

IN THE COURT OF APPEAL

AT NAKURU

[CORAM: F. SICHALE, JA IN CHAMBERS]

CIVIL APPLICATION NO. E10 OF 2021

JOHN WACHIRA GIKONYO & 9 OTHERS.....APPELLANTS

VERSUS

COUNTY GOVERNMENT OF LAIKIPIA.....RESPONDENT

(Being an application for extension of time to file a memorandum and record of appeal from the judgment of Mbaru J delivered on 6th December 2018.)

IN

(Nakuru ELRC Cause No. 96 of 2014)

RULING OF THE COURT

Before me is a motion dated 5th February 2021, filed by **John Wachira Gikonyo & 9 others, (The applicants)** brought under the provisions of **Rule 4 of the Court of Appeal Rules 2010, and Sections 3A and 3B of the Appellate Jurisdiction Act** in which they seek the following orders:

“1. Spent.

2. THAT this Honourable Court be pleased to extend time within which the applicant ought to have filed the memorandum and record of appeal.

3. THAT the memorandum of appeal and the record of appeal be filed within 60 days from the date of this order.

4. THAT the costs and incidental to this application abide the result of the said appeal.”

The motion is supported on the grounds on the face of the motion and an affidavit sworn by **John Wachira Gikonyo** who deponed *inter alia*, that the applicants were out of time for filing memorandum and record of appeal which was occasioned by the effects of the Covid 19 pandemic and that out of the same, the applicants were unable to personally engage an advocate and share the documents. He further deponed that there was a need to mitigate the delay by having the instant application heard at the earliest to pave way for filing the memorandum and record of appeal and that the applicants had a good and arguable appeal with high chances of success.

The application was opposed vide a replying affidavit dated 23rd February 2021 by **Joseph Mwangi**, learned counsel who has the conduct of this matter on behalf of the respondent who deponed that the application was incompetent and bad in law as the applicants never filed any notice of appeal within 14 days of delivery of judgment as provided under Rule 75 (2) of the Rules and that as such the jurisdiction of this court had not been properly invoked and that judgment in this matter was delivered on **6th December, 2018** and the delay in lodging the notice of appeal on time had not been explained. He further deposed that the certificate of delay contained on page 12 of the application could not be relied upon as the same was never served on the respondent and that the challenges occasioned by onset of Covid 19 could not be advanced as reasons for failing to file the notice of appeal on time as the pandemic started affecting court operations in Kenya in **March 2020**, while the judgment herein was delivered on **6th December, 2018**, a delay of 2 years which had not been explained.

It was submitted for the applicants that they were long serving employees of the respondent as demonstrated by their employment contracts and that they were retired pre-maturely before attainment of mandatory age of 60 years and that the retirement contravened the provisions of the CBA as it did not consider pending leaves and leave allowances that were due. It was further submitted that the legitimate expectations of the applicants to their graceful retirement upon long years of service were frustrated and that the learned judge appreciated and found fault with the respondent for not issuing the 6 months' notice as stipulated in the CBA but failed to declare those actions of the respondent in terminating the applicants' employment as unlawful and failed to condemn the respondent to pay damages.

On the other hand, the respondent reiterated the contents of the replying affidavit in their written submissions.

I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit and the rival submissions by the parties.

The applicants motion is brought, 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."

The principles upon which this court exercises its discretion under Rule 4

are firmly settled. The court has unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in ***Leo Sila Mutiso V. Rose Hellen Wangari Mwangi*** – Civil Application No. Nai 251 of 1997 where the court stated;

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."

In the instant case it is not in dispute that the impugned judgment was delivered on **6th December, 2018**, whereas the instant application was filed **5th February, 2021**, a period of over two years from the date of the judgment. The applicants contend that the delay in filing the appeal was occasioned by the effects of Covid 19 pandemic. A certificate of delay issued by the deputy registrar of the Employment and Labour Relations Court dated **3rd September, 2019**, indicates that court fees was paid for and certified copies of proceedings were collected on **27th August, 2019**, which was way before the onset of Covid 19 pandemic. Similarly, the applicants have not demonstrated what actions they took from **27th August, 2019** to **March 2020** when Covid 19 struck (a period of over 6 months from the date of collection of the proceedings. The contention by the applicants that due to Covid 19 they were unable to personally engage an advocate and share the documents is not supported by any evidence.

In the end, I find that the applicants have not demonstrated the existence of the principles for consideration in the exercise of my unfettered discretion as laid out in **Leo Sila Mutiso case (supra)**, to extend time and therefore decline to exercise my discretion to grant the instant application and accordingly dismiss it with no order as to costs.

DATED AND DELIVERED AT NAIROBI, THIS 4TH DAY OF JUNE, 2021.

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR