



Union of Kenya Civil Servants & another v Kachuwai & 2 others (Civil Application E018 of 2022) [2022] KECA 1198 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KECA 1198 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E018 OF 2022
F SICHALE, JA
OCTOBER 26, 2022**

BETWEEN

UNION OF KENYA CIVIL SERVANTS 1ST APPLICANT

TOM MBOYA ODEGE 2ND APPLICANT

AND

SOPHIA CHEMASIGEN KACHUWAI 1ST RESPONDENT

CHARLES JOHN ATIELI 2ND RESPONDENT

REGISTRAR OF TRADE UNIONS 3RD RESPONDENT

(Being an Application for Leave to Lodge the Record of Appeal out of time against the Ruling of the Employment and Labour Relations Court at Nakuru (Wasilwa J), dated 20th January 2022 in ELRC Petition No E016 of 2021)

RULING

1. The application before me sitting as a single judge is a motion dated April 4, 2022, predicated upon rules 41 and 47 of the [Court of Appeal Rules](#) 2010 and article 159 of the [Constitution of Kenya](#) 2010, in which Union of Kenya Civil Servants and Tom Odege (the applicants herein), seek *inter alia* leave to lodge the
2. Record of appeal out of time against the ruling of Wasilwa, J dated January 20, 2022, in Nakuru ELRC Petition No E016 of 2021.
3. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Tom Mboya Odege the (2nd applicant herein and the Secretary General of the 1st applicant) who deposed *inter alia* that after the ruling herein was delivered on January 20, 2022, they filed the notice of appeal within the prescribed time and further served the same upon the respondents and that the proceedings



- were availed and collected on March 21, 2022, so the last day for lodging the record of appeal lapsed on April 1, 2022, but the applicants suffered logistical and financial issues hence the delay of about 4 days.
3. He further deposed that the intended appeal was meritorious and that failure to lodge the same was inadvertent and that further the orders sought would not prejudice the respondents in anyway.
 4. There was no response on part of the respondents despite having been served with a hearing notice on September 1, 2022 at 2.43 PM.
 5. The applicants in their submissions basically reiterated the contents of the supporting affidavit and submitted *inter alia* that the application had been filed without unreasonable delay and that the intended appeal raises triable issues on the violation of article 50 read with 47 of the [Constitution of Kenya](#) 2010.
 6. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's submissions, the cited authorities and the law.
 7. The principles upon which this court exercises its discretion under rule 4 are firmly settled. The court has wide and unfettered discretion in deciding whether to extend time or decline the same. However, in exercising its discretion the court should do so judiciously.

See *Mwangi -vs- Kenya Airways Limited* (2003) eKLR 486 where this court stated thus:

“Over the years, the court has set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (Civil Application No Nai 255 of 1997 (unreported), the court expressed itself thus:

“It is now well settled that the decision whether or not to extend 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.”

8. In the instant case, and as regards the length of the delay, the impugned ruling was delivered on January 20, 2022, whereupon the applicants lodged and served the notice of appeal to the respondents well within time. The proceedings were subsequently availed and collected on March 21, 2022 and the last date for lodging the record of appeal was on April 1, 2022, whereas the instant motion is dated April 4, 2022, meaning there has been a delay of about 4 days. In my considered opinion, a delay of 4 days is certainly not inordinate.
9. Regarding reasons for the delay, the applicants have contended that the delay in filing the record of appeal within time was due to the fact that they suffered/encountered logistical and financial issues hence the delay of about 4 days. From the circumstances of this case, I am satisfied that the delay herein has been explained to the satisfaction of this court and I find the reasons given for the delay to be plausible.
10. With regard to the possibility of the appeal succeeding, I have looked at the annexed draft memorandum of appeal and I am satisfied that the applicants have an arguable appeal worthy of consideration by the court. 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.



11. As regards prejudice, no evidence has been placed before this court to show that indeed the respondents herein will suffer any prejudice if the instant motion is allowed. As a matter of fact, the respondents have not even opposed the motion nor filed any reply towards the same.
12. Given the circumstances, I find that the applicants have demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to rule 4 of this court to extend time to file the record of appeal.
13. Accordingly, the applicants motion dated April 4, 2022, is meritorious and the same is hereby allowed in terms of prayer 2 and 3 thereof.
14. The applicants are hereby granted leave to file their record of appeal against the ruling of Wasilwa, J dated January 20, 2022, within 30 days of this ruling failure to which these orders shall stand vacated.
15. The costs of this motion shall abide the outcome of the intended appeal.
16. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF OCTOBER, 2022.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

