



**Chunge v Masinde Muliro University of Science & Technology (Civil Appeal
(Application) E087 of 2021) [2022] KECA 1363 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1363 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E087 OF 2021
F TUIYOTT, JA
DECEMBER 2, 2022**

BETWEEN

CHALRES CHUNGE APPLICANT

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE &
TECHNOLOGY RESPONDENT**

*(Being an application for extension of time to service a notice of appeal
against the Judgment of the Employment & Labour Relations Court at
Kisumu (Radido, J.) Dated 10th March, 2021 in ELRC No. 295 of 2017)*

RULING

1. There is a notice of appeal dated March 28, 2021 and lodged with the Employment and Labour Relations Court (ELRC) Registry at Kisumu on the same date. By a notice of motion dated June 4, 2022, this court is asked to 'validate' the notice of appeal which is filed alongside a record of appeal on May 20, 2021. A second prayer is that time for service of the said notice of appeal be extended.
2. The notice of appeal is a notice of intention by the Prof Charles Chunge, the applicant, to prefer an appeal against the decision of Radido, J delivered on March 10, 2021 in ELRC Cause No 295 of 2017 Prof Charles Chunge – Vs- Masinde Muliro University of Science and Technology.
3. In an affidavit sworn by the applicant on June 4, 2022, he states that, dissatisfied with the judgment of the ELRC, he instructed his advocates, M/s JB Otsiula & Associates Advocates acting alongside M/s Elizabeth Chunge & company advocates to prefer and lodge a notice of appeal against it. In separate letters, both dated March 23, 2021, the advocates forwarded notices of appeal to the ELRC with a request that they be assessed for payment to be made. The notice of appeal sent by M/s JB Otsiula and associates was the one that was eventually lodged in the ELRC and is the subject of the current application. No response came from the deputy registrar of the ELRC and so no payment was



immediately made for the notice. Following the Covid 19 pandemic, physical access to court houses was restricted and it was only on May 15, 2021 that counsel for the applicant travelled to Kisumu and made payment for the notice of appeal.

4. This court is also told that record of appeal has been filed within the time prescribed by the rules of this court but the applicant seeks that the admission and service of the appeal be 'validated'.
5. There is no response to the application. It is unopposed and the depositions in the affidavit in support are uncontroverted.
6. Although various provisions of statute and the *Constitution* are cited as providing a basis for the application, rule 4 of the *Court of Appeal Rules, 2010* (then applicable) suffices. The discretion of the court to extend time given by that rule, though unfettered, is guided by well settled principles. These are; the length of the delay, the reasons for the delay, (possibly) the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No Nai 251 of 1997*.
7. The Covid 19 pandemic caused a countrywide lockdown and restricted physical access to the courts for some time and so the applicant's advocates sent the notice of appeal for filing through electronic mail. The notice, although not paid for, was lodged with the ELRC registry on March 23, 2021, within the 14 days of the decision in keeping with the time prescribed by rule 75 (now rule 77). Because of that action by the applicants' advocates, the timeline for lodging the notice was not breached.
8. It is explained that payment of court fees for the notice could not be made simultaneously with the lodging of the notice as payment had to be done digitally upon assessment of the court fees required. Such was the life during the Covid pandemic lockdown. There was considerable delay from the side of the ELRC in making the assessment and it had to take the personal visit of the advocate on May 10, 2021 for the assessment and subsequent payment to be made.
9. This delay, though somewhat lengthy, is explained and is excusable. And since the respondent has not filed a response to the application, then there is no resistance to the application on the ground that to grant the order would prejudice the respondent.
10. I am inclined to exercise my discretion in favour of the applicant. I allow the notice of motion dated June 4, 2022. The notice of appeal dated March 23, 2021 and lodged on the same day is deemed as duly filed. Time for service of the notice of appeal is extended by 14 days of today. Costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT KISUMU THIS 2ND DAY OF DECEMBER, 2022.

F TUIYOT'

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR.

