



IN THE COURT OF APPEAL

AT NYERI

(CORAM: SICHALE, J.A IN CHAMBERS)

CIVIL APPLICATION NO. NYERI 29 OF 2017

BETWEEN

COUNTY COMMISSIONER NYANDARUA.....1ST APPLICANT/ APPELLANT
CABINET SECRETARY MINISTRY OF INTERIOR AND CORDINATION OF
NATIONAL GOVERNMENT.....2ND APPLICANT/APPELLANT
PUBLIC SERVICE COMMISSION.....3RD APPLICANT/APPELLANT
HON. ATTORNEY GENERAL.....4TH APPLICANT/APPELLANT

AND

LUCY WANGARI METHU.....CLAIMANT/ 1ST RESPONDENT
HON. WANJIKU MUHIA.....2ND RESPONDENT

(In the matter of application for leave to extend time to lodge and serve the notice of appeal out of time and the record of appeal out of time in the intended appeal from Ruling of (Radido Stephen, J) delivered on 10th November, 2016

in

EMPLOYMENT & LABOUR RELATIONS COURT NAKURU CAUSE NO. 372 OF 2016)

RULING

The applicants, COUNTY COMMISSIONER NYANDARUA, CABINET SECRETARY MINISTRY OF INTERIOR AND CORDINATION OF NATIONAL GOVERNMENT, THE PUBLIC SERVICE COMMISSION AND THE HON. ATTORNEY GENERAL (hereinafter the 1st, 2nd, 3rd and 4th applicants respectively) filed the Notice of Motion dated 14th February, 2017. They sought two orders, to wit, a certification of the urgency of the motion and secondly, that time to file the Notice of Appeal on the ruling dated 10th November, 2016 be extended and the Notice of Appeal dated 8th December, 2016 be deemed to have been filed in time.

When the motion came before me on 25th April, 2017, I dispensed with the prayer for certification of urgency. I duly certified the motion as urgent and invited counsel on record to urge the motion dated 14th February, 2017.

The motion was supported by the affidavit sworn on an undisclosed date in February 2017 by **SAMUEL KIMITI**, the County Commissioner Nyandarua, and an officer at the Ministry of Interior and Coordination of National Government based at Nyandarua, on his own behalf and on behalf of the 2nd, 3rd and 4th applicants. Mr. Kimiti deponed that they were being pursued for contempt of court with the likelihood of being committed to civil jail; that the “**attached**” Notice of Appeal was filed late after the applicants “**earlier**” Notice of Appeal was found to be non-compliant with this Court’s Rules of Appeal; that the interdiction of the 1st respondent was justified and procedural and not illegal, irrational and that attached to the motion was “... **a draft memorandum of appeal marked SK3 and the letter requesting for typed proceedings marked SK5...**”

The 1st respondent, **LUCY WANGARI METHU**, opposed the Motion vide an affidavit sworn on 27th April, 2017. She deponed that the motion was incompetent as it was supported by an undated supporting affidavit, and on the basis that there was no Notice of Appeal annexed to it; that no sufficient reason was given for the delay in lodging the Notice of Appeal; that the applicants have no arguable appeal as they seek to challenge the orders of 10th November, 2016 which were merely directives; that the applicants were guilty of contempt and should not be heard as per the decision in **HADKINSON V HADKINSON [1952] ALLER 567.**

In urging the motion, Mr. Kirui learned counsel for the applicants explained that the delay to file the Notice of Appeal on time was due to the fact that they had earlier filed a Notice of Appeal which was found to be incompetent; that the applicants have an arguable appeal and that they had annexed a draft Notice of Appeal and a draft memorandum of appeal showing that they have an arguable appeal. When I asked counsel to explain as to what he meant by an “**earlier**” notice, counsel was unable to explain.

Mr. Katwa for the 2nd respondent supported the motion and asked me to exercise my discretion in favour of the applicants as the earlier notice of appeal was found to be improper albeit being filed in time and this occasioned delay, for which extension is being sought.

Mr. Kihiko for the 1st respondent vehemently opposed the motion. He urged me to find that no draft Notice of Appeal had been annexed to the motion and hence there can be no extension of a non-existent notice of appeal; that no arguable appeal can be predicated upon the orders of 10th November, 2016, which were merely directives giving effect to the orders of the court of 26th October, 2016; that the applicants have not indicated their intention to appeal against the primary orders made on 26th January, 2016 and finally, that the applicants being in contempt of the orders of the court, are undeserving of the discretionary powers of the court.

In a brief rejoinder, Mr. Katwa for the 2nd respondent maintained that the orders issued on 10th November, 2016 were capable of generating a Notice of Appeal.

I have considered the motion and its supporting affidavit, the 1st respondent’s replying affidavit, the rival submissions made before me, the authorities cited as well as the law. Having done so, I remind myself of the legal position that in considering an application under Rule 4 of this Court’s rules, the discretion of the court is unfettered. In **Leo Sila Mutiso v Rose Hellen Wanguri Mwangi (Civil Appeal No. Nai. 251 of 1997) (UR)** which was cited with approval in the case of **Nyeri Wholesalers Limited v Kasturi Limited, Civil Appeal No. 261 of 2010 (UR)** it was held:

“It is now well settled that the decision whether or not to extend 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.”

The motion before me seeks to have a Notice of Appeal allegedly dated 8th December, 2016 to be deemed to have been filed in time. Mr. Kihiko pointed out that there is no such notice annexed to the applicant’s supporting affidavit. In the affidavit in support of motion sworn by Samuel Kimuri there are several annexures. These are:

- i) The ruling of 26th October, 2016 (marked SMKI)
- ii) The ruling of 10th November, 2016 (marked SK2)
- iii) Draft memorandum of appeal (marked SK3)
- iv) Letter requesting for proceedings (marked SK4)

Firstly, there is no notice of appeal dated 8th December, 2016 to be deemed to have been filed on time. Secondly the delay was not sufficiently explained. When was the “**earlier**” notice filed? Counsel for the applicant was not in a position to explain when the “**earlier**” notice was filed and neither was I given the sequence of events that occasioned the delay.

Thirdly I have looked at the draft memorandum of appeal. In the affidavit of **SAMUEL KAMITI** it is marked as SK3. The prayers in the draft memorandum of appeal are:

- 1) “The appeal be allowed.**
- 2) The ruling of Hon. Justice Radido Stephen at Nakuru delivered on the 26th October and 10th November, 2016 in Employment and Labour Relations Court at Nakuru Cause No. 372 of 2016 be set aside.”**

It therefore follows that a notice of Appeal upon which the memorandum of appeal would be predicated upon would cite the two rulings as being appealed against i.e. the ruling of 20th October (the year is not stated) and 10th November, 2016.

On 7th December, 2016 this court in the same matter, had occasion to address the effect of a notice of appeal which purports to be against two rulings. The court stated: “**A notice of appeal cannot be against two separate orders**” and that it is “**...incapable of engendering jurisdiction**” By parity of reasoning, the draft memorandum of appeal that seeks to reverse the rulings of 26th October, and 10th November, 2016 cannot sustain an appeal that has chances of success.

Furthermore, even for purposes of computation of time to file a notice of appeal, would time begin to run from 26th October, or from 10th November, 2016? In my considered view, the draft memorandum of appeal does not show that the appeal has chances of success. It is in view of the above reasons that I have come to the conclusion that the motion of 14th February, 2017 is for dismissal with costs. It is so ordered.

Dated and delivered at Nyeri this 10th day of May 2017.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR