



REPUBLIC OF KENYA



Kenya County Government Workers Union v Kisumu Water & Sewerage Company (Civil Application E053 of 2022) [2022] KECA 1035 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KECA 1035 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E053 OF 2022
M NGUGI, JA
SEPTEMBER 23, 2022**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION APPLICANT

AND

KISUMU WATER & SEWERAGE COMPANY RESPONDENT

(Being an application for extension of time to file an appeal out of time against the ruling of the Employment and Labour Relations Court at Kisumu (Baari J.) dated 10th February, 2022 in Miscellaneous Application No. E060 of 2021)

RULING

1. In its application dated 10th April, 2022 brought under section 3A and 3B of the [Appellate Jurisdiction Act](#), Cap 9 of the Laws of Kenya and Rule 4 of the [Court of Appeal Rules](#), 2010, the applicant seeks the following orders:
 - i. That this Honourable Court be pleased to enlarge time and grant the applicant leave to lodge an appeal out of time against a ruling delivered on 10th February, 2022.
 - ii. That there be a stay of execution of the aforesaid ruling pending the hearing and determination of such intended appeal as may be preferred against the said ruling upon leave being granted by this Court.
 - iii. That the Court be pleased to issue an order it deems fit and just in the circumstance.
 - iv. The costs be provided for.
2. The application is based on the grounds set out on the face of the application and is supported by an affidavit sworn by Roba S. Duba, the applicant's Secretary General, on 10th April 2022. The applicant argues in these grounds that it is dissatisfied with the ruling of the trial court and has instructed its



- advocates to lodge an appeal against it. Its intended appeal raises arguable issues, and this court should exercise its discretion to extend the time granted in its Rules for filing the appeal.
3. The applicant argues that the delay in filing its appeal was caused by the bereavement of the appellant's Secretary General who is the only person mandated to instruct its advocates to act on suits. It was therefore impossible and or impractical for it to lodge the appeal without the requisite instructions. It contends that unless the orders sought are granted, the intended appeal, which has overwhelming chances of success, will be rendered nugatory. The respondent, according to the applicant, will not be prejudiced if the orders are granted.
 4. The respondent opposes the application and has filed an affidavit sworn by Thomas Odongo on 4th July, 2022. It is averred in this affidavit that the respondent has already complied with the decree in ELRC No. 429 of 2017. Further, that in the ruling dated 26th May 2021, Radido J had dismissed the contempt application dated 21st January 2021. Instead of the applicant appealing against the orders issued on 26th May 2021. It had filed Misc. Application No. E060 of 2021 seeking similar orders, which application was dismissed on 10th February, 2022 for being res judicata.
 5. In any event, according to the respondent, the issue of deductions and remittance of the union dues was extensively litigated in the application dated 21st January, 2021. It is its case that the applicant's intended appeal is not arguable and will only serve to waste the court's time, the applicant having failed to give sufficient cause to warrant enlargement of time to file the appeal out of time.
 6. In submissions dated 30th June, 2022, the applicant argues that Rule 4 of this Court's Rules gives the Court the discretion to extend time within the parameters set out in *Leo Sila Mutiso vs Hellen Wangari Mwangi* (1999) 2 EA 231. It contends that there is no minimum and maximum period of delay set out in the law; that what is expected from an applicant is that it gives a plausible reason for the delay. The applicant cites in support the case of *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* (2018) eKLR.
 7. The applicant further submits that the delay in this matter is not in any way inordinate; that that it is a union with a Secretary General who is the only person mandated to issue instructions with regard to institution of suits; and that it was not in court when the ruling was delivered. It reiterates that its intended appeal raises issues with high chances of success as it is evident that the learned judge in the impugned ruling misinterpreted and/or ignored the legal provisions relating to the doctrine of res judicata when the respondent was in breach of the orders issued on 18th September, 2019. It is its submission further that the respondent will not suffer any prejudice while it continues to suffer substantial loss as the respondent has failed to deduct and remit union dues to the applicant in violation of section 48(2) and (3) of the *Labour Relations Act* No. 14, 2007.
 8. In its submissions in response, the respondent notes that the applicant has not demonstrated where, in its constitution, it is provided that only the Secretary General can give instructions to a union. Further, it has not been explained how close the person who died was to the secretary general to warrant his absence from the office for two months. The applicant has also not annexed a memorandum of appeal to demonstrate that its appeal is arguable. In the respondent's view, the application should be dismissed with costs.
 9. The present application seeks extension of time to file an appeal out of time, as well as stay of execution of the orders of the ELRC issued on 10th February 2022. An application for extension of time is lodged under Rule 4 of the Court of Appeal Rules, which gives the Court unfettered discretion to determine whether or not to extend time for the doing of any act required under the Rules. Such discretion is to be exercised in accordance with the principles set out in *Leo Sila Mutiso vs Rose Hellen Wangari*



Mwangi (supra). The Court is required to consider the length of the delay, the reasons for the delay and (possibly) the chances of success of the appeal.

10. The ruling that the applicant seeks to appeal against was delivered on 10th February 2022. The present application was filed on 16th April 2022. There was therefore a delay of two months in approaching the Court to seek extension of time. I note that no application has been made for extension of time to file the notice of appeal. The reason advanced for the delay is that the applicant's Secretary General, the only person authorized by the applicant's constitution to instruct an advocate, was bereaved. The applicant had therefore not been able to issue instructions for filing the appeal.
11. The respondent has submitted, and this submission raises a valid question, that the applicant has not placed anything before the court that demonstrates that it is only the Secretary General who can issue instructions to the applicant's advocates. On the basis of the averments before me, I find nothing that supports the contention.
12. Supposing, however, that it was indeed the case that it was only the Secretary General who was authorized to instruct advocates. Is there a plausible explanation for his failure to do so within the time prescribed by the Rules? The applicant contends in the grounds in support of its application that the Secretary General was bereaved, hence the failure to issue instructions. I observe, however, that while the applicant states in the grounds on the face of the application that its Secretary General was bereaved, the Secretary General does not depose this in his affidavit in support of the application. Mr. Roba S. Duba avers at paragraph 14 of his affidavit in support of the application as follows:

‘14. That the delay in lodging the Appeal is and/or was occasioned by the fact that I was been (sic) at the time the Ruling was delivered and was therefore not in a position to instruct the Applicant's Advocate to pursue the Appeal’.
13. It is not indicated by whom he was bereaved, and when. Again, as submitted by the respondent, the applicant has not told the Court who the deceased was, and how close he or she was to the Secretary General that he was not in a position to issue instructions to the applicant's advocates in a period of two months. In my view, the applicant has not placed before this Court a plausible explanation for the two-month delay in filing its appeal within the time prescribed in the Rules, or seeking the exercise of the Court's discretion to extend time.
14. The applicant's second prayer is for stay of execution of the order issued on 10th February 2022. I observe, first, that the order issued was a negative order- it was a dismissal of the applicant's application on the grounds that it was res judicata. However, even had it been a positive order, an application for stay of execution filed contemporaneously with an application for extension of time is premature and unsustainable. Rule 5(2)(b) of the Court of Appeal Rules states as follows:
 - (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
 - (a) ...
 - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of proceedings, an injunction or a stay of any further on such terms as the Court may think just.

(Emphasis added).
15. The jurisdiction of this Court under Rule 5(2)(b) can only be invoked where there is a duly filed notice of appeal, a proposition that does not need belabouring. Until the applicant has obtained extension



of time to file its notice of appeal out of time and has done so, all the other prayers in the application before the Court are premature. Unless a valid and competent notice of appeal is filed in accordance with the Rules, this Court lacks jurisdiction to entertain any proceedings regarding the applicant's intended appeal.

16. Accordingly, it is my finding that the application dated 10th April 2022 is devoid of merit. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

