



**Kidiavai v Ladtema; County Public Service Board & 2 others (Interested Party)
(Civil Application E085 of 2021) [2021] KECA 73 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KECA 73 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E085 OF 2021
JW LESSIT, JA
OCTOBER 8, 2021**

BETWEEN

DORICE MUDEIZI KIDIAVAI APPLICANT

AND

EVANS MUSWAHILI LADTEMA RESPONDENT

AND

COUNTY PUBLIC SERVICE BOARD INTERESTED PARTY

DR. CATHERINE EDALA INTERESTED PARTY

COUNTY GOVERNMENT OF VIHIGA INTERESTED PARTY

*(Being an application for extension of time to file and serve notice of appeal
out of time against the judgement and decree of Hon. Justice Radido Stephens
dated 24th March 2021 in (Kisumu ELRC Petition No. E10 OF 2020)*

RULING

1 The application before me is dated 24th May 2021. It is brought pursuant to among others, Rules 1(2), 4 and 47 of Court of Appeal Rules. It seeks the following orders:

1. That the application be placed before a single judge of the Honourable Court for perusal and for an order certifying the same urgent for hearing on priority basis (spent).
2. That leave be granted to the applicant to file and serve notice of appeal out of time against the judgement of Hon. Radido Stephen in Kisumu Employment & Labour Relations Court Petition No. E10 of 2020 and to the extent thereof the time for the proposed action be extended accordingly.



3. Costs of this application to abide the outcome of the appeal.
- 2 The Applicant has explained the reasons for the delay in filing the Notice of Appeal as being her mistaken impression that she was still represented in the matter by the County Attorney, until on the 19th May 2021, when she was made aware that the said office could no longer represent her because the Superior Court quashed her appointment as a member of the County Public Service Board. She urges that she was not privy to the technicalities of legal representation until the office of the County Attorney explained them to her albeit belatedly. The Applicant urges that the delay is not inordinate, being a period of two months.
- 3 This application arises from a petition that was filed in the Superior Court challenging the appointment of the Applicant and the 2nd interested party's nomination and appointment as members of the County Public Service Board, Vihiga. The Petitioner, therein, Evans Muswahili Ladema abandoned the challenge against the 2nd interested party after reviewing the response by the Governor. The matter proceeded against the Applicant culminating with the Superior Court quashing her appointment. The judgment was delivered on 24th March 2021.
- 4 The 1st Respondent filed a replying affidavit dated 2nd July 2021. He avers that pursuant to Rule 50 of the Court of Appeal Rules, 2010, he was not opposed to the application. He however prays that the court directs the parties listed as 1st to 3rd interested parties in the application herein be listed as 2nd to 4th Respondents.
- 5 The principles that guide the exercise of jurisdiction under Rule 4 of the Court of Appeal Rules are now well settled by numerous enunciations in case laws, both binding and persuasive. In *Vishva Stone Suppliers Company Limited v Rsr Stone [2006]* Nairobi Civil Application No. 55 OF 2020 (2020) eKLR Nambuye, J.A stated as follows:

“The mandate under Rule 4 is discretionary, unfettered and does not require establishment of “sufficient reasons”. Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.

- i. Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.
- ii. The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see *Githere vs. Ndiriri*.
- iii. As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court...



6. I have considered the application, the reasons advanced for the delay in filing the Notice of Appeal, and the affidavit by the Respondent in which the application is not opposed. Having taken into account all the factors indicated above, and being guided by the principles governing the exercise of discretion under Rule 4 of this Court's rules, as set out in *Leo Sila Mutiso vs Hellen Mwangi*, Civil Appl. No. Nai. 251 of 1997, I allow this application, and order that the Applicant shall file and serve upon the Respondent the notice of appeal and memorandum of appeal within the next 14 days from date of this ruling.

7. Costs shall abide the outcome of this appeal.

Dated and Delivered at Nairobi this 8th day Of October, 2021

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

