



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM; WARSAME, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NO NAI 103 OF 2015**

**BETWEEN**

**TOM LUUSA MUNYASYA.....1<sup>ST</sup> APPLICANT**

**JOHN KENNEDY MUTETI.....2<sup>ND</sup> APPLICANT**

**AND**

**GOVERNOR MAKUENI COUNTY.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MAKUENI.....2<sup>ND</sup> RESPONDENT**

***(an application for leave to file and serve a notice and record of appeal out of time from the ruling and order of the Industrial court at Nairobi (Rika,J.) dated 17<sup>th</sup> September 2014***

***in***

***Industrial Court Case No 103 of 2014)***

**\*\*\*\*\***

**RULING**

The power of this Court to extend time within which to perform any act provided for in the Court of Appeal Rules follows a well beaten path, set out extensively in various judicial pronouncements. There is no confusion, uncertainty or obscurity as the path and procedure to be followed as the same is well known to both advocates and judicial officers. Often times, parties and their advocates use different paths to achieve the simple goal of persuading the court to exercise its discretion in their favour. However, the Court is guided by the length of the delay, a disclosure of reasonable explanation for the delay, the conduct of the parties and the nature of the dispute.

It suffices to restate some of the landmark decisions on this point. In ***Fakir Mohammed v Joseph Mugambi & 2 Others***

***[2005] eKLR (Civil Application No. Nai 332 of 2004)*** it was put thus:

***“The exercise of this Court’s discretion under Rule 4 has [follows] a well-beaten path ... 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, (possibly) 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.***

The Court can also consider any other relevant factor(s) in order to meet the ends of justice. As stated by this Court in

***Mongira & Another v Makori & Another [2005] 2 KLR 103:***

***“Those, in general are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general,” Rule 4 gives the judge an unfettered discretion and so long as the discretion is exercised judicially a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way”.***

In the application before me, the applicants are aggrieved by the decision of the High Court made on 17<sup>th</sup> September 2014. That was a decision dismissing their suit before the Employment and Labour Relations Court. After delivery of that decision, the applicants herein set out to instruct counsel, which took a long time, and which they state is the cause of the delay in filing the notice of appeal. Dr. Khaminwa, learned counsel for the applicants, has urged this Court to consider the issue of delay as a technicality which ought not to be used against the applicants.

Dr. Khaminwa submitted that the intended appeal is arguable. He stated that the finding of the trial judge that it was the prerogative of the Governor of a county to terminate the services of the members of his executive committee was erroneous. In counsel’s view, the Constitution of Kenya, 2010 provides for a wide array of rights, among them the right to be heard, and thus, the Governor of a county cannot relieve an employee of his duties without first giving him a hearing.

Mr Nyamu, learned counsel, opposed the application on behalf of the respondents. He submitted that the explanation proffered by the applicants is implausible, and that taking time to instruct an advocate cannot be used as an excuse for failing to comply with the rules. He further submitted that the counsel previously on record were based in Nairobi, and it was thus not difficult to comply with the rules of this Court. He argued that even if it was true that the applicants were looking to instruct counsel, this issue was not demonstrated in any of their pleadings, and was only raised during the hearing of this application. Counsel also submitted that the Court could not determine whether or not this was an arguable appeal since the applicants had failed to annex a draft memorandum of appeal to their application. For these reasons, Mr. Nyamu considers this application to be a non-starter, and asked that it be dismissed with costs.

As stated above, one of the factors that I must consider before exercising my unfettered discretion in favour of the applicants is the length of the delay. The impugned decision was made on 17<sup>th</sup> September 2014. The applicants therefore had fourteen days until 1<sup>st</sup> October 2014 to lodge the notice of appeal in the Employment and Labour Relations Court. They did not do so. From the supporting affidavit of the 1<sup>st</sup> applicant, it appears that the applicants elected to file, on 2<sup>nd</sup> October 2014, a constitutional petition before the Constitutional and Human Rights Division of the High Court, challenging their termination. That petition was dismissed on 20<sup>th</sup> February 2015, and the present application was eventually filed on 21<sup>st</sup> April 2015. The delay in lodging the notice of appeal is therefore of over four months, and is therefore inordinate.

