



Lopite & 45 others v County Government of Turkana & 5 others (Cause 1 of 2021) [2025] KEELRC 334 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 334 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE 1 OF 2021
MA ONYANGO, J
JANUARY 30, 2025**

BETWEEN

**REUBEN LOWOTE LOPITE 1ST CLAIMANT
AMOS ABONG APEENY 2ND CLAIMANT
ETABO JOHN LOKENO & 43 OTHERS & 43 OTHERS & 43
OTHERS 3RD CLAIMANT**

AND

**THE COUNTY GOVERNMENT OF TURKANA PUBLIC SERVICE
BOARD 1ST RESPONDENT
THE COUNTY GOVERNMENT OF TURKANA 2ND RESPONDENT
THE COUNTY GOVERNMENT OF TURKANA SECRETARY 3RD
RESPONDENT
THE CHIEF OFFICER OF HEALTH COUNTY GOVERNMENT OF
TURKANA 4TH RESPONDENT
THE CHIEF OFFICER FINANCE COUNTY GOVERNMENT OF
TURKANA 5TH RESPONDENT
THE HON ATTORNEY GENERAL 6TH RESPONDENT**

RULING

1. The application before this court is dated 11th June 2024 and is brought by the Respondents under section 13 of the *Employment and Labour Relations Court Act*, Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, sections 1A, 1B and section 3A of the *Civil Procedure Act*,



Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, section 7 and 75 of the [Appellate Jurisdiction Act](#). The application seeks orders that:

- i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of the intended Appeal, this court be pleased to stay the execution of the Judgment and Decree of this court delivered on 6th February 2024 and any Orders and/or decree arising therefrom.
 - iv. That this court be pleased to enlarge time and grant the Applicant leave to file a Notice of Appeal at the Court of Appeal and lodge an Appeal out of time against the Judgment of this Honourable Court delivered on 6th February 2024.
 - v. That upon grant of leave to appeal out of time, the Notice of Appeal filed herewith and dated 14th February 2024 be deemed as duly filed and properly on record.
 - vi. That the costs of this application be in the cause
2. The application is supported by the affidavit of Chris Locheria, the 1st Respondent's Director of Administration sworn on 11th June 2024.
 3. The grounds upon which the application is premised are contained at the foot of the application. Briefly, they are that:- this court delivered its judgment on the Claimants' suit on 1st February 2024 in favour of the Claimants; that upon receipt of the said judgment, the Applicant's counsel on record shared an update of the outcome of the Judgment with the Appellant together with an advisory containing the viability of an Appeal against the decision of this Honourable Court and the Applicant's counsel also sought instructions to file an Appeal at the Court of Appeal having advised on the viability of the same; that the 1st to 5th Respondents delayed in issuing instructions to counsel before the expiry of fourteen (14) days which is statutorily required to lodge a Notice of Appeal under the [Appellate Jurisdiction Act](#); that due to a technical hitch, the Applicants failed to see their counsel's email, updating them of the outcome of this court's judgment hence the delay in eventually issuing instructions to file the Appeal; that by the time the 1st to 5th Respondents issued their counsel instructions to file an Appeal, the fourteen (14) days' statutory period for filing an appeal from this court had already lapsed; that the 1st to 5th Respondents are nonetheless aggrieved by the Judgment of this court and have since filed and served the Claimants with their Notice of Appeal dated 14th February, 2024 which Notice of Appeal was filed on 27th February 2024 and stamped by the Deputy Registrar of this court on 4th March, 2024; that the 1st to 5th Respondents have reasons to believe that there are valid grounds to successfully appeal this matter; that an Appeal does not operate as automatic stay of execution and therefore, the Appellant/Applicant seeks stay of execution pending hearing and determination of this Application and the Appeal; that the intended Appeal is arguable and has overwhelming chances of success and therefore if the orders of stay of execution sought herein are not granted, the substratum of the intended Appeal will be destroyed thereby rendering the same nugatory and resulting to substantial loss to the Applicants; that the application is brought in good faith and the Applicants are ready and willing to abide by any terms as may be imposed by this Honourable Court on the issuance of the stay Orders pending appeal and lastly, that under the [Appellate Jurisdiction Act](#), this court has power to extend the time for giving notice of intention to appeal from a Judgment of the Court notwithstanding that the time for giving such notice may have already expired.
 4. In reply to the application, the Claimant's counsel filed a Replying Affidavit sworn on 24th June 2024. The deponent avers that the application is merely intended to frustrate the Claimants who were



discriminated and denied their constitutional rights under Article 40 by the Applicants for over 2 years until the court delivered its judgment on this matter and that they should be allowed to enjoy the fruits of their judgment. He further deposes that judgment in the matter was entered in favour of the Claimants on 1st February 2024 and not 6th February 2024 as averred by the Applicants hence the order sought to be stayed is non-existent. It is averred that the Applicants were accordingly informed of the decision on time the decision of the Court by their Advocates on record and when the Claimants demanded for their salary arrears and allowances, the 1st Respondent instead of filing an appeal or paying the Claimants, started intimidating them to withdraw the case from the court or be sacked. The Claimants state that when they adamantly refused to back down and withdraw the case, the Applicants then instructed their Advocates to file the Notice of Appeal dated 14th February 2024 on 27th February 2024 as an afterthought 13 days late.

5. The Claimants aver that the Notice of Appeal is incurably defective and offends the provisions of section 75(2) of the Court of Appeal Rules as the same ought to have been filed within 14 days from the date of the judgment herein. The Claimants aver that the Applicants failed to file an appeal within 60 days from 27th February 2024, hence under Rule 83 of the Court of Appeal Rules the applicants were deemed to have withdrawn their notice of Appeal.
6. According to the Claimants, this application has been brought late, 5 months after judgment was delivered on 1st February 2024 and the delay has not been explained. Further, that the Applicants have not shown any sufficient cause to warrant stay of execution that they will suffer any substantial loss. The Claimants have sought that the Decretal sum amounting to Kshs.135,582,174/= be deposited in a joint interest earning account pending the hearing and determination of the intended appeal.
7. In a rejoinder, the 1st to 5th Respondents filed a further affidavit sworn on 17th September 2024 by Chris Locheria its previous Human Resource Manager. The deponent asserts that the Replying Affidavit of Claimants is diversionary and intended to mislead the Court from the real issues within the suit herein. It is averred that the choice to appeal court's judgment is a Constitutionally entrenched right under Article 50 of *the Constitution* and it is not an avenue for delaying cases as misconstrued by the Claimants. The Applicant's reiterated that Judgment in the matter was entered on 1st February, 2024 and not 6th February, 2024 as contended by the Claimants in their response to the Application. The Applicants reiterated that whereas they were accordingly informed on time about the Judgment of the Court by their Advocates on record, the delay in issuing instructions to their Advocates to lodge an Appeal was occasioned by a technological error. It was contended that there are instances in which the Court can enlarge time to allow an aggrieved party to file a Notice of Appeal out of time and that the essence of the instant application is to seek enlargement of time to allow the Applicants lodge an Appeal out of time.
8. In response to the allegation made by the Claimant that they had withdrawn the Notice of Appeal, the Applicants stated that Rule 83 of the Court of Appeal Rules, 2022 provides that withdrawal of a Notice of Appeal can only be done by the party that lodged the Notice and the same must be in writing, and that in the instant case, they have not made any such written application to withdraw the Notice of Appeal filed on 27th February, 2024.
9. It is the Applicants' case that the technical hitch on their part that caused the delay in issuing instructions to their Advocates, was not attributable to them or to their Advocates on record. It is thus contended that the Applicants have sufficiently explained the reason for delay in filing the Notice of Appeal herein and this instant Application has been made timeously without undue delay.
10. The Applicants aver that if the Orders for stay of execution herein are not granted, the substratum of the intended Appeal will be destroyed. the Claimants will not be prejudiced in any way.



11. According to the Applicants, the Judicial Review Application by the Claimants is unlawful and pervaded with frivolity as the Orders granted to the Claimants as well as their Application bear no force in this Court due to want of jurisdiction. In this regard, the Applicants explained that the High Court lacks jurisdiction to grant the said Orders against this Court and the Claimants have misconstrued the legal doctrines of jurisdiction as well as the powers of the High Court and the Employment and Labour Relations Court in the context of judicial review orders. The Applicants therefore maintained that there is no competent Application by the Claimants before this Court since the High Court which granted leave to allow filing of the Judicial Review Application lacks jurisdiction.
12. The Applicants urged the court to allow the application dated 11th June 2024.
13. The application was disposed of by way of written submissions pursuant to the directions of this court made on 26th June 2024. The Claimants submissions are dated 30th September 2024.

Determination

14. I have considered the application and the response as well as the submissions of the parties. The issues that present themselves for this court's determination are;
 - i. Whether leave to lodge appeal out of time should be granted; and
 - ii. Whether or not the orders of stay of execution should issue.

Whether leave to lodge appeal out of time should be allowed.

