



**Wajir County Government & another v Kenya County Government Workers Union
(Civil Application E291 of 2020) [2021] KECA 268 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 268 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E291 OF 2020
J MOHAMMED, JA
DECEMBER 3, 2021**

BETWEEN

WAJIR COUNTY GOVERNMENT 1ST APPLICANT

WAJIR COUNTY ASSEMBLY SERVICE BOARD 2ND APPLICANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION RESPONDENT

(Being an application for extension of time to lodge an appeal against a judgment of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 16th January, 2020 in ELRC petition No. 38 of 2019)

RULING

Background

1. Wajir County Government and Wajir County Assembly Service Board (the 1st and 2nd applicants respectively) moved this Court vide a Notice of Motion dated 3rd February, 2021 brought under Rule 4 of the *Court of Appeal Rules*, substantively seeking leave of the Court to file an appeal out of time together with an attendant order for provision for costs. It is supported by grounds on its body, a supporting affidavit sworn by Shalle Sheikh Mursal, the 1st applicant's Clerk and the 2nd applicant's Secretary. The Kenya County Government Workers Union (the respondent) opposed the application by a replying affidavit sworn by Roba Duba, the respondent's National General Secretary.
2. The application was canvassed through written submissions. The applicants and the respondent filed written submissions.
3. Supporting the application, the applicants aver that they were aggrieved by the trial court's judgment delivered on 16th January, 2020 in favour of the respondent and proceeded to lodge a notice of appeal on 30th January, 2020; that the certified proceedings were only availed to them on 10th



December,2020; and that further delay in filing the memorandum and record of appeal was occasioned by the Covid-19 pandemic which led to the closure of the applicants' public offices, their advocate's office and scaling down of services in the judiciary.

4. It is in light of the above assertions, that the applicants contend that unless the orders sought are granted they will be highly prejudiced as the trial court's judgment relates to the question of unsustainable public wage bill and prudent use of public funds and should the 2nd applicant be compelled to pay the decree holders, the County Assembly stands to suffer huge financial losses with the public bearing the blunt of the prejudice for loss of public funds. According to the applicants, if the orders sought are granted, the members of the respondent stand to suffer no prejudice in view of the fact that if the intended appeal is not successful, they can recover the money from the respondent who are still employees of the 2nd applicant.
5. In rebuttal, the respondent relying on its replying affidavit and submissions contended that the applicants have not provided to this Court any reasonable or sufficient grounds for filing the memorandum of appeal out of time; that the applicants applied for the proceedings on 24th March, 2020 almost two months and one week after the impugned judgment was delivered and no plausible explanation has been offered for this delay; and that the applicants attributing the delay to the Covid-19 pandemic is misconceived as there were clear guidelines by the Judiciary issued on e-filing during the pandemic; and that for these reasons the application must fail.

Determination

6. The jurisdiction of this Court has been invoked under Rule 4 of the Court of Appeal Rules. Rule 4 of this Courts Rules provides:

“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.”
7. The principles that guide the court in the exercise of its mandate under the Rule 4 of the Court of Appeal Rules have now been crystallized by case law. See *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* [1999] 2E A 231.
8. The case of *Leo Sila Mutiso* (supra) which is the locus classicus, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 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.”[Emphasis supplied.]
9. The above principles were restated by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2013] eKLR as follows:-

“extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

10. On the period of delay, it is common ground that the impugned judgment was delivered on 16th January, 2020. The instant application is dated 3rd February, 2021. There is a delay of about one (1) year.
11. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated as follows:

“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.”
12. The applicants aver that the certified copy of the proceedings were received on 10th December, 2020 hence the delay in filing the record of appeal. I note that the applicants applied for the certified proceedings vide a letter dated 24th March, 2020.
13. The applicants attribute further delay in filing the memorandum and record of appeal on the covid-19 pandemic. The respondents in rebuttal aver that the applicants could have lodged the appeal through the e-filing platform. It is common knowledge that from mid-March 2020, the Covid-19 pandemic interfered with normal operations in all spheres in this country. The applicants aver that the pandemic led to the closure of the applicants’ public offices as well as their advocate’s offices. In the circumstances, I find that this is a plausible explanation for the delay.
14. On arguability of the intended appeal, the draft memorandum of appeal is annexed. I am satisfied that the intended appeal is not frivolous on the face of it. The applicants’ averment that the intended appeal is a matter of public interest has not been controverted by the respondent. It is, therefore, only fair and just that the issues intended to be raised on appeal be interrogated on merit in the interest of justice to both parties.
15. As for prejudice likely to be suffered by the respondent if the relief sought were granted. As mentioned above, also falling for consideration is the right of appeal. In *Richard Nchapi Leiyagu vs. IEBC & 2 Others* [2013] eKLR; *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; in which it was variously held inter alia that:

“the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.”
16. From the circumstances of the instant application, the applicants have demonstrated the existence of the parameters set out in *Leo Sila Mutiso* (supra). In the circumstances, the application dated 3rd February, 2021 is allowed. I direct the applicants to file and serve the record of appeal within thirty (30) days from the date hereof. Costs to abide by the outcome of the



intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

