



**County Government of Samburu & another v Letambul (Civil Appeal  
(Application) E204 of 2023) [2024] KECA 1000 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KECA 1000 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) E204 OF 2023**

**J MOHAMMED, JA**

**MAY 28, 2024**

**BETWEEN**

**THE COUNTY GOVERNMENT OF SAMBURU ..... 1<sup>ST</sup> APPLICANT**

**THE COUNTY PUBLIC SERVICE BOARD - SAMBURU**

**COUNTY ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SIMON LETAMBUL ..... RESPONDENT**

*(Being an application for extension of time to serve the notice of appeal dated 26th September, 2023 and to admit the record of appeal dated 23rd November, 2023 in the appeal from the judgment of the Employment and Labour Relations Court of Kenya in Nyeri (Onesmus Makau, J.) dated 22nd September 2023, in Nyeri ELRC No. E038 of 2022)*

**RULING**

1. The County Government of Samburu (the 1<sup>st</sup> applicant) and the County Public Service Board - Samburu County (the 2<sup>nd</sup> applicant), filed the instant application by way of a notice of motion dated 7<sup>th</sup> December, 2023, expressed to be brought under Rule 4 and Rule 43 of the [Court of Appeal Rules, 2022](#) (this Court's Rules) and Sections 3A and 3B of the [Appellate Jurisdiction Act](#). The applicant seeks orders in the main:

- “1. That the Honourable Court be pleased to extend time to serve the Notice of Appeal dated 26<sup>th</sup> September 2023 against the judgement of Onesmus Makau, J. in Nyeri ELRC Cause No E038 of 2022 delivered on 22<sup>nd</sup> September 2023 and the notice of appeal served on 11<sup>th</sup> October 2023 be deemed as duly served in this appeal.



2. That the Honourable Court be pleased to extend the time for filing the record of appeal admit the record of appeal filed on 27<sup>th</sup> November 2023 and deem it as properly filed and served.
3. That the Honourable Court be pleased to make such further orders and directions as may be appropriate to meet the ends of justice.
4. That costs of this application do abide the outcome of the appeal.”

Simon Letambul, is the respondent herein.

2. The application is premised on the grounds inter alia that the ruling of the Employment and Labour Relations Court (ELRC) was delivered on 22<sup>nd</sup> September 2023 and a notice of appeal was filed on 27<sup>th</sup> September, 2023; that the ELRC registry forwarded the notice of appeal to the applicants’ advocates via the firm’s email address on 11<sup>th</sup> October 2023; that the notice of appeal was served upon the respondent’s counsel via email on 11<sup>th</sup> October, 2023; that the delay in serving the notice of appeal within the period of time prescribed under the law was occasioned by failure by the ELRC Registry staff to furnish a copy of the filed notice of appeal within the prescribed time; that the notice of appeal has already been served upon the respondent’s advocates; and that no prejudice will be occasioned upon the respondent. Counsel urged that this Court do extend time for filing the record of appeal and admit the record of appeal dated 23<sup>rd</sup> November, 2023 and filed on 27<sup>th</sup> November, 2023 and deem it as properly filed.
3. The application is supported by the applicants’ affidavit sworn by Joseph Mwangi, learned counsel for the applicants who deposed inter alia that on 26<sup>th</sup> September, 2023 he forwarded to the ELRC a letter dated 22<sup>nd</sup> September, 2023 requesting for certified copies of typed proceedings, judgment and the ruling delivered on 22<sup>nd</sup> September, 2023 together with the notice of appeal dated 26<sup>th</sup> September, 2023 via email; that on the same day an invoice was sent from the court at 4:11pm for payment made on 27<sup>th</sup> September, 2023 and the court notified the applicants’ advocates of the said payment; and that on 27<sup>th</sup> September, 2023 a court stamped copy of the letter requesting for certified copies was shared by the court via the firm’s email address and they were notified that the notice of appeal was in chambers awaiting signature.
4. Counsel further deposed that on 28<sup>th</sup> September, 2023 the respondent’s advocate was served with a letter dated 22<sup>nd</sup> September, 2023 requesting for certified copies of typed proceedings, judgment and ruling; that on 4<sup>th</sup> October, 2023 a reminder was sent to court via email to find out whether the notice of appeal had been endorsed by the Deputy Registrar; that he sent an office clerk to physically follow up at the ELRC registry in Nyeri without any success; that the notice of appeal was presented to this Court on 11<sup>th</sup> October, 2023 and not 27<sup>th</sup> September, 2023 as indicated on the court stamped copy; that the notice of appeal would not have been endorsed by the Deputy Registrar after being presented to this Court; that the notice of appeal was forwarded to counsel for the applicants through the office email on 11<sup>th</sup> October, 2023 at 5:04pm approximately fourteen (14) days after the date of lodging; that the notice 2023 who were therefore aware of the applicants’ intention to appeal against the impugned ruling; and that no prejudice will be occasioned on the respondent if the application is allowed. Counsel urged that the record of appeal dated 23<sup>rd</sup> November, 2023 and filed on 27<sup>th</sup> November, 2023 be deemed as properly filed.
5. The application was opposed through the respondent’s replying affidavit dated 16<sup>th</sup> January, 2024 where he deposed inter alia that; the applicants’ application is an afterthought as the same was filed to counter his application dated 3<sup>rd</sup> November, 2023 in Nyeri Civil Application No E097 of 2023



