



REPUBLIC OF KENYA



KENYA LAW
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**Makueni County Public Service Board & another v Ndede (Civil Application
E329 of 2021) [2022] KECA 516 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 516 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E329 OF 2021**

AK MURGOR, J

APRIL 28, 2022

BETWEEN

MAKUENI COUNTY PUBLIC SERVICE BOARD APPLICANT

AND

MAKUENI COUNTY GOVERNMENT APPELLANT

AND

FREDRICK ODHIAMBO NDEDE RESPONDENT

*(An application for leave to file an appeal out of time against the judgment
of the Employment and Labour Relations Court at Nairobi (B. Ongaya,
J.) delivered on 7th December, 2018 in in ELRC No. 2106 of 2014)*

RULING

1. By a Notice of Motion dated 31st August 2021, brought pursuant to rules 4 and 41 of this Court's rules and sections 3A and 3B of the [Appellate Jurisdiction Act](#), the applicants, Makueni County Public Service Board and Makueni County Government seek an order staying execution of the Decree, the subject matter of the Intended Appeal, pending the hearing and determination of the Appeal and leave to file an appeal out of time.
2. The motion is brought on the grounds on its face and an affidavit in support (which was not attached) of Joshua Wambua, on behalf of the applicant wherein, it was contended that the respondent, Fredrick Odhiambo Ndede filed a memorandum of claim on 24th November, 2014 seeking for damages for unlawful suspension and breach of his constitutional rights. In a judgment entered on 7th December, 2018 in his favour, the trial judge declared that in view of his deployment as interim County Secretary by the Public Service Commission being overtaken by events, the respondent was entitled to be released back to the Commission in accordance with the applicable transitional law, including section 138(5)



- of the [County Governments Act](#) and applicable transitional policies; that the applicants were aggrieved by the decision and intend to file an appeal out of time.
3. In this regard, it was asserted that they lodged a Notice of appeal dated 22nd January, 2019 on 20th February, 2019 in the Employment and Labour Relations Court and in this Court on 23rd May, 2019; that they also served the notice on the respondent on 24th May, 2019; that leave of this Court to extend time is necessary before the applicants can file the intended appeal; that thereafter, the applicants seek to file an application for stay of execution of the judgment and decree issued by the trial court; that the intended appeal raises arguable issues.
 4. In their written submissions in support of the application, it was submitted that the delay in filing the appeal was occasioned by the delay in obtaining the typed proceedings from the High Court and that further delay was caused when obtaining the decree.
 5. In a replying affidavit sworn on 13th October 2021 on behalf of the respondent by Alfred Ochieng Opiyo advocate, and in written submissions, the applicant's motion was opposed. It was deponed that the Notice of appeal served on the respondent on 24th May 2019 did not comply with rule 74 (2) of this Court's rules as it was lodged in the lower court on 20th February 2019, approximately 75 days after the judgment; that the applicants' assertion that the delay in filing the intended appeal was occasioned by the registry's delay in supplying the certified copies of proceedings and judgment is unsupported as no Certificate of delay was attached; that further, rule 74 (5) stipulates that it shall not be necessary to extract the Decree before lodging a Notice of appeal; that the applicants' reasons are mere excuses; and further, since the applicants lodged the Notice of appeal, they have not taken any tangible steps to institute the intended appeal and have slept on their rights; that the applicants have not demonstrated what prejudice they are likely to suffer since the trial court's decision was delivered almost 2 ½ years ago, and it has been approximately 7 years since the suit was lodged in the trial court; that if leave to extend time were to be granted, the respondent would suffer great prejudice and irreparable harm, as he is due to retire from public service before the appeal is heard and determined; that the pendency of the appeal is both prejudicial and oppressive to the respondent as he has been denied the enjoyment of the fruits of the trial court's judgment.
 6. Under rule 4 of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application* No. Nai 251 of 1997.
 7. The respondent has strenuously opposed the application to extend time to file an appeal nearly 2 ½ years after the judgment was rendered. According to the record, judgment was rendered on 7th December 2018, and this application is dated 31st August 2021. In effect, the delay in seeking to file the appeal is 2 years and 8 months. The explanation the applicants have advanced is that the delay was occasioned by the registry which failed to supply the certified proceedings within the required time. No Certificate of delay was annexed to the application. The Certificate of delay would have specified the period that it took the registry to prepare the proceedings, which period according to rule 82 of this Court's rules would have excluded the time taken for preparation of the proceedings from the period of delay.
 8. Since no Certificate of delay was attached, there was nothing that demonstrated that the registry was responsible for the delay in supplying the proceedings, and without it, it was not possible to ascertain the period to be excluded. Without the possibility of excluding the period of preparation of the



proceedings, it became incumbent on the applicants to explain the entire 2 years and 8 months delay. A further consideration of the application does not disclose that any other reasons were advanced, with the result that it becomes evident that the applicants have failed to explain the inordinate, excessive and oppressive delay in lodging an appeal against the trial court's judgment.

9. As to whether the appeal would have any likelihood of success. The application does not disclose any grievance against the judgment as a consequence of which I am able to determine the likelihood of success of the intended appeal.
10. Turning to whether the respondent will be prejudiced were time to be extended, given the 2 years and 8 months delay in seeking to lodge the intended appeal, which the applicants have not in any way explained, my view is that the respondent would be subjected to further delay in the enjoyment of the fruits of his judgment, through no fault of his own, which will only occasion him undue prejudice.
11. In sum, the applicants having failed to satisfy the requirements of rule 4, I decline to exercise my discretion to extend time to lodge an appeal. Accordingly, the motion is dismissed with costs to the respondent.
12. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH OF APRIL, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