15. This court has jurisdiction to extend time for filing appeal. Section 7 of the [*Appellate Jurisdiction Act*](#) provides as follows;

7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

16. Rule 75 of the Court of Appeal Rules provides as follows in respect of notice of appeal:

75. Notice of appeal

1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.
3. Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.
4. When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.



5. where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.
6. A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.
17. In the instant case judgment was delivered on 1st February, 2024 and Notice of Appeal was filed on 27th February, 2024, some 13 days late. The Applicants have explained that the delay in lodging the Notice of Appeal was caused by the failure of the Applicants to see the email from counsel updating them on the outcome of the judgement.
18. In the case of Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, the court held as follows: -

“It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion: -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 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; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
19. I have considered the application in light of the principles that guide this court in the exercise of its discretionary jurisdiction when determining an application for extension of time as discussed in the case of Nicholas Kiptoo Arap Korir Salat. The first question to be answered is whether the Applicants have tendered a satisfactory explanation for the delay in filing the Notice of Appeal. The explanation offered for the delay, being that the Respondents failed to read the email from their counsel is sufficient, noting that the delay in lodging the Notice of Appeal was only 13 days.
20. The next issue is whether the instant application to expand the time for lodging the Notice of Appeal was timeously brought. The same was filed on almost 3 months after lodging the Notice of Appeal and more than 4 months after the date of judgment.
21. Judgment was read on 1st February 2024. The Notice of Appeal was filed on 27th February 2024. The instant application was lodged on 11th June 2024. Although the Applicants explained the reason for delay in filing Notice of Appeal, no mention is made in the application about the delay in filing the instant application or of the reasons for the delay in filing the same out of time or for seeking stay of execution of more than 4 months after the judgment was delivered. The inordinate delay has thus not been explained.
22. On the application for stay pending appeal, the procedure is set out in the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules. Under the said provisions, the court is supposed to be guided by the Principles set out therein in determining whether or not to grant the Orders for stay of execution of the decree pending appeal.



23. Order 42 rule 6(2) of Civil Procedure Rules provides as follows: -

“2. No order for stay of execution shall be made under sub rule 1) unless—

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

24. The questions that arise in this kind of application are whether there is an appeal in place, whether the application has been made without delay and whether that substantial loss would result if the order of stay sought was not granted and if there is any security offered for the due performance of the decree.

25. It must first be verified that there is an appeal in place before the court delves into any other issue in an application of this nature. Rule 82 of the Appellate Jurisdictions Act provides that an appeal has to be filed within 60 days.

26. Section 2 of the Appellate Jurisdictions Act defines appeal as:

“appeal”, in relation to appeals to the Court, includes an intended appeal; and “appellant” includes an intended appellant” the notice of appeal therefore suffices for purposes of the application.

27. There is a Notice of Appeal filed out of time and an application for extension of time for filing the same. There is also a letter dated 14th February requesting for certified copies of typed proceedings and judgment on record. I am however not satisfied that there is an appeal in place within the contemplation of Rule 75 of the Court of Appeal Rules for reason that the application for expansion of time for lodging the same has been declined.

28. The third issue is whether the Applicants would suffer substantial loss. The Applicants have alluded that the decretal sum is a colossal amount and they would suffer substantial loss if orders of stay of execution are not granted. They have argued that no prejudice will be suffered by the Claimants if the orders for extension of time is allowed. The Claimants on the other hand have contended that the application is merely intended to frustrate them from enjoying the fruits of their judgment.

29. In the case HCCA NO.716 OF 2003 Johnson Mwiruuti Mburu –Vs- Samuel Machaia Ngure, the court observed that a Respondent’s possible inability to pay the decretal amount was sufficient to justify grant of stay of execution pending appeal on the condition that the decretal amount be secured.

30. On the other hand, in Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of



procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

31. In the instant case the Claimants are all employees of the Respondent and even if an appeal were to be filed and to succeed the Applicants would be in a position to recover the same from the salaries and emoluments of the Claimants.
32. I find no proof of substantial loss to the Applicants as the Applicant is able to recover the said sum from the Claimants individually since they are in its employment. The fact that the decretal sum is substantial alone is not proof of substantial loss.
33. With regard to security, the Applicants being in the County Government, this is not a relevant factor in the instant application.
34. In conclusion, I find that the Applicants have failed to explain the delay in filing the application to admit their Notice of Appeal out of time. On the stay of execution, once the Notice of Appeal is not admitted the prayer for stay of execution pending appeal would be unnecessary.
35. I accordingly find no merit in the application dated 11th June 2024 with the result that the same is dismissed with costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY, 2025.

M. ONYANGO

JUDGE

