



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OUKO, (P), (IN CHAMBERS))**

**CIVIL APPLICATION NO. 33 OF 2020**

**BETWEEN**

**NOAH ASANGA OKAYA.....APPLICANT**

**AND**

**COUNTY ASSEMBLY OF VIHIGA.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR VIHIGA COUNTY.....2<sup>ND</sup> RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD.....INTERESTED PARTY**

*(An application for leave to appeal out of time against the ruling and orders of the*

*Employment and Labour Relations Court at Kisumu (Nduma, J.)*

*dated 2<sup>nd</sup> May, 2019 in ELRC No. 93 of 2018)*

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**RULING**

Though the title of the motion before me suggests that the application is one for leave to file an appeal out of time against a ruling of the Employment and Labour Relations Court (ELRC) dated 2<sup>nd</sup> May, 2019 in ELRC No. 93 of 2018, the truth is that, in the same application, the applicant also seeks an order of stay of execution of the very impugned ruling.

Time and time again, this Court has explained that its jurisdiction is exercised at two levels; that is, by a single Judge on behalf of the entire Court under **Rule 53 (1)** of this Court’s Rules, or by a fully constituted Bench. We must continue to discourage such omnibus applications, like this one, because they waste valuable court time as they end up being adjourned to be placed before the right forum.

Secondly, there is also an implication on the court filing fees, in that, by the nature of the omnibus application, the requisite court filing fees, which would have been payable if the orders were sought in separate applications, will not be met.

That said, it is not within my jurisdiction, as a single Judge, to determine an application for stay of execution under **Rule 5(2) (b)** of this Court’s Rules.

The applicant’s issue with the impugned ruling is that the learned Judge proceeded on the wrong premise that he was a Chief Officer as opposed to a Chief of Staff, thereby misconstruing the applicable disciplinary process applicable to him. Though aggrieved, the applicant did not file a Notice of Appeal, as the first step to challenge the decision, within the stipulated time frame under **Rule 75(2)** of this Court’s Rules hence the instant application, in which the applicant seeks an order enlarging the time within which to lodge and serve the notice of appeal.

The lapse was attributed to alleged out of court settlement negotiations by the parties as well as the applicant’s advocate, which lapses the applicant believed should not be visited upon him. In the applicant’s view, the intended appeal is not only arguable but also the respondent would not be prejudiced if the leave sought is granted.

Opposing the application, the 1<sup>st</sup> respondent argued that the application was unmeritorious; that the applicant had failed to give a plausible

explanation for the delay in lodging the intended appeal to warrant the exercise of this Court's discretion in its favour; that there was no evidence to demonstrate that the applicant had made any effort to obtain certified copies of the proceedings in the ELRC; and that no appeal could lie against the impugned ruling since the main suit in the ELRC was withdrawn by the applicant on 18<sup>th</sup> July, 2019, thus, the Court would be engaging in an academic exercise, should it accede to the applicant's request.

It is settled that in an application under **Rule 4** of this Court's Rules for extension of time, the Court exercises unfettered discretionary powers. Some of the guiding factors that ought to be considered are, the length of the delay; the reason for the delay; the degree of prejudice to the respondents, if the application is granted, and, possibly, the chances of the success of the intended appeal, should the application be granted. See **Fakir Mohammed vs. Joseph Mugambi & 2 Others** [2005] eKLR.

With the above factors in mind, the impugned judgment was delivered on 2<sup>nd</sup> May, 2019 and the application herein was filed on 2<sup>nd</sup> March, 2020, about 10 months late. I am not convinced by the explanation offered for the delay since there is nothing to prove the alleged negotiations, let alone the role played by the applicant's advocate towards the delay. I therefore find that the delay was inordinate.

Similarly, being cognisant that it not within my mandate to determine the merit of the intended appeal, I am not satisfied that it is arguable. More so, taking into account that the suit at the ELRC has since been withdrawn. Therefore, to what end is the leave sought to appeal against a ruling which has ceased to exist?

Accordingly, I find no merit in the application which I now dismiss with costs to the 1<sup>st</sup> respondent.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of March, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**