicate with his lawyer because of inability to power his phone at home due to lack of power.

9. The court takes judicial notice of the high poverty levels in many Kenyan homes that have denied many families access to basic amenities such as electricity and water. This is a matter that cannot just be wished away in the absence of cogent evidence that the Applicant was misleading the court on the issue.

10. The parameters that guide the grant or refusal of an application for leave to appeal out of time were considered in **Leo Sila Mutiso Vs Hellen Wangari Mwangi (1999) 2EA 231**. In the matter the court observed as follows: -

*“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”*

11. In my view, the Applicant has offered a reasonable explanation for the delay in presenting the appeal in time. I have no reason to doubt that the Applicant may have been prevented from getting to know the decision of the trial court because of the reason he has given.

12. From the dispositions in the affidavit by the Applicant, I discern no evidence of deliberate inaction or negligence by him in processing the proposed appeal after judgment was delivered. Although the Respondent’s director avers that the Applicant was indolent, no evidence is given to support this proposition.

13. In **Mutahi Kiharanga v Margaret Wangari Waweru & another [2016] eKLR**, the learned judge suggests that the court in determining such applications must remain alive to the need to advance justice by maintaining *a liberal construction of the motions particularly where there has been no negligence, or inaction or want of bona fides by the proposed appellant*.

14. I note that the application was filed in early February 2021 shortly after the Applicant got to know of the results of his case. And this was not inordinately long after the date of delivery of the judgment. I see no evidence of deliberate inaction on the part of the Applicant.

15. I have as well considered the question of the merits of the proposed appeal. While not pronouncing myself on its merits or otherwise, I note that the main complaints by the Applicant relate to alleged misapprehensions of the law by the trial court resulting in a purported unjust decision. I think that these are critical matters that the Applicant should be given a chance to fully ventilate on appeal.

16. I will therefore exercise my discretion in favour of extending the time within which to file the appeal by 14 days from the date of this ruling. I award costs of the application to the Respondent.

**DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF NOVEMBER, 2021**

**B O M MANANI**

**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> April 2020, this judgment 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.**

**B O M MANANI**

**JUDGE**