



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wambugu v Muna & 4 others (Civil Appeal (Application)
E462 of 2023) [2023] KECA 1267 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1267 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E462 OF 2023
MSA MAKHANDIA, JA
OCTOBER 27, 2023**

BETWEEN

JOHN MARK WAMBUGU APPLICANT

AND

NICHOLAS KARIMI MUNA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

**PRINCIPAL SECRETARY STATE DEPARTMENT OF SPORTS
DEVELOPMENT 3RD RESPONDENT**

**CABINET SECRETARY NATIONAL TREASURY & PLANNING 4TH
RESPONDENT**

**SPORTS, ART AND SOCIAL DEVELOPMENT FUND OVERSIGHT
BOARD 5TH RESPONDENT**

(An application for extension of time to enable the applicant to file and serve the notice and record of appeal out of time arising from the judgment and decree of the Employment & Labor Relations Court of Kenya (B. Ongaya, J.) dated 25th May 2023 in Nairobi HC Judicial Review No. E058 of 2022)

RULING

1. By an application dated 22nd June 2023, brought under rule 4 of this Court's rules, the applicant prays for an order that the notice of appeal filed and served out of time on the respondents as well as the record of appeal on the record, be deemed as properly filed and served after payment of the requisite fees.
2. The grounds in support of the application which are restated in the supporting affidavit of the applicant, are that the impugned judgment was delivered on 25th May 2023, and in accordance with the provisions of rule 75 (2) of this Courts rules, 2010, the notice of appeal should have been lodged



within 14 days of the date of the decision against which it is desired to appeal. However, the applicant's notice of appeal was filed 11 days after the statutorily provided timeline. Further, that the delay in filing and lodging the notice of appeal was inadvertent and this application has been filed without any undue delay.

3. It is the applicant's case that he intends to file an application for stay of execution of the impugned judgment under the provisions of rule (5) (2)
 - (b) of this Court's rules, which application would be pegged on the notice of appeal being deemed properly filed and served. The applicant is the acting Secretary and Chief Executive Officer of the Sports, Arts, and Social Development Fund, though as per the impugned judgment, his employment was terminated. That the recruitment of the new Chief Executive Officer had commenced in earnest to the exclusion of the applicant. That the applicant's right of appeal would be taken away and he will be greatly prejudiced if the application is not allowed. That the respondents would not suffer any prejudice if this application is allowed as it will have an opportunity to contest the appeal on merit.
4. The respondents did not oppose the application as despite the hearing notice and directions being sent to them, there is nothing filed in response.
5. The applicant filed written submissions. The submissions merely reiterate the reasons for the delay advanced on the face of the motion and in the supporting affidavit. Relying on the cases of *Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge* [2013] eKLR, *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR, the applicant submits that in meeting the threshold for the Court to invoke its discretion in his favour, the application has been brought only 11 days after the lapse of the 14 days statutory period required for lodging a notice of appeal. That the delay was occasioned by the applicant seeking legal interpretation during the period stated.
6. On the arguability of the appeal, the applicant submits that the grounds in the memorandum of appeal raise serious triable issues, among them, that the learned Judge erred in law and fact by: making a declaration that the applicant had failed in his administrative duties; giving mandatory order compelling the 2nd to 4th respondents to commence the process of recruiting and appointing the new Chief Executive Officer; and that the learned Judge erred when he declared that the applicant had served the statutory maximum six months allowed in law as acting Chief Executive Officer in the secretariat and he was ineligible for further reappointment in the acting capacity.
7. As concerns the aspect of prejudice, the applicant whilst relying on the case of *Sokoro Savings and Credit Co-operative Society Ltd vs. Mwamburi* [2023] KECA 381 submits that no prejudice will be suffered by the respondents. That the interest of justice demands that a party is accorded every reasonable and available opportunity to ventilate his grievances within the available ranks of our judicial system.
8. I have considered the application, the affidavits on record, the list of authorities, submissions by counsel, and the law. The discretion that I am being called upon to exercise in this application is provided for under rule 4 of the rules of this Court which provides inter alia:

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, of any decision of the Court or of a Superior Court, for doing any act authorized or required by these rules, whether before or after 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. The principles that guide the Court on an application of this nature are now well settled. The principles are that the powers of the Court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.
10. The parameters for the exercise of such discretion are clear, see *Wasike vs. Swala* [1984] KLR 591 where this Court stated:-
- “As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:
- “a) That there is merit in his appeal.
 - b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and
 - c) That the delay has not been inordinate.”
11. The applicant contends that he has an arguable appeal. My glance at the grounds shows no doubt that the appeal is arguable. The position in law is that an arguable appeal is not necessarily one that must succeed but one that warrants interrogation by a court of law. See *Sammy Mwangi Kirietho & 2 Others vs. Kenya Commercial Bank* [2020] eKLR.
12. On the issue of delay, I note that the impugned judgment was delivered on 25th May 2023, while the notice of appeal is dated on 22nd June 2023, 11 days out of the prescribed timelines for filing the same. The instant application was filed on 22nd June 2023, less than a month after the delivery of the impugned judgment. The applicant’s reason for the delay is that he was seeking legal counsel and also trying to read and understand the judgment before making a decision on whether or not to appeal. I find the period of delay not inordinate and the reason for the delay plausible.
13. On the prejudice to be suffered by the respondent if the reliefs sought are not granted, the position as I understand, is that a deserving party should be accorded a right to pursue his or her undoubted right of appeal to exhaustion. See for instance the cases of *Richard Nchapi Leiyagu vs. IEBC & 2 Others* [2013] eKLR; and *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206.
14. Further and as earlier noted, the application is not opposed, and therefore, I am inclined to agree with the applicant that indeed the respondents will not suffer any prejudice.
15. On the totality of the above assessment and reasoning, I am satisfied that the applicant has satisfied the prerequisite for granting a relief under rule 4 of this Court’s rules. I therefore proceed to make orders as follows:
- 1. The applicant’s application dated June 22nd, 2023 be and is hereby allowed on the following terms:
 - a. Leave of extension of time within which to file and serve a notice of appeal out of time is granted to the applicant.
 - b. The notice and record of appeal on record are deemed as properly filed and served.
 - c. No order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

ASIKE-MAKHANDIA



.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

