



County Public Service Board Kitui v S Kenya County Government Workers Union (Civil Appeal (Application) 89 of 2018) [2023] KECA 1591 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KECA 1591 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 89 OF 2018
AO MUCHELULE, JA
MAY 31, 2023**

BETWEEN

COUNTY PUBLIC SERVICE BOARD KITUI APPLICANT

AND

S KENYA COUNTY GOVERNMENT WORKERS UNION RESPONDENT

(Being an application to enlarge time within which the applicant can file and serve the memorandum of appeal and record of appeal against the ruling and orders of Justice Byram Ongaya delivered in Nyeri on 16th June 2017 In ELRC No. 45 of 2016)

RULING

1. Rule 4 of the *Court of Appeal Rules*, 2022 states 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.”

2. A request to extend time under Rule 4 entails the exercise of this Court’s discretion. This is a judicial discretion that is exercised to ensure that the parties to the dispute are fairly and justly treated as they go about the business of the court. Regarding extension, the courts have developed principles that guide in the exercise of the discretion. First, the court will consider the length of the delay, and the reasons or the delay. Such reasons have to be reasonable and plausible. The applicant’s efforts to appeal, in exercise of his undoubted constitutional right, should be weighed against the prejudice, if any, that the respondent, who has the judgment or decision, may suffer. The court will consider whether there is any public interest in the appeal or intended appeal, and whether such appeal has possible chances of success or contains only frivolous grounds. This being an exercise of discretion, the court will bear



in mind the conduct of the parties, especially the applicant who seeks that his application be treated favourably.

3. These principles have been reiterated in various decisions, which include *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014]eKLR, *Imperial Bank Ltd (In Receivership) and Another v Alnasir Popat & 18 others* [2018]eKLR, *Edith Gachungu Koine v Stephen Njagi Thuiti* [2014]eKLR and *Andrew Kiplagat Chemarigo v Paul Kipkorir Kibet* [2018]eKLR, just to mention a few.
4. The respondent Kenya County Government Workers Union filed a statement of claim dated 24th February 2016 against the applicant County Public Service Board Kitui regarding the alleged unlawful termination of one Oscar Kiili Nzilu by the then Kitui Municipal Council, the applicant's predecessor. The dispute was filed before the Employment and Labour Relations Court at Nyeri.
5. On 18th November 2016 the dispute was before the learned Byram Ongaya, J. when the court was informed that Oscar Kiilu Nzilu, the grievant, had died on 10th November 2016. The learned Judge indicated that the death of the grievant could not stop the matter from proceeding, and gave directions on the hearing of the dispute. The applicant filed an application dated 1st March 2017 seeking the review of the orders of 18th November 2016 that had indicated that the death of the grievant had no effect on the proceedings. The applicant further asked that the suit be stayed pending the appointment of a legal representative of the grievant and his substitution in the proceedings. The application was heard, and a ruling delivered on 16th June 2017 dismissing the same for lacking in merits. The learned Judge held that there was no representative suit before him; that the suit was a referral by a trade union in which the only parties were the claimant trade union and the respondent employer with the deceased employee being a subject in the dispute and not a party in the suit.
6. This is the decision that aggrieved the applicant, and is in respect of which it filed a notice of appeal on 30th June 2017, and on 20th September 2017 successfully applied before this Court for the stay of the proceedings before the Employment and Labour Court pending the hearing and determination of the intended appeal.
7. Before me is a notice of motion dated 6th July 2018 brought under Rule 4 of the Court of Appeal Rules, 2022 and section 3A of the *Appellate Jurisdiction Act* seeking the extension of time to file and serve the Memorandum of Appeal and Record of Appeal out of time. The application was based on the grounds on the face and on the sworn affidavit of Nicholas Weru, counsel for the applicant. Counsel stated that they requested for typed proceedings on 28th June 2017, and the same were made available on 2nd April 2018. A certificate of delay was issued to them on 23rd April 2018. They prepared the Record of Appeal and on 25th May 2018 forwarded to their representatives M/s G.K. Kibira Advocates in Nyeri with instructions to file the same immediately. It came to their attention that the Record had instead been filed out of time on 27th June 2018. Counsel swore that:-
 - “ 10. That the delay was on account of an inadvertent miscommunication between the applicant's counsel and the firm of M/s G.K. Kibira Advocates on the status of the record of appeal owing to the non- payment of fees on account of our instructions to file the Record of Appeal which came to our attention by an email dated 21st June 2018.”
8. The application was served on the respondent who did not file any response.
9. Considering that the applicant received a certified copy of the proceedings on 2nd April 2018, under the proviso to Rule 84(1) of the *Rules* the Record ought to have been filed by 2nd June 2018. If it was erroneously filed on 27th June 2018. One is looking at the delay of 25 days. The application was filed



on 6th July 2017, about 10 days later. Essentially, I find, one is not talking about a long delay, and there has been a reasonable explanation.

10. When this Court, consisting of three judges, heard the application for stay under Rule 5(2)(b) of the *Court of Appeal Rules*, it observed that the intended appeal had raised arguable grounds.
11. In conclusion, I allow the application and extend time. The applicant shall file and serve the Memorandum of Appeal and Record of Appeal within 10 days from today.
12. Costs shall be in the appeal.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF MAY 2023

A.O. MUCHELULE..... JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

