



**Warui v Office of the Auditor General & another (Civil Application
E438 of 2021) [2022] KECA 762 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 762 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E438 OF 2021**

F SICHALE, JA

JUNE 24, 2022

BETWEEN

CHRISTOPHER WARUI APPLICANT

AND

OFFICE OF THE AUDITOR GENERAL 1ST RESPONDENT

DIRECTOR OF PENSIONS 2ND RESPONDENT

*(Being an Application for Extension of Time to File and Serve Notice of
Appeal out of Time against the Ruling and Orders of Nzioka wa Makau
J, dated 29th June 2021 in Nairobi ELRC Cause No. E662 of 2020)*

RULING

1. The application before me sitting as a Single Judge is a motion dated 7th December 2021, brought pursuant to the provisions of Article 159 of *the Constitution* of Kenya 2010, Sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, Rules 4, 41, 42, 43 and 47 of the *Court of Appeal Rules* and the inherent powers of the Court in which Christopher Warui (the applicant herein), seeks the following orders:
 1. Spent.
 2. The applicant be and is hereby granted leave to file and serve the letter requesting for proceedings out of time.
 3. The time limited for the applicant to file and serve the respondent with the Notice of Appeal, Memorandum of Appeal and Record of Appeal be enlarged or extended to allow the filing and serving of the same within such time as the Court shall deem fit.
 4. The costs of this application be in the intended appeal.”



2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Linda Aluvale, Counsel who has the conduct of this matter on behalf of the applicant who deposed inter alia that the applicant wished to appeal against the decision of Makau wa Nzioka, J, in which he struck out the applicant's claim in Nairobi ELRC Cause No. E662 of 2020, on 29th June 2021.
3. That, upon review of the ruling, the applicant instructed them to appeal against the same but unfortunately, soon thereafter she lost a very close family member on 10th July 2021 and was forced to take time away from the office to travel for the funeral and burial.
4. That, following her return from the burial, she felt very unwell and was displaying Covid-19 related symptoms whereupon she sought treatment on 15th July 2021, following which she went into isolation.
5. That, whilst still recuperating, she unexpectedly lost her foster sister on 22nd August 2021, and was forced to take time away from office to travel for the funeral and burial and that upon resuming work towards the end of September 2021, the file was not brought to her immediate attention as it was filed away in her absence.
6. Counsel thus deposed that the delay in filling the Notice of Appeal ought not to be visited upon the applicant as the same had been explained and that further the applicant had an arguable appeal with high chances of success and that the respondents would not suffer any prejudice if the orders sought are granted.
7. The applicant in his submissions basically reiterated the grounds set out in detail of the face of the application and the supporting affidavit and submitted that the hardship and/or prejudice that will be occasioned to the applicant in the event that the application is not allowed greatly outweighs the prejudice (if any) that will be suffered by the respondents and that further the applicant, is a senior member of the society, who with integrity and zeal, served the 1st respondent for a whopping 35 years, only to be cannibalized at the time of his retirement and that the applicant deserves to have his day in Court as the matters canvassed in his suit are weighty.
8. There was no response on part of the respondents.
9. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's submissions, the cited authorities and the law.
10. The applicant's motion is brought inter alia under Rule 4 of this Court's Rules. The said Rule provides:

“4.
Extension of time
The Court may, on such terms as it thinks 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.”
11. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously.



12. In *Fakir Mohamed vs. Joseph Mugambi & 2 others* C.A. No. NAI. 332 of 2004, this Court stated as follows regarding discretion under the Rule and the factors that ought to guide its exercise:

“The exercise of this Court’s discretion under rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors ...”

13. In the instant case, the impugned ruling was delivered on 29th June 2021, whereas the instant application is dated 7th December 2021. There has therefore been a delay of about 5 months or 161 days from the date of delivery of the impugned ruling. From the circumstances of this case, I do not consider a delay of about 161 days to be inordinate, deliberate or unreasonable, given the reasons that have been advanced for the delay.
14. As regards the reasons for the delay, it was contended that the same was due to inevitable circumstances since at the time that the ruling was delivered, the applicant’s advocate was unwell for some time and during the same period, she was bereaved on two separate quick successions thus making it difficult for her to comply with the required timelines. Evidence towards this effect has been provided.
15. From the circumstances of this case, I am of the considered opinion that the reasons put forth for the delay are reasonable and plausible and the same has been explained to the satisfaction of this Court.
16. With regard to the possibility of the appeal succeeding, I have looked at the annexed draft Memorandum of Appeal and I am satisfied that indeed the applicant has established to the satisfaction of this Court that he has raised issues worthy of consideration by the Court on appeal. Of course I am alive to the fact that I cannot say more regarding this issue lest I embarrass the bench that will be eventually seized of the appeal, since this is an issue for consideration by a full bench.
17. As regards prejudice, I am satisfied that the applicant will be greatly prejudiced if this application is not allowed as his right of appeal will have been completely shut out. In any event the respondents have not even responded to the application.
18. Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of this Court to extend time to file an appeal out of time.
19. Accordingly, the applicant’s motion dated 7th December 2021, is merited and the same is hereby granted as prayed.
20. The applicant shall file and serve the Notice of Appeal, Memorandum of Appeal and Record of Appeal within 30 days of obtaining certified copies of proceedings failure to which these orders shall stand vacated.
21. The costs of the motion shall abide the outcome of the intended appeal. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

