



**County Government of Murang'a & another (Sued as County Secretary
County Government of Murang'a) v Njoroge (Civil Application
134 of 2019) [2022] KECA 403 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 403 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 134 OF 2019
KI LAIBUTA, JA
MARCH 4, 2022**

BETWEEN

COUNTY GOVERNMENT OF MURANG'A 1ST APPLICANT

PATRICK MUKURIA 2ND APPLICANT

SUED AS COUNTY SECRETARY COUNTY GOVERNMENT OF MURANG'A

AND

NANCY WAITHERA NJOROGE RESPONDENT

*(Being an application for extension of time to file an appeal out of time, from the
Judgment of the Employment and Labour Relations Court at Nyeri (Nzioki wa
Makau, J.) delivered 18th February 2019 in E.L.R.C Petition No. 13 of 2017)*

RULING

1. Before me is a Notice of Motion dated 14th August 2019 made under Rule 4 and 5(2) (b) of the *Court of Appeal Rules* in which the 2nd Applicant (Patrick Mukuria) seeks extension of time pursuant to Rule 4 to file an appeal from the judgment of the Employment and Labour Relations Court at Nyeri (Nzioki Wa Makau, J.) delivered on 18th February 2019 in Nyeri ELRC Petition No. 13 of 2017. The applicant also seeks stay of execution of the said judgment pursuant to Rule 5(2) (b) pending his intended appeal. The second limb of his application falls within the jurisdiction of a 3-Judge bench and, accordingly, I shall confine myself to the first limb of the 2nd applicant's Motion.
2. The 2nd Applicant's Notice of Motion for extension of time to appeal is made on the grounds that his application for certified copies of proceedings was made on 23rd April 2019; that his counsel was informed that the copies were ready for collection on 18th June 2019; that copies of the proceeding were



supplied after the prescribed time to appeal had already expired; that the delay in lodging his Record of Appeal was not inordinate; and that the intended appeal has high chances of success.

3. The 2nd Applicant's Motion is supported by his annexed affidavit sworn on 14th August 2019 in which he restates the reasons for the delay in filing the intended appeal. Annexed to his affidavit are copies of the impugned judgment, the Notice of Appeal; and the payment receipt in respect of the proceedings.
4. It is noteworthy that the Notice of Appeal dated 28th February 2019 and lodged in this Court on 4th March 2019 is lodged by the County Government of Murang'a, which is named as the 1st applicant, but without any indication as to whether the 1st applicant lodges the Notice on its own behalf and on behalf of the 2nd applicant.
5. Equally curious is the fact that the 2nd applicant's Motion makes no suggestion that it is made on behalf of both applicants. In addition to the foregoing, the 2nd applicant's affidavit in support of his Motion is not accompanied by a draft Memorandum of Appeal or other material disclosing the grounds on which the intended appeal is founded. Neither has learned counsel (M/s. Kimwere Josphat & Co. Advocates) made submissions in support of the application to aid me in determining whether both applicants seek to appeal, and whether the 2nd applicant's Motion before me is for the respondents' mutual benefit.
6. Be that as it may, Rule 75(1) of this Court's Rules requires "... any person who desires to appeal to the Court to give notice in writing ...". Even though the notice on record is lodged by the 1st applicant, it is signed by Mr. Kimwere Josphat, "Advocates for the Respondents". To my mind, this expression suggests that the notice is "... signed ... on behalf of" the applicants in accordance with Rule 75(6) of the Rules. In my considered view, that cures the apparent defect in the notice, which does not clearly indicate that both the 1st and 2nd applicants intend to appeal. I also take to mind the provision of Article 159(2) (d) of the Constitution, which mandates this Court to do justice "... without undue regard to procedural technicalities".
7. Accordingly, I am constrained to presume that the 2nd applicant's Motion is also made for and on behalf of both respondents. That leaves me with the pertinent issue as to whether the application before me merits the first limb of the orders sought.
8. The jurisdictional precept of 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.
9. 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."
10. The Court's discretion under Rule 4 to extend time to lodge an appeal from a superior court was enunciated in the case of *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited 2020 eKLR*. To my mind, the Applicants' prayer for extension of time to file an appeal is dependent on my findings on the following factors:
 - (a) whether the intended appeal is arguable with a possibility of success;



- (b) the reasons for the delay in filing the intended appeal;
- (c) the reasons for the delay; and
- (d) whether the delay was inordinate;
- (e) whether the Respondent would be unduly prejudiced by extension of time for the Applicant to file the appeal.

11. With regard to the merit of the intended appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. In the absence of a draft memorandum of appeal or other material disclosing the grounds on which the intended appeal is to be anchored, I am unable to draw a reasonable conclusion that the intended appeal is arguable with the possibility of success. Indeed, the application before me turns on my finding on this critical issue and no useful purpose would be served by a scrutiny of the remaining issues. For the avoidance of doubt, though, I find that the applicants have sufficiently explained the reasons for delay in filing their appeal; that the delay is, in the circumstances of this case, not inordinate; and that the respondent would not be prejudiced by extension of time to file the intended appeal. However, my findings on this account do not cure the fatal defect in failing to supply the Court with a draft Memorandum or other material setting out the grounds on which the intended appeal is preferred. Consequently, the applicants' Motion fails and the same is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

