

**IN THE COURT OF  
APPEAL AT NYERI**

**(CORAM: ALI-ARONI, J.A. (IN**

**CHAMBERS) CIVIL APPLICATION NO.**

**E156 OF 2025 BETWEEN**

**KIRINYAGA COUNTY PUBLIC SERVICE BOARD.....APPLICANT**

**AND**

**KENYA NATIONAL UNION OF NURSES.....RESPONDENT**

**AND**

**PUBLIC SERVICE COMMISSION ..... INTERESTED  
PARTY**

*(Being an application for an extension of time to file a notice of  
appeal out of time against the Ruling and Order of the Employment  
and Labour Relations Court at Nyeri (Makau, J.) delivered on 26<sup>th</sup>  
July, 2024*

***in***

***Misc. Application No. 1 of 2021)***

**\*\*\*\*\***

**RULING**

1. Before the Court is an application by way of a notice of motion dated 22<sup>nd</sup> October 2025, brought under **section 7** of the Appellate Jurisdiction Act and **rule 4** of the Court of Appeal Rules 2022 (“the Rules”), seeking an extension of time to file an appeal out of time.
2. The application is predicated on the grounds on the face of

the application and the affidavit sworn by **Newton Njenga**, the

applicant's secretary where he deposed that there are two conflicting decisions regarding the same subject matter; a judgment dated 27<sup>th</sup> April 2023 which quashed the decision of the interested party to reinstate nurses and explicitly prohibited the enforcement of that decision and; a ruling dated 26<sup>th</sup> July 2024 which adopted the interested party's decision to reinstate

188 members of the respondent to their previous positions without loss of benefits; that the positions previously occupied by the 188 nurses have already been filled following their lawful termination for absconding duties and participating in an illegal strike and; there are no vacant positions to facilitate the reinstatement ordered by the court in the judgement.

3. It is further deposed that the failure to file the appeal within the required time frame was due to an inadvertent error by counsel, who mistakenly believed that "leave to appeal" was required before filing the appeal and had filed an application for leave at the ELRC on 5<sup>th</sup> August 2024, instead of filing a notice of appeal immediately; that on realizing that appeals to the Court of Appeal are a matter of right under the Constitution, the advocate withdrew the erroneous application; it is averred that the mistake was honest and excusable; the intended appeal has a high likelihood of success as the learned Judge in a latter ruling allowed the enforcement of a decision he had previously prohibited in his earlier judgment of 27<sup>th</sup> April 2023; the learned Judge adopted a decision he had previously found to be tainted

with illegality for failing to consider relevant evidence; the learned Judge failed to assess the practicability of reinstatement given that more than three years had passed

since dismissal and the positions were already filled and further, the reinstatement order violates **section 12(30) (vii)** of the Employment and Labour Relations Court Act regarding the timeline for reinstatement.

4. Further, it is contended that unless the orders sought are granted, grave injustice will be occasioned to the applicant.
5. In response the respondent filed a replying affidavit sworn by its General Secretary, **Seth Ambusini Panyako**, dated 2<sup>nd</sup> December 2025, where he complained that the current application was not served upon the respondent and that its counsel stumbled on it in the CTS portal; that the application is an afterthought, incompetent, lacking in substance, unnecessary, scandalous, vexatious, frivolous, a waste of the Court's time, an abuse of the court process, and a delaying tactic by the applicant to avoid implementing the ruling delivered on 26<sup>th</sup> July 2024.
6. He deposed further, that the applicant has not met the threshold necessary for the granting of the prayer sought; that following the ruling of 26<sup>th</sup> July 2024 granting the applicant a 30-day stay of execution; on 5<sup>th</sup> August 2025, the applicant filed an application seeking a further stay of execution and leave to appeal and when the matter came up for ruling, the applicant changed counsel from Waweru Gatonye & Company Advocates to V.A. Nyamodi & Co Advocates, who orally applied to withdraw the application.

7. Further, that the applicant through the new counsel, filed another application dated 22<sup>nd</sup> November 2024, seeking to stay proceedings in Misc. Application No. 1 of 2021 and for contempt of court against the respondent's officials; the trial court dismissed the application in a ruling dated 22<sup>nd</sup> May 2025; and therefore the applicant's claim that former advocates caused the delay is untrue; the applicant chose to make frivolous applications instead of utilising the time judiciously the new counsel having come on record on 15<sup>th</sup> November 2024; the instant application is impulsive, and triggered by the respondent's judicial review application filed in the trial court.
8. Learned counsel for the applicant filed submissions dated 28<sup>th</sup> November 2025, and urged that the Court to exercise its discretion under **rule 4** of the Court of Appeal Rules to extend the time for filing the intended appeal. In support counsel cited **Thuita Mwangi vs. Kenya Airways Limited [2003] eKLR** and submitted that the applicant has met the threshold necessary and is deserving of the orders sought. Further, he cited **Resia Ene Nasotokini & 3 Others vs. Stephen Ndungi Kinyanjui & Another [2020] eKLR**, urging that an advocate's honest mistake should not be visited upon an innocent litigant. Counsel asserted that they acted diligently and in good faith, and that no prejudice will be occasioned to the respondent if an extension is granted. Counsel further submitted that the intended appeal is not frivolous and raises substantial points of law which are outlined in the application.

9. Learned counsel for the respondent filed submissions dated 2<sup>nd</sup> December 2025, rehashing the contents of the affidavit in reply which I need not repeat. On whether the application is merited, counsel submitted that the power to extend time for filing of an appeal out of time is discretionary and must be exercised judicially. In support of this contention, he relied on the principles set out in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2 E.A.** On the issue of delay, counsel contended that the applicant sat on its right to appeal for 15 months and that, instead of appealing when it had time, the applicant made frivolous applications.
10. On whether the certificate of urgency was merited. The subject is now moot and I need not get into the submissions on the same.
11. I have considered the application, the affidavit in support, the replying affidavit and the rival submissions. The issue for determination is whether the applicant is deserving of the order of extension of time to file its intended appeal out of time.

**Rule 4** of the Rules allows the Court to exercise discretion to extend the time limited by the Rules for doing any act authorized or required.

In **County Government of Mombasa vs. Kooba Kenya Limited (Civil Appeal 130 of 2018) [2019] KECA 221 (KLR)**, the Court relied on the case of **Karny Zaharya & Another vs. Shalom Levi. C. Appl. No. 80 of 2018**, where **Koome, JA** (as she then was) stated:

***“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal.”***

12. In *Dele alias Gazi Mvoi vs. Awadh & Another (Civil Application E166 of 2023) [2024] KECA 723 (KLR) (21 June 2024)* this Court stated as follows; -

***“It is however appreciated that the broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See Philip Chemwolo &***

***Another v Augustine Kubende [1986] KLR  
492; (1982-88) KAR 103. 23. Where it is not***

***shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure.”***

13. It is explained that an application for leave was filed on the mistaken belief that the applicant required leave to file an appeal to this Court. Further, when this became apparent to counsel, the application was withdrawn. I find this explanation is an honest admission of the mistake by counsel. Where a party has the services of counsel, they go by their advice; rarely would a litigant question counsel's move. Yes, indeed, several applications were filed by counsel for the applicant, which, in the respondent's view, were irrelevant and unnecessary; that may be so, but there is also an admission of the withdrawn application showing the intent to appeal. The question that lingers in my mind is whether an honest and acknowledged mistake of counsel should be visited on a litigant, especially where there is no demonstration that the litigant sat idle. I think not. I am of the view that justice of this matter militates in favour of allowing the applicant to ventilate its matter and not to shut the door of justice. This approach has found favour in several of this Court's decision such as:

***Shital Bimal Shah & 2 Others vs. Akiba Bank Limited & 4 Others [2006] KECA 225 (KLR)***, where this Court held; -

*“That leaves the consideration whether the mistake of counsel in this matter is excusable.*

*Such mistakes come in all shapes and sizes, as it were, but some have been rejected by this Court, such as total inaction*

by counsel disguised as a mistake. The most memorable discourse on the subject was again from Madan JA (as he then was) in **Murai v Wainaina (No. 4) 1982 KLR 38:**

*“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”*

**Towett vs. Kibaru & Another (Civil Application E191 of 2025) [2025] KECA 1650 (KLR) (9 October 2025)**, where the

Court held; -

***“Having considered the explanation put forth by the applicant, it is noteworthy that the applicant demonstrated clear intention to prosecute the appeal, as evidenced by the timely filing of the Notice of Appeal on 24th January 2023 and the prompt request for typed proceedings on the same day. The delay in filing and serving the record of appeal was occasioned by inadvertence and negligence on the part of counsel. It is a well-established principle that the mistakes of counsel ought not to be visited upon an innocent litigant who has acted diligently in pursuing his legal remedies.”***

14. From the intended grounds of appeal, which include the

ground that there are two conflicting decisions of the trial court, the intended appeal does not appear frivolous; I also find that it will

be in the best interest of both parties to settle the matter one way or the other. In addition, I find that, the 15-month delay is not inordinate, given the issues proposed for this Court's determination.

15. Based on the findings above, I allow the application and direct that; -

**a. the notice of appeal be filed and served not later than seven (7) days from today's date.**

**b. The record of appeal shall be filed and served within fourteen (14) days from the date of service of the notice of appeal.**

16. Costs of the application will abide by the outcome of the appeal.

**Dated and delivered at Nyeri, this 8<sup>th</sup> day of December, 2025.**

**ALI-ARONI**

.....  
**JUDGE OF APPEAL**

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

*Signed*  
**DEPUTY REGISTRAR**