



**Owino v County Assembly of Siaya & 2 others (Civil Application
17 of 2021) [2021] KECA 8 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 8 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 17 OF 2021
DK MUSINGA, JA
SEPTEMBER 23, 2021**

BETWEEN

DOROTHY OWINO APPLICANT

AND

COUNTY ASSEMBLY OF SIAYA 1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF SIAYA 2ND RESPONDENT

GOVERNOR, COUNTY GOVERNMENT OF SIAYA 3RD RESPONDENT

(Being an application for extension of time to file the Notice of Appeal out of time in an intended appeal against part of the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Kisumu (Radido, J.) dated 27th January 2021 in Petition No. 45 of 2019)

RULING

1. Before me is a Notice of Motion dated 25th February 2021 by the applicant brought under rule 4 of the *Court of Appeal Rules*, 2010 seeking leave to file a notice of appeal out of time to enable her lodge an appeal against part of the judgment of Radido, J. delivered on 27th January 2021.
2. The application is premised on the grounds that upon delivery of judgment by the trial court, the advocate of the applicant was not able to access hard copy of the impugned judgment until 5th February when a copy of the same was made available to him. For this reason, the applicant's advocate was not in a position to study the judgment of the trial court and advise the applicant accordingly and more specifically whether or not there was any need to appeal any part of the judgment.
3. The applicant further argues that by the time her advocate obtained a copy of the judgment from the trial court, she was not within jurisdiction and therefore her advocate was not able to reach her on telephone to discuss the judgment; that the applicant returned on 19th February 2021 after which she had discussions with her advocate on the judgment and consequently instructed her advocate



- to commence the process of appealing part of the judgment; that at the time the applicant issued instructions to her advocate, the stipulated timeline for filing the notice of appeal had already lapsed.
4. According to the supporting affidavit sworn by the applicant on 26th February 2021 in support of this application, the applicant argues that the delay in filing the notice of appeal was not inordinate or deliberate and is therefore excusable. The applicant further argues that she has an arguable appeal with high chances of success and that the intended appeal raises issues of great public importance. It is the applicant's further argument that the respondents will not suffer any prejudice if this application is allowed.
 5. The applicant has filed written submissions that are dated 30th April 2021. In her submissions, the applicant reiterates the grounds appearing in the application and argue that it is in the interest of justice that she be given an opportunity to pursue their intended appeal so that substantive justice is achieved.
 6. The application was opposed through Grounds of Opposition filed jointly by the 1st and 2nd respondents on 4th May 2021. The two respondents argue that there was inordinate delay in filing this application. Further, that the applicant has not given satisfactory reasons for the delay, and lastly, that the respondents stand to suffer prejudice if the application is allowed. Vide their written submissions dated 6th May 2021, the 1st and 2nd respondents reiterate the grounds of opposition and urge this Court to dismiss the application. The 3rd respondent did not file any replying affidavit or written submissions.
 7. I have considered the application, grounds in support thereof, the submissions as well as the relevant law. The principles upon which this Court determines an application for extension of time under rule 4 are well settled. The Court considers the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi; Fakir Mohammed v Joseph Mugambi & 2 Others*; and *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*.
 8. In *Njuguna v Magichu & 73 Others*, Waki J.A. expressed himself thus:

“The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless, discretion has to be exercised judicially, that is on sound factual and legal basis.”
 9. The trial court delivered judgment in this matter on 27th January 2021. Pursuant to rule 75 of the Rules of this Court, the applicant was supposed to have filed the notice of appeal within fourteen days which lapsed on 9th February 2021. There is a time gap of about 30 days between the date of judgment and the date of this application. The applicant has explained that her advocate who is based in Nairobi was not able to obtain copy of the judgment from the trial court in good time so as to be able to advise her and when the advocate was able to obtain copy thereof, the applicant was out of jurisdiction and unreachable by way of phone calls and messages. I note however that the applicant has not annexed any correspondence between the trial court and her advocate requesting for a copy of the judgment. That notwithstanding, I am satisfied that the delay and reasons thereof are plausible. Further, the delay between the date of judgment and the date of this application is not too long as to be regarded as unreasonable.
 10. On the aspect of the chances of success of the intended appeal, it is not my role at this stage to determine definitively the merits of the intended appeal. That is the duty of the full court when it is ultimately



presented with the intended appeal. In *Athuman Nusura Juma v Afwa Mohamed Ramadhan* this Court stated as follows:

“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.”

11. Although the applicant has not annexed a copy of the impugned judgment and the draft memorandum of appeal to her application, I have taken note of the few grounds appearing in the application and upon which the applicant intends to rely on appeal. All I can say is that the intended appeal is not frivolous.
12. On the issue of the degree of prejudice to be occasioned on the respondent if the application is allowed, the applicant argues that her right to appeal is constitutionally entrenched and should not be unreasonably denied; that if the 1st and 2nd respondents were to proceed to debate the report of the Ad hoc Committee, then the applicant would suffer serious legal setbacks in her appeal. On the other hand, the 1st and 2nd respondents argue that they have both legislative and oversight responsibilities under the law and if the application is allowed, their legislative and oversight role will be barred. Taking the circumstances of the dispute between the parties herein into consideration, I think that the degree of prejudice that the respondent stands to suffer if this application is allowed is outweighed by the prejudice that the applicant will suffer if this application is not allowed
13. Consequently, I allow the application and direct the applicant to file a proper notice of appeal within fourteen (14) days from the date of this ruling. The applicant shall also bear costs of this application.

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

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

