



REPUBLIC OF KENYA



KENYA LAW
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Kariuki & 4 others v Office of the Auditor General & 2 others (Civil Application E036 of 2022) [2022] KECA 1108 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KECA 1108 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E036 OF 2022
F SICHALE, JA
OCTOBER 7, 2022**

BETWEEN

**KELVIN GATEMBO KARIUKI 1ST APPLICANT
ELIZABETH W MUTUA 2ND APPLICANT
BRENDA ANINDO 3RD APPLICANT
CATHERINE MURITHI 4TH APPLICANT
SCOLASTICA WAWIRA NJERU 5TH APPLICANT**

AND

**OFFICE OF THE AUDITOR GENERAL 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
NATIONAL EMPLOYMENT AUTHORITY 3RD RESPONDENT**

(An Application to lodge an appeal out of time against the Ruling and Orders of the High Court of Kenya at Nairobi (Rika, J) dated 11th June 2021 IN (ELRC Petition No.16 OF 2020)

RULING

1. Kelvin Gatembo Kariuki, Elizabeth W. Mutua, Brenda Anindo, Catherine N. Murithi and Scolastica Wawira Njeru (the applicants herein), have vide a motion dated 7th February 2022, brought pursuant to the provisions of Article 159 of the Constitution of Kenya, Rules 4, 5 (2) (b), 41, 42 and 47 of the Court of Appeal Rules 2010, sought leave to lodge an appeal out of time.
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Kelvin Gatembo Kariuki (the 1st applicant herein), who deposed inter alia that the time within which to file the Memorandum and Record of Appeal had since lapsed and that the delay in filing the same was



excusable, justifiable and unavoidable since the applicants' advocates had closed office at the time that the ruling was delivered owing to covid19 pandemic.

3. He further deposed that the 1st respondent had filed an application for review of the ruling which they had failed to prosecute to date and that they had an arguable appeal with high chances of success.
4. There was no reply on part of the respondents.
5. The applicants in their submissions basically reiterated the averments contained in the affidavit in support of the motion and submitted that they had not been indolent in bringing the instant application as they had endeavored to explain what occasioned the delay.
6. The respondents on the other hand did not file submissions.
7. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicants' submissions, the cited authorities and the law. 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.
8. See *Fakir Mohamed V. Joseph Mugambi & 2 Others* C.A. No. NAI. 332 of 2004 where the Court laid out some of the considerations to be taken into account by Court in deciding applications of these nature as follows; the length of the delay, the causes of the delay, the possibility of the appeal succeeding and prejudice to be occasioned to the parties.
9. In the instant case, the impugned ruling was delivered on 11th June 2021, whereas the instant motion is dated 7th February 2022. There has therefore been a delay of about 8 months which delay is certainly inordinate.
10. As regards the reasons for the delay, it was contended for the applicants that the same was occasioned by the fact that as at the time that the ruling was delivered, their advocates offices had closed as a result of covid19 pandemic and that as at the time they became aware of the ruling, the stipulated timelines for appeal had lapsed. It is instructive to note that it has not been indicated when the applicants advocate allegedly closed office and neither has it been stated when they became aware of the impugned ruling. Additionally, no evidence has been tendered to support these contentions either by way of notices or otherwise.
11. In view of the foregoing, I am of the considered opinion that the reasons put forth for the delay are not tenable and the same has not been explained to the satisfaction of this Court.
12. With regard to the possibility of the appeal succeeding, I have looked at the annexed draft Memorandum of Appeal and I cannot make a definitive finding on this issue sitting as a single Judge.
13. As regards prejudice, it has not been demonstrated to the satisfaction of this Court, the prejudice that that the applicants will stand to suffer if the instant motion is not allowed.
14. Taking into totality all the circumstances in this case, I find that the applicants have not 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 an appeal out of time and I hereby decline to extend time within which to file the appeal.
15. Accordingly, the applicant's motion dated 7th February 2022, is without merit and the same is hereby dismissed with no order as to costs.

Orders accordingly.



DATED AND DELIVERED AT NAIROBI THIS 7TH 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