which seeks to strike out the notice of appeal dated 26<sup>th</sup> September, 2023 for having been served out of time; that the applicants have not responded to the application dated 3<sup>rd</sup> November, 2023 despite being served and have opted to respond through the instant application; that the notice of appeal should be struck out as service was not effected within seven (7) days; that service of the notice of appeal is an essential step under Rule 77(1) of this *Court's Rules*; that if the applicants were aware that the notice of appeal was served out of time they ought to have sought extension immediately upon serving the same on 11<sup>th</sup> October, 2023; that it has taken two months and two weeks to file the instant application which is an inordinate delay in the circumstances; that the record of appeal was filed out of time without leave of court on their own admission and no plausible reason for the delay has been given; and that he will suffer prejudice if the application ruling in Nyeri ELRC No E038 of 2022 which is the subject of appeal. The respondent urged that the instant application be dismissed.

6. The applicants and respondent have filed written submissions which reiterate the contents of their respective affidavits.

### Determination

7. I have considered the motion, the grounds in support thereof, the submissions filed, the authorities cited and the law. The issue for determination is whether the application is deserving of the orders sought.
8. The discretion that I am called to exercise in the determination of this application is provided under Rule 4 of the *Court of Appeal Rules* which provides as follows:

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

9. Rule 4 of the Court of Appeal Rules does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving an objective decision in the circumstances of each case. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the *locus classicus*, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.” [Emphasis supplied].

10. The issues I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of *Fakir Mohammed v Joseph Mugambi & 2 others* [2005] eKLR where the court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path... As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of



compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”

11. This was reiterated further in the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*, Civil Application No 190 of 2019 where it was explained that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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.”

12. There is no maximum or minimum period of delay set out under the law. However, the reason or reasons for the delay must be reasonable and plausible.

13. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR as was cited by the applicant, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

14. Pursuant to Rule 77 of this *Court’s Rules*, the notice of appeal should have been filed within fourteen (14) days from the date of the impugned decision. In the instant application, the applicant did file the notice of appeal within time. The notice of appeal was filed on 27<sup>th</sup> September, 2023, five days after delivery of the impugned ruling. The notice of appeal was therefore filed within the time envisioned under Rule 77 of this *Court’s Rules*.

15. The applicants claim that service of the notice of appeal was not effected within seven (7) days as per the provisions of Rule 79 of this Courts Rules for the reason that the Deputy Registrar of the ELRC delayed in endorsing the same. That the notice of appeal was filed on 26<sup>th</sup> September 2023 and that the same was received on 11<sup>th</sup> October, 2023 and served upon the respondent the same day approximately fourteen (14) days after lodging.

16. Rule 79 of this *Court’s Rules* provides as follows:

“79. (1) An intended appellants shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.

- (2) (2) Where any person who is required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on that person at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.”



17. The applicants' counsel deposed that he filed the notice of appeal but could not serve the same in time due to the delay by the ELRC to endorse the same. Counsel explained the service of the notice of appeal out of time as due to the late endorsement by the ELRC. I have noted that the delay in service was seven (7) days as the same ought to have been served by 4<sup>th</sup> October, 2023 but the same was served on 11<sup>th</sup> October, 2023. In the circumstances, I find that the period of delay is not inordinate and is well explained.
18. Pursuant to Rule 84 of this Court Rules, the record of appeal should have been filed within sixty (60) days from the date when the notice of appeal was lodged. The notice of appeal was lodged on 27<sup>th</sup> September, 2023 and the record of appeal was lodged on 27<sup>th</sup> November, 2023 within the sixty (60) days contemplated under Rule 84. The instant application was filed on 7<sup>th</sup> December, 2023 nine (9) days after the filing of the record of appeal.
19. In *Muchugi Kiragu v James Muchugi Kiragu & another* Civil Application No NAI. 356 of 1996, this Court had the following to say as regards this Court's discretion under Rule 4:
- “Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.” [Emphasis supplied].
20. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicants, in denying an extension, against the prejudice to the respondent in granting an extension. The applicants are aggrieved by the ruling of the ELRC and are desirous of appealing against the said judgment out of time. In the case of *Richard Nchapi Leiyagu v IEBC & 2 others*, Civil Appeal No 18 of 2013, this Court expressed itself as follows:
- The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
21. From the circumstances of the application before me, the applicants have demonstrated the existence of the parameters set out in *Leo Sila Mutiso (supra)*. The upshot is that the notice of motion dated 7<sup>th</sup> December, 2023 is allowed.
22. Accordingly, I make the following orders:
- a. That the notice of appeal filed on 27<sup>th</sup> September, 2023 and served on 11<sup>th</sup> October, 2023 be deemed as properly filed and served;
  - b. That the record of appeal dated 23<sup>rd</sup> November, 2023 and filed on 27<sup>th</sup> November, 2023 be deemed as properly filed and served;
  - c. Costs of this application to abide by the outcome of the appeal.

**DATED AND DELIVERED AT NYERI THIS 28TH DAY OF MAY, 2024**



**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

