



Kenya National Union of Nurses v Lamu County Public Services Board & 2 others (Civil Application E014 of 2024) [2024] KECA 1183 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1183 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E014 OF 2024
AK MURGOR, JA
SEPTEMBER 20, 2024**

BETWEEN

KENYA NATIONAL UNION OF NURSES APPLICANT

AND

LAMU COUNTY PUBLIC SERVICES BOARD 1ST RESPONDENT

KILIFI COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

MOMBASA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

(An application for extension of time to file an appeal out of time in respect to the decision of the Employment and Labour Relations Court at Malindi (M. Mbaru, J.) dated 31st day of January 2024 in ELRC Case No. E 019 of 2021)

RULING

1. By Notice of Motion dated 4th March 2024 brought pursuant to Article 159 of the Constitution, Sections 3A and 3B of the Appellate Jurisdiction Act, rules 4,31,39(b) 41,42,43,47 and 53 of the Court of Appeal Rules 2010, the applicant, the Kenya National Union of Nurses seeks *inter alia* that this Court:
 - i. be pleased to extend time for filing the appeal against the judgment in Malindi Employment Court Cause No. E019 of 2021; (ii) that upon granting the prayer (i) to provide timelines for filing the appeal and (iii) the costs of this application be in the cause.
2. The motion is brought on grounds set out on its face and an affidavit in support sworn by Seth Ambusini Panyako, the General Secretary of the applicant in which he contends that the delay in lodging the Notice of appeal was occasioned by the time the Board of Management took to be appraised with the impugned judgment and to authorize the commencement of the appeal; that the delay was further occasioned by the time it took to appoint an advocate and for the advocates to appraise themselves with the matter and advise the applicant on whether or not to lodge an appeal; that the



delay in filing the appeal was not inordinate or deliberate and if leave is not granted, the more than 400 members of the applicant who have been adversely affected by the impugned judgement will be greatly prejudiced; that according to the attached Memorandum of appeal, the appeal has both substantial legal issues and evidential matters that could render the appeal successful and that the respondents will not be prejudiced if the extension of time to appeal out of time is allowed.

3. Annexed to the application is a Notice of appeal dated 4th March 2024 and a Memorandum of appeal raising the following grounds of appeal; that the learned Judge was in error in failing to consider the circumstances and the reasons why the appellant's members went on strike, which reasons included, failure by the respondents to provide PPE's to the appellant's members who were exposed to Covid 19 pandemic; that the 2nd respondent deliberately failed to adopt the Directorate of Occupational Safety and Health Services' Return to work issued on 29th June 2020, and further failed to take into account the appellant's grievances that the respondents' workplaces presented eminent and serious danger to the appellant's members hence their having kept off their workplaces in accordance with section 14 of [Occupational and Safety Health Act](#).
4. In their written submissions, counsel for the applicant Mr. Chisengo submitted that the delay in filing the Notice and Memorandum of appeal is not unreasonable; that the applicant took 14 days in excess of the statutory 14 days to reflect on the matter and lodge the appeal and that 14 days in excess of the statutory period is not inordinate.
5. Counsel further submits that the applicant's appeal has raised triable legal and evidential issues as demonstrated by the draft memorandum of appeal that was annexed to the application and the respondents will not suffer any prejudice if the application is allowed.
6. Counsel invited the court to consider the case of [Paul Wanjobi Mathenge v Duncan Gichane Mathenge](#) [2013] eKLR and the Supreme Court decision in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR which laid down the principles governing the exercise of discretion in applications for extension of time.
7. For her part Ms. Oloo learned counsel for the 1st respondent did not have any objection to the application for time to be extended for lodging the Notice of appeal.
8. There was no appearance by the 2nd respondent despite their having been served, while the applicant sought and obtained leave of the Court to withdraw the appeal against the 3rd respondent.
9. Rule 4 of the [Court of Appeal Rules](#) 2010 under which the present application is brought provides that:

The Court may, on such terms as may be 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.
10. Waki, JA in [Fakir Mohamed v. Joseph Mugambi & 2 others](#) [2005] eKLR laid out the principles of extension of time under rule 4 as follows:

“The exercise of this Court's discretion under Rule 4... 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, (possibly) 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 factors: See *Mutiso v. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi v. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v. Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”

11. Under rule 4 of this Court’s rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997.
12. In addition, the Supreme Court in *Itolondo v Attorney General & 9 others* (Application 3 (E005) of 2021) [2021] KESC 44 (KLR) reiterated its position in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others*, SC Civil Appl. No 3 of 2016; [2017] eKLR and emphasized the need for the applicant, in an application for an extension of time, to satisfactorily declare and explain the whole period of delay.
13. Pursuant to the above stated principles, therefore, the questions to be answered in this matter are whether the applicant has satisfactorily explained the delay in filing the Notice of appeal. In the instant application, the applicant has explained that the delay in lodging the Notice of appeal was occasioned by the time it took the Board of Management to be appraised of the impugned judgment and authorize the commencement of the appeal; that further delay was occasioned by the time it took to appoint an advocate and the time the advocates took to appraise themselves of the matter and advise the applicant. I consider the reasons advanced to be sufficient explanations for the delay.
14. On the basis of the grounds of appeal set out in the Memorandum of appeal, I am also satisfied that the appeal has chances of success, and that the respondent will not suffer any prejudice were time to be extended to file the Notice of appeal.
15. In sum, the applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time for lodging of the Notice of appeal dated 4th March 2024.
16. In so finding, I make the following orders:
 - i. that time is extended for lodging the Notice of appeal dated 4th March 2024 and accordingly deem it as having been properly filed;
 - ii. that the applicant to serve the Notice of appeal within 14 days from the date of delivery of this ruling; and
 - iii. that the Memorandum and Record of appeal to be lodged and served in accordance with rule 84 of this Court’s rules.
 - iv. Costs in the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

