



**Registrar of Trade Unions & another v National Union of Domestic Workers  
(Civil Application 87 of 2020) [2022] KECA 511 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 511 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 87 OF 2020  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
APRIL 28, 2022**

**BETWEEN**

**REGISTRAR OF TRADE UNIONS ..... APPELLANT**

**AND**

**KENYA UNION OF DOMESTIC, EDUCATIONAL INSTITUTIONS AND  
ALLIED WORKERS (KUDHEIHA) ..... PROPOSED APPELLANT**

**AND**

**NATIONAL UNION OF DOMESTIC WORKERS ..... RESPONDENT**

*(Being a reference to the full Court from the ruling of S. Ole Kantai JA dated 4th May 2021 on an application for extension of time to file an appeal against the judgment of the Employment and Labour Relations Court in Kisumu (Nduma Nderi J) dated 30th May, 2019 in Bungoma ELRC Civil Appeal No. 1 of 2018)*

**RULING**

1. By the letter dated 14<sup>th</sup> May 2021, the applicant requests for a reference to the full bench of this Court under Rule 55 of the *Court of Appeal Rules*. The reference relates to the ruling of Kantai JA dated 4<sup>th</sup> May 2021 on its application dated 27<sup>th</sup> July 2020.
2. In the said application, the applicant, the Kenya Union of Domestic, Educational Institutions and Allied Workers (KUDHEIHA) sought extension of time to file and serve a Notice of Appeal from the decision of the Employment and Labour Relations Court at Kisumu (Nduma Nderi J,) dated 30<sup>th</sup> May, 2019 in Bungoma ELRC Civil Appeal No. 1 of 2018.
3. The application was brought under Rules 41 and 47 of the Court of Appeal Rules and Article 159 of *the Constitution* of Kenya, 2010. It is supported by an affidavit sworn by one Albert Njeru Obed, the Secretary General of the applicant. The applicant argued in the grounds in support of its application



that it was not aware that judgment had been delivered on 30<sup>th</sup> May, 2019. It had only learnt of the delivery of the judgment on 19<sup>th</sup> July, 2020. The litigation leading to the judgment had been handled by the applicant's Eldoret Branch which did not inform the national office that judgment in the matter had been delivered.

4. Upon considering the application and the reasons advanced, Kantai JA concluded that the delay of 13 months since the delivery of the judgment sought to be appealed from to the date of the application was not a reasonable period. Further, that the delay was compounded by the reasons advanced for the delay, which were that the applicant's Eldoret Branch had handled the case but had failed to inform the national office that judgment had been delivered.
5. The Court noted that this was not a case in which the applicant had been kept away from the fact that judgment had been delivered, its representatives having participated in the case. Not having seen the judgment sought to be appealed from, could not tell whether the appeal had high chances of success or not. In the Court's view, however, since the respondent had been registered after the judgment of the ELRC, rights may already have accrued, and the respondent may be prejudiced should the Court grant the application. The Court therefore found no basis for exercising discretion in favour of the applicant and dismissed its application, hence this reference.
6. As observed by Kantai JA in his ruling, the correct rule under which an application for extension of time should be brought before this Court is Rule 4 of the Court of Appeal Rules, not Rules 41 and 47. Under the said Rule, the Court is empowered to exercise discretion to extend time for an applicant to do any act authorized or required by the Rules.
7. Rule 55 (1) (b) provides for a reference to the full bench of the Court by a party dissatisfied with a decision of a single judge. Such a reference is required to be made within seven days of the decision. We observe that the present reference has been brought outside the period prescribed under the Rules, a fact that the applicant concedes. It submits that the ruling the subject of the reference was delivered electronically on 4<sup>th</sup> May, 2021 but was received electronically on 6<sup>th</sup> May, 2021. A letter seeking a reference to the full bench should have been lodged on 13<sup>th</sup> May, 2021. However, by the time the ruling was received and a meeting of the applicant convened to decide on the way forward, the 7 days provided under Rule 55 had lapsed. This failure to comply with the Rules notwithstanding, the applicant asks us to exercise discretion in its favour and allow its application.
8. In order to find in the applicant's favour, we must be satisfied that the single judge did not exercise discretion properly in declining to grant the orders sought for extension of time to file a notice of appeal. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (1999)2 EA 231, the Court set out the principles for exercise of discretion in an application for extension of time as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, 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. Should the full Bench find that the single judge has not exercised discretion properly, the Court may set aside that decision. In *Peninah Mongina & Another v Walter Masese Makori & Another* [2005] eKLR (Civil Application No. 20 of 2004) this Court held that:

“It has been stated time and again that in an application under rule 4 of the Rules, a single Judge of this Court is called upon to exercise his discretion which discretion although unfettered must be exercised judicially.”

10. The Court went on to consider decisions in which the matters to be taken into account in a Rule 4 application have been set out, notably *Mwangi v Kenya Airways Ltd* [2003] KLR and *Leo Sila Mutiso v Rose Hellen Wangari Mwangi (supra)* and concluded as follows:

“What comes out clearly from the foregoing is that under rule 4 of this Court’s Rules, the learned single Judge was exercising his unfettered discretion. In a reference to the full court before we can interfere with that discretion, we must be satisfied that the learned single Judge misdirected himself in some matter and as a result arrived at a wrong decision or, that the learned single Judge misapprehended the law or failed to take into account some relevant matter.”

11. The question is whether, in the present case, the single judge exercised his discretion improperly in declining to grant the application for extension of time. The judge noted in his ruling that there was a 13-month delay between the date of delivery of the decision of the ELRC and the filing of the application before us. The reason advanced for the delay was that the applicant’s Eldoret Branch did not notify the applicant that the judgment had been delivered.

12. As observed by the single judge, the applicant’s Eldoret Branch appears to have participated in the proceedings before the ELRC. The applicant’s argument therefore that it did not learn of the delivery of the judgment until 13 months later was not a proper basis for asking the court to exercise discretion under Rule 4 in its favour. As was observed in *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* (2018) eKLR:

“(12) 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.”

13. The single judge also considered the prejudice likely to be suffered by the respondent should the application be granted. It noted that the respondent had been registered after the judgment rendered 13 months before the application; that rights were likely to have accrued, and therefore granting the application for extension of time was likely to prejudice the respondent.

14. We find no basis for faulting the single judge in reaching this conclusion. The decision of the ELRC had been rendered over a year before the applicant sought extension of time to file its notice of appeal. The respondent had in all likelihood been registered. Rights would have accrued, both to the respondent and those who would have joined the respondent in the interim.

15. Finally, the single judge considered, as required in the principles established in *Sila Mutiso*, the chances of the applicant’s intended appeal succeeding. Like the single judge, we have not had sight of the



judgment sought to be appealed from. We cannot therefore consider the chances of the appellant's appeal succeeding.

16. Given the other factors we have considered however, particularly the length of the delay in lodging the application and the absence of sufficient reasons advanced for the delay, we are satisfied that the single judge properly exercised his discretion in declining to grant the extension of time to the applicant. We accordingly find no merit in the application, and it is hereby dismissed.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

