



**Naburi v County Assembly Servicer Board, Busia County & another (Civil Application E121 of 2023) [2024] KECA 210 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KECA 210 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E121 OF 2023  
HA OMONDI, JA  
FEBRUARY 29, 2024**

**BETWEEN**

**NAMENYA DANIEL NABURI ..... APPLICANT**

**AND**

**COUNTY ASSEMBLY SERVICER BOARD, BUSIA COUNTY ... 1<sup>ST</sup>  
RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

*(Application for extension of time to serve Notice of Appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Bungoma of (J. W. Keli, J.) dated 27th July 2023 in ELRC No. 094 of 2023)*

**RULING**

1. The application dated 28<sup>th</sup> September 2023, made pursuant to rule 4 of the Court of Appeal Rules, 2010 (now 2022), seeks extension of time within which to serve the notice of appeal dated 7<sup>th</sup> August 2023; and that costs be provided for. The application is supported by the affidavit of even date sworn by Frederick Fadey Oundo. The applicant had filed a suit against the respondents in Bungoma ELRC No. 94 of 2021 seeking reliefs following what he described as unlawful termination of his employment; and judgment was entered on 27<sup>th</sup> July 2023 (J. W. Keli, J.), partially allowing the claim.
2. The applicant was aggrieved by the outcome, and instructed Counsel to file an appeal vide a Notice of Appeal dated 7<sup>th</sup> August 2023, which was lodged with the Registrar of the trial court on even date; however, the process server apparently misplaced the said Notice of Appeal without disclosing that fact to the applicant's counsel, and this was only discovered in the course of preparing the record of appeal. A copy of the notice was eventually retrieved from the court file on 20<sup>th</sup> September 2023. As a result of the said misplacement, the time within which to serve the notice lapsed. The applicant explains that



the record of appeal has been substantially prepared, save for certified proceedings which should be ready; and the intended appeal is described as predisposed to a great chance of success.

3. In opposing the application, John Oscar Juma, the 1<sup>st</sup> respondent's advocate by a replying affidavit dated 24<sup>th</sup> October 2023, deposes that the time-frame for filing the application as stipulated under rule 79 of the Court of Appeal Rules 2022, has lapsed; the 1<sup>st</sup> respondent was never served with the said notice, which in any event could have been served electronically; the applicant has not disclosed the identity of the person alluded to as having misplaced the notice, as such is guilty of material non-disclosure, which would assist the court to exercise discretion in its favor; and that this application was filed outside the stipulated directions as given by court.
4. Has the applicant met the prerequisites for granting relief under Rule 4 of the Court of Appeal Rules? I have considered the written submissions by both parties. Rule 4 of the Court of Appeal Rules, 2022, gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. Although under the said rule, this Court has unfettered discretion on whether to extend time or not, that discretion must be exercised judiciously as was set out in *Leo Sila Mutiso vs. Rose Wangari Mwangi Civil Application No. Nai. 255/97* (unreported), which pointed out that this discretion, however, must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment. [See *Julius Kamau Kithaka vs. Waruguru Kithaki & 2 Others* (2013) eKLR].
5. In *Imperial Bank (IR) & Anor vs. Alnashir Popat and Others* [2018] eKLR M'Inoti, J. had this to say concerning Rule 4:

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favor. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”
6. Discretion also depends on circumstances of each case as was discussed in *Mongira & Another vs. Makori & Another* [2005] eKLR. The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat vs. IEBC* [2014] eKLR sets down these principles as follows: -
  - i. Extension of time is not a right to 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 extension of time has the burden of laying basis to the satisfaction of the court.
  - iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
  - iv. Where 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 extension is granted.
  - vi. Whether the application has been brought without undue delay.



vii. Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of Julius Kamau Kitheka (*supra*) is whether *prima facie* the intended Appeal/Appeal has chances of success or is a mere frivolity.

7. The applicant has in the supporting affidavit, tried to explain the reason for the delay in serving the notice of appeal, pegging it to the process server misplacing the notice. Yet as pointed out by the respondent, the applicant has not disclosed the name of said person, and is indeed guilty of material non-disclosure. I would expect as a sign of good faith, not only disclosure of the identity of the person who misplaced the notice; but an accompaniment in the form of the process server's affidavit to that effect.
8. The other issue for consideration is whether there has been inordinate delay. I take note that, the notice should have been served on 14<sup>th</sup> August 2023, whereas this application was filed on 28<sup>th</sup> September 2023. Under rule 79(1) of the *Court of Appeal Rules, 2022* as read together with Rule 77(1) & (2) thereof, service ought to have been effected within seven (7) days from the time of lodging the Notice of Appeal, meaning 36 days had lapsed. In arguing that the delay is not inordinate, the applicant, draws from the case of *Mukabi vs. Mukabi* [2004] eKLR (Onyango-Otieno, J.A), on explanations issued for delay), and *Anastasius H. Kamau vs. Karen Insurance Brokers Limited* [2008] eKLR, where J. Aluoch, JA found that delay of 3 months (90) days was not inordinate; that in any event and without prejudice to the foregoing, from the explanations furnished, the mistake/lapse, if at all, was on the part of the applicant's advocates which should not always lead to dismissal of applications for extension of time. In support of this proposition, reference is made to the case of *Murai vs. Wainaina* (No.4) [1982] KLR 33 (Madan, JA as he then was).
9. Certainly, the period of 36 days would not be described as inordinately long, but the applicant in his submissions now introduces a new angle to the reason for delay, namely the mistake of the advocate, when all along the fault had been blamed on an unnamed process server – why this sudden shift? This creates the impression of one coming to seek equity with a stained hands ... he who seeks equity must do so with clean hands. This renders the explanation given for the delay not only suspect, but unsatisfactory, the applicant is simply clutching to any passing straw!
10. On the issue as to whether or not the Intended Appeal has no chance of success, this Court is conscious of the fact that, it is not the role of a single Judge to determine the merits or otherwise of the Appeal. This Court has held in the case of *Athuman Nasura Juma vs. Afwa Mohammed Ramadhan* ca 227/15:

“...this court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge”.

I must bear this in mind whilst determining the present application, the less said the better.

11. Although the delay is not inordinate, I find that given the non- disclosure of material information, plus the sudden shift as to who was responsible for the delay, which renders the explanation unsatisfactory; I find that the applicant has not demonstrated sufficient reasons to warrant the orders sought, and I hold that the application lacks merit and is dismissed. Costs of the application shall be borne by the applicant

**DATED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF FEB, 2024.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

