



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 335 OF 2008**

REPUBLIC .....APPLICANT

V

CHIEF MAGISTRATE COURT AT NAIROBI.....1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT

KENYA UNION OF POST

PRIMARY TEACHERS .....INTERESTED PARTY

EX-PARTE

LEONARD RUFUS OCHIENG

THOMAS CHARIGA ONYANGO

BENTER AKINYI OPONDE

SAMUEL LEWIS JOMO NYAKWEBWA

**RULING**

At this moment what remains to be considered in the application dated 15<sup>th</sup> May, 2012 brought by Kenya Union of Post Primary Education Teachers is whether leave should be granted to the applicant to file a notice of appeal and a record of appeal out of time. The application is brought under sections 3 and 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, 2010.

Briefly, Leonard Rufus Ochieng, Thomas Chariga Onyango, Benter Akinyi Oponde and Samuel Lewis Jomo Nyakwebwa who are the ex-parte applicants in the substantive judicial review proceedings had sought orders of certiorari and prohibition in respect of charges brought against them by the Attorney

General (the 2<sup>nd</sup> respondent) before the Chief Magistrate's Court at Nairobi (the 1<sup>st</sup> respondent). The applicant in the current application was an interested party in the main proceedings. Through a judgment delivered on 1<sup>st</sup> December, 2009 R.P.V Wendoh, J issued an order of certiorari quashing the said charges. She also issued an order of prohibition prohibiting the Attorney General **“from prosecuting the said charges contained in Crc. 666/08 or 252/08 or 246/08.”**

The applicant being aggrieved by the said decision wishes to challenge the same in the Court of Appeal hence the reason for this application.

The ex-parte applicants who are now the respondents for the purpose of this application opposed the same through the replying affidavit and further replying affidavit of Leonard Rufus Ochieng. The respondents contend that this court has no jurisdiction to hear this matter as it became functus officio when it delivered its judgement on 1<sup>st</sup> December, 2009. The respondents also contend that the applicant did not explain why the application is being made three years after the delivery of the judgment and yet the office of the applicant has been functioning with the same officials being in office throughout the material time.

In my view, this application raises two issues for consideration by this court. The first issue is whether this court has jurisdiction to entertain this application. The second issue is whether the application should be allowed.

On the issue of jurisdiction the respondents argued that this court has no jurisdiction to entertain the matter. The applicant submitted that this court has jurisdiction as was confirmed by the Court of Appeal in the case of **STANDARD CHARTERED BANK LTD AND ANOTHER V ABOK AND ANOTHER, EALR[2005] 1 EA (CAK), 373.**

Section 7 of the Appellate Jurisdiction Act (Cap. 9) provides that:-

**“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.”**

From the above quoted Section and the decision of the Court of Appeal in the already cited **STANDARD CHARTERED BANK LTD AND ANOTHER** case, it is clear that this court can extend time for giving notice of intention to appeal.

The remaining question is whether the application should be allowed. The matters to be considered in allowing an application for extension of time for giving a notice of intention to appeal were stated by the Court of Appeal in the case of **NICHOLAS MAHIHU MURIITHI V NDIMA TEA FACTORY LIMITED & ANOTHER [2009] EKLR.** In that case the Court of Appeal referred to Rule 4 of the Court of Appeal Rules which also deals with extension of time for filing appeals and opined that:-

**“The power of the Court under rule 4 above is discretionary and wide. The discretion is judicial which then means that the Court must be guided by the law and evidence. Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. NAI. 251 of 1997, lays down the matters to consider in an application for an order under rule 4 aforesaid namely, the length of the delay, the reason for the delay, possibly the chances of the appeal succeeding if the extension sought is granted and the degree of prejudice to the respondent if the application is granted.”**

Through the supporting affidavit of Ngigi G.M. sworn on 15<sup>th</sup> May, 2012 the court is informed that the decision of R.P.V. Wendoh, J was given in total disregard to well settled principles of law and the same sets a dangerous precedent which is a threat to the rule of law. The applicant is therefore of the view that

its intended appeal has high chances of success. The court is also informed through the said affidavit that the delay in filing the appeal was not intentional but due to the constant change of office bearers of the applicant.

As to whether the intended appeal has high chances of success, I will not make any comment. It must be noted that I do not have jurisdiction to sit on appeal over the decisions of my sister R.P.V. Wendoh, J. I therefore do not have the authority to state with any certainty whether the intended appeal is likely to succeed or not. Any comments I make may give the impression that I am sitting on appeal over the decision of a court with the same jurisdiction.

Why did the applicant delay in coming to court and what was the reason for the delay? The applicant informed the court that the delay was caused by the infighting among its officials. The respondents through the further replying affidavit annexed extracts from the Register of Trade Unions showing the officers, trustees, executive committee members and central council members of the applicant as at 8<sup>th</sup> January, 2007 and 16<sup>th</sup> February, 2011. The said extracts show that the officials of the applicant did not change between 2007 and 2011. The applicant's claim that there was infighting and change of office bearers is therefore not supported by any documentary evidence. There is therefore no good reason placed before the court to explain why this application is being made two and a half years after the delivery of the judgment. Even trying to sympathize with the applicant will not bear any fruits since a delay of two and a half years is indeed inordinate. As such the application fails and the same is dismissed with costs to the respondents i.e. the ex-parte applicants in the main judicial review proceedings.

**Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of May , 2013**

**W. K. KORIR,**

**JUDGE**