



REPUBLIC OF KENYA



KENYA LAW
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**Oloo & 19 others v Development (Civil Application
E081 of 2023) [2024] KECA 425 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KECA 425 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E081 OF 2023
HA OMONDI, JA
APRIL 5, 2024**

BETWEEN

SIMEON ANYANGO OLOO & 19 OTHERS APPLICANT

AND

LAKE BASIN DEVELOPMENT RESPONDENT

*(Application for extension of time to file and serve Notice of Appeal from
the decision of the Environment and Labour Relations Court at Kisumu
(Christine N. Mbaari, J.) dated 16th June 2021 in ELRC 49 of 2021)*

RULING

1. The application dated 6th June 2023, brought pursuant to rule 4 of the *Court of Appeal Rules*, 2010 and supported by the affidavit of even date sworn by Simeon Anyango Oloo, seeks extension of time within which to file the appeal and pay assessed costs.
2. The applicants filed a petition in the Employment and Labour Relations Court (ELRC) against the respondents, to which the respondent raised a preliminary objection on grounds inter alia that the petition was fatally defective as it did not meet the recognized threshold anchored to the *Constitution*; and it offended the provisions of order 1 rule 13(1) and (2) of the *Civil Procedure Rules*. The court (Baari, J.) in a ruling dated 16th June 2022 upheld the preliminary objection, and dismissed the petition.
3. Aggrieved by this outcome, the appellants are desirous of appealing against the ruling; the applicants explain that Judgment was entered on 16th June 2021; and the Notice of Appeal was filed and served on 24th June 2022; on 27th July 2022 the same was duly paid; that subsequently further demand for court fees was made for Kshs.101,400/-, and an official protest to the said fees was turned down by the Deputy Registrar, as such the record of appeal could not be admitted for hearing.



4. The applicants being elderly, persons of straw and incapable of raising the hefty court fees, leading to the applicant setting out to raise said funds from the other applicants who are all over the country but was unable to raise said fees. Consequently, Simeon Anyango, (the main applicant) in what he terms as an unprecedented zeal, to eventually turn to his daughter who lived in the USA to assist in raising the court fees, make the journey to the USA in April 2023; returning to Kenya in June 2023. So, on 27th June 2023 he contacted their advocate, and gave him instructions to revive the matter; and this application has been brought timeously without undue delay; so, it is only fair that the same be allowed.
5. In a replying affidavit by Micheal Okuk, the respondent's Legal Manager, opposes the application saying that in the absence of a memorandum of appeal it is difficult to gauge whether there is a prima facie case; the applicants have not detailed how they will suffer prejudice with regards to the superior court finding; the deponent of the supporting affidavit has no authority from the other applicants to do so on their behalf; lack of filing fees is not a good ground for delay in filing the appeal; the funds used to travel to the US should have been used for filing fees; and the matter in the superior court emanated from a contract, and the petition was filed 20 years after retrenchment, out of time and prejudicial to the respondent as all litigation must come to an end.
6. Have the applicants met the prerequisites for granting relief under rule 4 of the Court of Appeal Rules? Rule 4 of the [Court of Appeal Rules](#) gives this Court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. *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 and 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.
7. 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.”
8. Discretion also depends on circumstances of each case as per [Mongira & Another v 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 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 Kitheka* (*supra*) is whether prima facie the intended appeal/appeal has chances of success or is a mere frivolity.

- 9. I agree with the respondent's argument that the travel to the US was absolutely unnecessary, and the ticket payment could have been used to file appeal. I also hold the view that it is not plausible for the main applicant's daughter to summon her father to ask for the money in person knowing the history and stake of the matter.
- 10. The applicants' in my view has failed to try and explain the delay in filing the Record of appeal; and has not, in my view, met and satisfied the principles set out for this Court to exercise its discretion in his favor and grant the extension. I find no merit in the application and dismiss it with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 5THNDAY OF APRIL, 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

