



**Governor Nyamira County & another v Ogwora & another (Civil Application E115 of 2023) [2024] KECA 506 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 506 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E115 OF 2023  
HA OMONDI, JA  
APRIL 26, 2024**

**BETWEEN**

**GOVERNOR NYAMIRA COUNTY ..... 1<sup>ST</sup> APPLICANT**

**COUNTY GOVERNMENT OF NYAMIRA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CLIVE NYAANGA OGWORA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF NYAMIRA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to file and serve Notice of Appeal and Record of Appeal out of time, and, for stay of execution pending the hearing and determination of the appeal from the judgment and decree of the Employment and Labour Relations Court at Kisumu (Baari, J.) dated 24th March 2022 in JR No. 10 of 2021)*

**RULING**

1. The application dated 8<sup>th</sup> September 2023 is brought pursuant to Rule 4 and 5(2) (b) of the [Court of Appeal Rules](#), and seeks: extension of the time for lodging notice of appeal and record of appeal against the judgment and decree in Environment and Labour Relations Court (ELRC) JR No. 10 of 2021 ; that the notice dated and filed on 24<sup>th</sup> March 2022, and the record dated and filed on 11<sup>th</sup> November 2022, as well as the supplementary record of appeal dated and filed on 6<sup>th</sup> December 2022, be deemed as properly filed and served; that there be stay of execution of the decree pending the hearing and determination of the application and appeal; and the 1<sup>st</sup> respondent be ordered to bear the costs, in the alternative, the costs to abide the outcome of the appeal. The application is supported by an affidavit of even date sworn by Erastus Menge Orina, the County Attorney for the 2<sup>nd</sup> applicant.
2. The applicants are aggrieved by the decision made on 18<sup>th</sup> July 2023, where the court delivered a ruling allowing the 1<sup>st</sup> respondent's application to strike out the applicant's notice of appeal; and the



applicants maintain that the notice of appeal was struck out on the genuine mistake by the applicant's counsel who believed that he had served the same on respondent's counsel as evidenced by email correspondence. It is the applicants' contention that they have a strong arguable appeal; and that the application has been made without undue delay.

3. I am alive to the fact that rule 4 of the [Court of Appeal Rules](#) gives this Court unfettered discretion in deciding whether to grant extension of time to do a particular prescribed action. In *Leo Sila Mutiso v Rose Wangari Mwangi* Civil Application No. Nai 255/97 (unreported) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in [Julius Kamau Kithaka v Waruguru Kithaki & 2 Others](#) (2013) eKLR.

4. M'Inoti, J, had this to say concerning Rule 4 in [Imperial Bank \(IR\) & Anor v Alnashir Popat and Others](#) [2018] eKLR

“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.”

5. I also recognize that the Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of [Nicholas Kiptoo Korir Arap Salat v 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 Kithaka](#) (*supra*) is whether prima facie the intended Appeal/Appeal has chances of success or is a mere frivolity.

6. In the instant application, apart from the application and the supporting affidavit sworn by counsel, the impugned decision against which it is intended to appeal, is not annexed; None of the parties have filed written submissions, so that for all practical purposes, the application has not been argued.

7. Even if I was to consider the documents presented, the applicants have failed in the supporting affidavit to try to explain the delay in serving the record of appeal. All that the applicants avers depose to, is that the counsel on record was in the mistaken belief that he had served the record of appeal upon



respondent's counsel. I note that the advocate himself has not sworn an affidavit to that fact and the circumstances around which service was not done. The applicants have also asked for stay of execution. Being a 5(2) (b) application this cannot be handled by a single judge.

8. The upshot is that this application lacks merit and fails. The applicants shall bear the costs of the application.

**DATED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**H. A. OMONDI**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

