



Nthiwa v Jubilee Insurance Co of Kenya Ltd (Civil Application E039 of 2023) [2023] KECA 395 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KECA 395 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E039 OF 2023**

**KI LAIBUTA, JA
MARCH 31, 2023**

BETWEEN

SIMON WAMBUA NTHIWA APPLICANT

AND

JUBILEE INSURANCE CO OF KENYA LTD RESPONDENT

(Being an application for extension of time to lodge an appeal out of time from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Abuodha, J.) delivered on 14th May 2020 in E.L.R.C Cause No.1392 of 2017)

RULING

1. Before me is a Notice of Motion dated February 14, 2023 made under Rule 4 of the [Court of Appeal Rules](#) in which the Applicant, Simon Wambua Nthiwa prays for: leave to lodge an appeal out of time; that the notice of appeal lodged in this Court be deemed as duly filed; and that costs of the application be costs in the intended appeal.
2. The intended appeal is from the judgment and decree of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) dated May 14, 2020 in ELRC Cause No.1392 of 2017.
3. The Motion is supported by the applicant's annexed affidavit sworn on February 14, 2023, which merely restates the grounds set out on the face of the Motion, namely: that the impugned judgment was delivered on May 14, 2020; that the applicant was not in gainful employment and, therefore, lacked the financial means to institute the appeal within the required time; that he had to move to his rural home, and was unable to travel to Nairobi due to the then prevailing travel restrictions imposed by the Government; that his advocates on record were only able to obtain certified copies of the proceedings on September 2, 2021 due to the scaling down of judicial services following the outbreak of COVID-19 pandemic; that the respondent will not suffer any prejudice if the orders sought are granted; and that it is only fair and just that the orders sought are granted.



4. In support of the applicant’s Motion, learned counsel for the applicant, M/s.Kipyator Kibet & Associates, filed written submissions and list of authorities dated 9th March 2023 citing the cases of *Kiu & Another vs. Khaemba & 3 Others* [2021] KECA p.318; *Andrew Kiplagat Chembaringo vs. Paul Kipkorir Kibet* [2018] eKLR; *Joseph Wanjohi Njau vs. Benson Maina Kabau* [2013] eKLR; and *Joyce Lenges vs. Attorney General & 11 Others*[2021] eKLR, all of which set out the factors to be considered in the determination of applications under rule 4 of the Court of Appeal Rules, namely: the length of the delay; the reasons for the delay; arguability of the intended appeal; and whether the respondent would be prejudiced by a grant of the orders extending time to lodge the intended appeal. They urged me to grant the Motion.
5. Opposing the Motion, the respondent filed a replying affidavit of Sarah Oneya, the respondent’s legal officer, sworn on March 16, 2023 deponing that the applicant had fourteen (14) days from the date of judgment within which to file his notice of appeal, which he failed to do; that his application for leave to file the notice of appeal out of time comes 32 months later; that the delay is inordinate, and has not been sufficiently explained; that the intended appeal is not arguable; that the applicant has not annexed a draft memorandum of appeal; that the applicant obtained certified copies of the proceedings on September 2, 2021, but has not filed the intended appeal eighteen (18) months later; that court operations continued online; and that it was not necessary for the applicant to travel to Nairobi.
6. Learned counsel for the respondent, M/s. Oraro & Company, filed written submissions and case digest dated 17th March 2023 citing seven (7) authorities, including *Leo Sila Mutiso vs. Helen Wangari Mwangi* [1999] 2 EA p.231 where this Court set out the factors to be considered in determination of applications under rule 4 of this Court’s Rules, namely the period of delay, the reasons for the delay, whether the intended appeal is arguable with a probability of success, and whether the respondent would suffer undue prejudice if the orders sought were granted.
7. Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to “... 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 ...,” on such terms as it thinks just.
8. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that “the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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.”
9. The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005]eKLR lends clarity to the issue of the Court’s jurisdiction in determination of applications made under Rule 4. In principle, the discretion is unfettered. In its celebrated decision, the Court observed:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. 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, 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.”

10. As to the requirement that the applicant demonstrates that he has an arguable appeal, it is noteworthy that he has neither annexed a draft memorandum of appeal to his Motion nor alluded to what he considers to be advanced as the grounds of the intended appeal. Accordingly, the applicant has failed to demonstrate that it has an arguable appeal with the likelihood of success.
11. This Court in *Kiundi vs. Kenya Pipeline Company Limited* [2023] eKLR
“.... he has given very little information regarding his intended appeal. Apart from stating that he has an arguable appeal, he has not availed any memorandum of appeal nor has he given any indication of the grounds that he intends to canvas in the intended appeal. That is not sufficient to demonstrate that “his appeal is not without reasonable possibility of success” or that he has an arguable appeal.”
12. With regard to the length and reasons for the delay, counsel submit that the 32 months delay was inordinate. They cited the cases of *Neville Patrick Gibson Warren & 3 Others vs. Linda Watiri Muriuki* [2014] eKLR; *Kenya National Highways Authority vs. Joseph Ndolo Mutua* [2020] eKLR; and *County Government of Mombasa vs. Kooba Kenya Limited* [2019] eKLR contending that the applicant’s delay in lodging the intended appeal was not satisfactorily explained. We agree with counsel that no satisfactory explanation has been given for the inordinate delay in lodging the notice of appeal fifteen months later (see *Abdul Azizi Ngoma vs. Mungai Mathayo*[1976] eKLR).
13. Addressing itself to the issue of the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that “... 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.” It is only then would consideration as to whether the intended appeal is arguable would be worthy of the Court’s attention in exercise of its discretion under Rule 4.
14. Having carefully considered the applicant’s Motion, the affidavits in support and in reply, the rival submissions of learned counsel for the applicant and for the respondent, I reach the inescapable conclusion that the delay in moving this Court for extension of time to lodge the intended appeal is inordinate; that no satisfactory explanation has been given for the delay; that, in any event, the applicant has not placed any material before me to suggest that he has an arguable appeal. In the circumstances, the Motion fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

