



REPUBLIC OF KENYA



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**Akinyi v Mumiflora Limited t/a Baraka Roses Ngorika (Civil Application
56 of 2020) [2021] KECA 48 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 48 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 56 OF 2020
KI LAIBUTA, JA
SEPTEMBER 23, 2021**

BETWEEN

SUSAN AKINYI APPLICANT

AND

MUMIFLORA LIMITED T/A BARAKA ROSES NGORIKA RESPONDENT

*(Being an application for extension of time to file an Appeal out of time, against
the Ruling and Order of Lady Justice Monica Mbaru, dated 4 th December, 2019
in Nakuru Employment and Labour Relations Court Cause No. 38 of 2019)*

RULING

Background

1. Before me is a Notice of Motion dated 16th June 2020 made under Rule 4 of the [Court of Appeal Rules](#) in which the Applicant, Susan Akinyi, seeks extension of time pursuant to Rule 4 to file an appeal from the Ruling and Order of the Hon. Lady Justice Monica Mbaru delivered on 4th December 2019 in Nakuru Employment and Labour Relations Court Cause No. 38 of 2019.
2. The Applicant's Notice of Motion is made on the grounds that –
 - (a) the Ruling from which the Applicant seeks to appeal was delivered on 4th December 2019 striking out her suit for want of jurisdiction;
 - (b) the Applicant filed and served a Notice of Appeal dated 11th December 2019;
 - (c) the delay in lodging the intended appeal was due to unavailability of the certified copy of the Ruling and proceedings requested from the superior court;
 - (d) further delay was occasioned by the COVID-19 pandemic that led to suspension of appeals, the scaling down of court sessions and cessation of movement between counties; and



- (e) allowing this application would not occasion any injustice to the Respondent.
3. The Applicant's Motion is supported by the annexed affidavit of Jacqueline Waihenya, counsel for the Applicant, sworn on 16th June 2020 in which she restates the reasons for the delay in filing the intended appeal. Annexed to her affidavit is the Applicant's draft Memorandum of Appeal setting out eight grounds for the intended appeal, which may be summed up as follows:
- (a) the learned Judge erred in law in holding that the Applicant was a dependant of the Respondent, a limited liability company;
 - (b) the learned Judge erred in law in holding that she had no jurisdiction to determine the Applicant's claim despite the dictates of Article 41(1) of the Constitution and Section 3(2)(d) of the Employment Act, 2007;
 - (c) the learned Judge erred in law and in fact in considering extraneous matters not contemplated in the Applicant's claim in the superior court; and
 - (d) the learned Judge erred in concluding that the provisions of section 3(2)(d) of the Employment Act removed the Applicant from the court's jurisdiction by reason of having been a family member of the Respondent's Chief Executive Officer.
4. In reply, the Respondent's Operations Manager, Mr. Ngari Mahihu, has filed an affidavit sworn on 11th January 2021. According to him –
- (a) the Notice of Appeal was lodged outside the statutory time limit of 14 days, and was also served out of time on 15th January 2020;
 - (b) the letter requesting for proceedings was filed on 20th December 2019, but was not copied to the Respondent;
 - (c) the typed proceedings were certified on 2nd March 2020;
 - (d) the Applicant ought to have filed her record of appeal within 60 days from the date of filing her Notice of Appeal; and
 - (e) this application was filed on 23rd June 2020, which was over 60 days after the applicant had received copies of the typed proceedings.

Submissions by Counsel

5. In her written submissions dated 2nd July 2021 and made in support of the Applicant's application, counsel for the Applicant has invited the Court to find for the Applicant on her application for inter alia (a) extension of time to file an appeal; and (b) the Draft Memorandum of Appeal herein be deemed as properly filed; and (c) costs. Counsel relies on the authority of *Visbva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR and *Karny Zabrya and another v Shalom Levi*. [2018] eKLR. Except for the matters stated in its Operation Manager's replying affidavit, The Respondent has not made any submissions in writing.

Determination

6. Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to "... 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 ...," on such terms as it thinks just.



7. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that “the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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. The case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR lends clarity to the issue of the Court’s jurisdiction in determination of applications made under Rule 4. The discretion is unfettered. In its decision, the Court observed:

“The exercise of this Court’s discretion under Rule 4 has followed a wellbeaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors.”
9. I agree with counsel’s submissions on the factors considered in exercise of the Court’s discretion under Rule 4 to extend time to lodge an appeal from a superior court as enunciated in the case of *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* 2020 eKLR. To my mind, the Applicant’s prayer for extension of time to file an appeal is dependent on my findings on the following factors:
 - (a) whether the intended appeal is arguable with a possibility of success;
 - (b) the reasons for the delay in filing the intended appeal;
 - (c) the reasons for the delay; and
 - (d) whether the delay was inordinate ;
 - (e) whether the Respondent would be unduly prejudiced by extension of time for the Applicant to file the appeal.
10. In considering these factors, I am guided by the decision in *Pothiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others* [2005] eKLR where the Court, at p.733, called to mind the criteria applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* [1984] KLR p591 where this Court stated:

“As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

 - (a) that there is merit in his appeal;
 - (b) that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and
 - (c) that the delay has not been inordinate.”



11. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. I am satisfied that the grounds set out in the Applicant’s draft Memorandum of Appeal point to a reasonable conclusion that the intended appeal is arguable with the possibility of success. Indeed, the application before me turns on the authority of *Joseph Wanjobi Njau v Benson Maina Kabau*, No. 97 of 2012 (Unreported) where the Hon. Mr. Justice Kathurima M’Inoti held that “the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court.”
12. In *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, the Court held that:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”
13. I have carefully considered the contents of the Applicant’s Notice of Motion and the supporting affidavit to which the Ruling of the learned Judge is annexed together with the grounds contained in her draft Memorandum of Appeal. The grounds point to the fact that the intended appeal is arguable with the possibility of success. Whether or not the intended appeal will succeed in whole or in part is not for me to judge, but remains to be seen on scrutiny by the Court of the entire record of appeal once filed, and on consideration of the relevant law relating to the matters in contention. Furthermore, it is not within my jurisdiction to consider the merits of the intended appeal with finality at this stage in the proceedings.
14. By so determining, I am guided by this Court’s decision in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* CA No. 227 of 2015 (Unreported), where the Court had this to say:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.
15. As regards the issue as to whether the extension of time to file the intended appeal will cause undue prejudice to the respondent, I find that no such prejudice would be suffered. The Respondent has not alluded to any undue prejudice.
16. With regard to the period of delay, the Court of Appeal in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR observed that “... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.”
17. The applicant has given a plausible and satisfactory explanation for the delay in filing her appeal. Accordingly, I find that the Respondent would not suffer undue prejudice by extension of time for the Applicant to lodge her intended appeal. In view of the foregoing, I find that the Applicant’s Notice of Motion dated 16th June 2020 merits the orders sought for extension of time to lodge her intended appeal. Accordingly, I hereby order and direct that –
 - (a) time be and is hereby extended for the Applicant to file her record of appeal within fourteen (14) days from the date hereof;



- (b) the Applicant's Notice of Appeal dated 11th December 2019 and lodged in the superior court on 20th December 2019 be deemed as duly filed and served; and
- (c) the costs of this application be costs in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