This Court in ***Fredrick Jones Kinyua & Another v Wanda Baird [2000] eKLR (Civil Application No. Nai. 17 of 1999)*** stated that:

***“In an application of this nature, an applicant must give a satisfactory explanation [for the delay] to warrant the court to exercise its discretion in his favour.”***

I have noted that Dr Khaminwa submitted that the delay in lodging the notice of appeal was occasioned by the fact that the applicants were looking for counsel to instruct to handle the appeal. I do not consider this to be a satisfactory explanation. As stated by Waki JA. in *Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR (Civil Application No. 15 of 2011)* that:

***“The filing of a notice of appeal is a simple and mechanical task and could even have been done ... soon after the applicant became aware of the judgment.”***

Once the applicants were aware of the decision against them, there was no reason why they could not instruct their advocates at the time to lodge a notice of appeal against the decision of Rika J., even as they moved to the Constitutional and Human Rights division.

I have considered Dr. Khaminwa’s submission that the failure to lodge the notice of appeal on time was a technicality, the consequences of which should not be visited on the applicants. With utmost respect, I disagree with the learned counsel. I restate and remind parties and advocates that the rules of procedure are not technicalities. As a Court, we have been given a set of substantive and procedural routes that are to be followed by advocates and litigants when they are pursuing their causes of action, or pursuing redress or remedies which call for the intervention and determination of the Court. It suffices to say that as a Court we cannot decide or determine a different route other than what is provided in law, so long as no injustice results in the employment of the rules. I think the direction on filing of a notice of appeal within the mandatory period of fourteen days as provided under rule 75(2) of this Court’s rules cannot be said to result or lead to any injustice. This rule is a tool for both parties to the dispute. In essence, it is both a shield and a weapon for parties to litigation. It is intended to smoothen the path or road to achieve an efficient and quick resolution of disputes filed before Court.

The rules are the handmaiden in the course of justice and should be followed with fidelity in order to facilitate access to justice. While Article 159 of the Constitution, as well as sections 3A and 3B of the Appellate Jurisdiction Act, call on courts to do substantive justice to litigants without undue regard to procedural technicalities, I am also mindful that the rules of the Court are not to be willfully subverted. See the holding of the Court in *Waweru & Another v Kirori [2003] KLR 448* where it was stated that:

***“The rules of the Court must prima facie be obeyed and in order to justify a court in extending the time during which some step in the procedure requires to be taken there must be material on which the court can exercise its discretion.”***

If a party decides to file another matter before the High Court, as the applicants elected to do here, after the determination of an earlier matter with a view to seek and obtain what was lost in the earlier suit, and then thereafter decides to pursue an appeal of the earlier matter, the reasonable conclusion of the right thinking members of society is that he is either not sure of his suit or he intends to abuse the due process of the law. Here, the delay was occasioned by the multiplicity of suits and a lack of coherent path to follow in order to achieve the desired goal.

The issue of whether or not the intended appeal raises a substantial question of constitutional interpretation has no relevance in the present application. Dr Khaminwa, for the applicants, submitted that the intended appeal raises a matter of considerable public importance as to whether or not the governor of a county can sack or remove an executive committee member at will and without giving him a hearing. To my mind, this is a moot point since no draft memorandum of appeal was annexed in support of the application before me. At this stage, it would be premature to say that the intended appeal raises grounds of a fundamental nature. In any case, the applicants knew the nature of their case and their grievances and therefore should have filed the notice of appeal on time which was not done and consequently, that ground fails.

Whichever way you look at it, and however sophisticated an advocate may be, the delay in this matter has

not been explained, and therefore, I have no basis upon which I can exercise my discretion in favour of the applicants. This application has no merit, and it is hereby dismissed with costs to the respondents.

**Dated and Delivered at Nairobi this 4<sup>th</sup> day of December, 2015**

**M. WARSAME**

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**JUDGE OF APPEAL**

**I certify that this is a**

**True copy of the original.**

**DEPUTY REGISTRAR**