



**Kenya National Private Security Workers Union v M'Mbolo & 7 others (Civil Application E052 of 2024) [2024] KECA 1506 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1506 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E052 OF 2024  
JM NGUGI, JA  
OCTOBER 25, 2024**

**BETWEEN**

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION ..... APPLICANT**

**AND**

**HESBON LUMUMBA M'MBOLO ..... 1<sup>ST</sup> RESPONDENT**  
**JANET MUSIMBI OLWANGU ..... 2<sup>ND</sup> RESPONDENT**  
**CAROLYNE MUKHWANA ..... 3<sup>RD</sup> RESPONDENT**  
**JAIRUS KATERE SHIAMALA ..... 4<sup>TH</sup> RESPONDENT**  
**DEBORAH KERUBO OGAKE ..... 5<sup>TH</sup> RESPONDENT**  
**ONGERA SAMSON OMECHI ..... 6<sup>TH</sup> RESPONDENT**  
**WILFRED DIZUZA BOGONKO ..... 7<sup>TH</sup> RESPONDENT**  
**ALL Suing on behalf of the proposed, Kenya Union of Special  
& Professional Guards (KUSPROG) and the Registrar of Trade  
Unions ..... 8<sup>TH</sup> RESPONDENT**

*(Being an Application for Leave to enlarge time to lodge notice of appeal, in respect of lodging an appeal against the Judgment of the Employment and Labour Relations Court at Kisumu, (Radido, J.) dated 7th February, 2024 in ELRC Case No. 5 of 2020)*

**RULING**

1. At the centre of the controversy pitting the applicant and the respondents in this matter is whether a second union should be registered representing private security guards. The applicant, a registered union and a member of the Central Organization of Trade Unions (COTU), opposes the registration



- of a second union in the same sector. The 1<sup>st</sup> – 7<sup>th</sup> respondents are promoters of a second union in the sector, Kenya Union of Special & Professional Guards (KUSPROG).
2. The 1<sup>st</sup> – 7<sup>th</sup> respondents applied for KUSPROG to be registered. The 8<sup>th</sup> respondent declined leading to the litigation that eventually culminated in the judgment dated 14<sup>th</sup> February, 2024 by the Employment and Labour Relations Court (ELRC) sitting in Kisumu. The judgment ordered the 8<sup>th</sup> respondent to register KUSPROG.
  3. The applicant, who was an interested party in the case, was aggrieved by the judgment and orders granted. Through its officials it “filed” a Notice of Appeal on the same day – 14<sup>th</sup> February, 2024.
  4. In truth, the Notice of Appeal was never regularly filed. It was not endorsed by the Deputy Registrar of the superior court, who raised several queries about it using the Court’s online system. The officials of the applicant claim they never received the directions of the Deputy Registrar, and, therefore, did not act on them.
  5. Believing that their appeal was successfully lodged and in place, the appellant proceeded to file a Notice of Motion seeking to stay the judgment and orders of the ELRC. When the application came up for directions, the Honourable Deputy Registrar of the Court pointed out to the applicant that there was no competent appeal on record as the Notice of Appeal filed on 14<sup>th</sup> February, 2024 was defective. That was on 9<sup>th</sup> April, 2024.
  6. This prompted the applicant, through its new advocates (it was acting in person until then) to bring the present application. The application is dated 29<sup>th</sup> April, 2024. It seeks the following prayers:
    1. This application be certified urgent and be heard on priority basis.
    2. Leave of extension of time within which to file and serve a proper Notice of Appeal be granted.
    3. The period within which to comply with lodging and service of the Notice of Appeal be extended.
    4. The Notice of Appeal filed on the 14<sup>th</sup> day of February, 2019 be deemed as properly filed and served.
    5. Costs of the Application to abide the outcome of the main Appeal.
  7. The application is supported by the affidavit of Isaac G.M. Andabwa sworn on 29<sup>th</sup> April, 2024. In support of the application, the applicant also filed written submissions dated 24<sup>th</sup> May, 2024.
  8. The application is strenuously opposed by the 1<sup>st</sup> – 7<sup>th</sup> respondents. There is a replying affidavit sworn by Ongera Samson Omechi on 8<sup>th</sup> May, 2024; and written submissions dated 28<sup>th</sup> May, 2024.
  9. In short, the supporting affidavit rehashes the narrative above which explains how time ran out for the applicant. The applicant straightforwardly blames the mistake on the fact that it was relying at the time on a layman for filing; and that the representative simply made an inadvertent mistake. It is argued that as soon as the applicant learnt of the mistake, it moved to regularize it through the present application.
  10. The applicant argues that the delay was not inordinate; was excusable; and that it has an appeal which is arguable and, in fact, has a high chances of success. Two of the points that the applicant wishes to take up on appeal are whether the learned Judge misapprehended the meaning of “adequate representation” in trade union discourse; and whether there is, in fact, any species of private guards called “professional guards” which KUSPROG claims to represent.



11. On their part, the 1<sup>st</sup> – 7<sup>th</sup> respondents give a long history of the matter from its genesis in May, 2018 when they first wrote to the 8<sup>th</sup> respondent seeking the registration of KUSPROG. The aim of that history, as I understand it, is to fortify their argument that the application is frivolous, and follows a long line of many applications the applicant has been making in a bid to delay and thwart their constitutional right to form a trade union.
12. In the written submissions, the 1<sup>st</sup> – 7<sup>th</sup> respondents also argue that the Notice of Appeal the applicant is seeking an order deeming it as properly filed is fatally defective and even deeming will not cure its defectiveness. This is because, the 1<sup>st</sup> – 7<sup>th</sup> respondents argue, the impugned Notice of Appeal does not properly capture their respondents’ address for service, and neither does it indicate that it was to be served on the 9<sup>th</sup> respondent.
13. Additionally, the 1<sup>st</sup> – 7<sup>th</sup> respondents argue that the intended appeal is not arguable because the ELRC found that the applicant did not sufficiently and or substantially represent the whole of the employees in the private security sector. They argue that the finding of the court was pronounced in line with parameters set by the Supreme Court in the case of Kenya Plantation & Agricultural Workers’ Union v Kenya Export Floriculture, Horticulture and Allied Workers’ Union (KEFTHAU) Represented by Its Promoters: David Benedict Omulama & 9 others [2020] eKLR.
14. This Court is empowered to grant extension of time under Rule 4 of the Court of Appeal Rules which provides that:

“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.”
15. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons 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.”
16. In the present case, the applicant has explained in a straightforward manner the regrettable cause for the delay. The record bears it out that the defective Notice of Appeal was, indeed, timeously filed on 14<sup>th</sup> February, 2024. The record also bears it out that it did not learn about the defect until 9<sup>th</sup> April, 2024 when the Court brought it to their attention. It then filed the present application on 29<sup>th</sup> April, 2024 in a bid to regularize the appeal.
17. In my view, the applicant acted in good faith; the delay was not inordinate; and the reason for the delay – an inadvertent mistake – is eminently excusable. Further, I would agree with the applicant that for a first appeal where the standard of review is de novo scrutiny, it cannot be said that the appeal is arguable. The very question whether the threshold had been reached to declare that the applicant adequately represents unionisable workers in the sector is an arguable matter to be taken up on appeal.



18. Finally, while the 1<sup>st</sup> – 7<sup>th</sup> respondents have ponderously argued that the Notice of Appeal which was filed on 14<sup>th</sup> February, 2024 was defective in certain ways, that technicality cannot be a factor in determining whether to extend time or not since the applicant has an alternative prayer to be permitted to file and serve a new Notice of Appeal.
19. In short, the applicant has adequately brought itself within the equitable embrace of Rule 4 of the Court of Appeal Rules. Consequently, I would allow the application dated 29<sup>th</sup> April, 2024 and give the following orders:
  - a. The applicant shall file and serve a new Notice of Appeal within seven (7) days from the date hereof.
  - b. The appeal filed, which shall stand regularized upon compliance with order (a) above, shall retain the number it had been assigned.
  - c. Costs of this application shall be in the appeal
20. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**Signed**

**DEPUTY REGISTRAR**

