



Teachers Service Commission & another v Wanyonyi (Miscellaneous Civil Application E011 of 2024) [2024] KEELRC 2483 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2483 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION E011 OF 2024**

**JW KELI, J
OCTOBER 15, 2024**

BETWEEN

TEACHERS SERVICE COMMISSION 1ST APPLICANT

EJ MITEI 2ND APPLICANT

AND

CONSTANTINE NYONGESA WANYONYI RESPONDENT

(Being an Application for Leave to Lodge Appeal Out of Time and Stay of Execution of the Judgment and Orders of the Hon. Justice Jemimah Keli in Bungoma ELRC Petition No E016 of 2023 Delivered on 26th June 2024)

RULING

1. The application was brought by way of a Notice of Motion dated 9th August 2024 under Article 159 of the Constitution, sections 3A,75,78, 79(G) of the Civil Procedure Act and Order 42 Rule 6 (1) and 8 Order 22 rule 22 of the Civil Procedure Rules and all enabling provisions of the law seeking the following orders:-
 - i. Spent
 - ii. The Honorable Court be pleased to grant leave to the Applicant to appeal out of time against the judgment of Hon. Jemimah Keli delivered virtually on 26th June 2024 in Bungoma ELRC No. E004 of 2021.
 - iii. Serve the notice of appeal out of time and to request for typed proceedings in *ELRC Petition No. E016 of 2023*.
 - iv. The notice of appeal annexed hereto be deemed as duly filed and served
 - v. Spent



- vi. The Honourable Court be pleased to order a stay of execution of judgment and all consequent orders pending the lodgment hearing and determination of the intended appeal.
- vii. The costs of the application be provided for.
2. The application was supported by the grounds stated therein and the affidavit of Allan Sitima Advocate.
3. The essence of the application was that the Advocate misdiarised the judgment date issued in court of 26th June 2024 in his presence as 27th June 2024 (AS-1 was what he referred to as the court's attendance sheet). On 27th June 2024, the matter was not listed for judgment. The Advocate instructed their court clerk to ascertain the status of the judgment vide letter dated 2nd July 2024. On or about 15th July 2024 the Advocate found that a judgment had been delivered in favor of the Petitioner/respondent (AS-3 being the judgment). The Advocate got instructions to appeal but time for filing the notice of appeal had since lapsed, and the inadvertence of the counsel of failing to attend court for delivery of judgment should not be met upon the applicants.
4. The applicants stated they have an arguable appeal and annexed the draft memorandum of appeal. The court holds that whether the appeal is arguable or not, is not for this court to consider having delivered the impugned judgment. Those are grounds to be canvassed before the appellate court.
5. The applicants submitted that the respondent will not suffer any prejudice loss, injury, or injustice. That if the judgment is executed in its present form, the applicants will suffer irreparable loss and damage as the decretal sum may not be recovered from the respondent if the appeal succeeds.
6. The Applicants' Advocate stated in paragraph 18 of his affidavit, that he swore the affidavit to seek leave to file an appeal to the High Court out of time which the court finds to be mistaken as this Court enjoys same status as the High Court under Article 162 of the Constitution to wit:- "162. System of courts
 - (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—(a) employment and labour relations; and.."
7. The Application seeks a stay of execution and leave to file an appeal out of time against the Judgment of 26th June 2024 in *Bungoma ELRC Petition No. E016 of 2023* under which I entered judgment for the respondent as follows:-
 - a. A declaration is hereby issued that the 2nd Respondent lacked any constitutional and lawful authority to chair a disciplinary panel and make a decision on behalf of the 1st Respondent to dismiss the Petitioner from service of the Teachers Service Commission, therefore the decision contained in the proceedings of 12th August 2021 is null and void for all intents and purposes.
 - b. A declaration that any actions taken or decisions made pursuant to the illegal disciplinary proceedings are declared to have been void ab initio.
 - c. An order of Certiorari be and hereby issued bringing to this Honourable Court the decision contained in the proceedings of 12th August 2021, to quash the offending disciplinary proceedings purportedly chaired by the 2nd Respondent.
 - d. A mandatory order is issued directing the 1st Respondent to reinstate the Petitioner back to his position or equivalent teacher position and be paid in full special damages arising from all the



outstanding emoluments and benefits that he would have otherwise earned from the time he was illegally dismissed until today and to continue earning accordingly, and the 1st respondent to deploy the petitioner upon reporting to the TSC headquarters not later than 30 days from today.

- e. The 1st respondent to pay costs of the petition.
8. The application was brought under section 79G of the *Civil Procedure Act* which states:-⁹ 79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.” It is the opinion of this Court that section 79G of the Civil Procedure Act applies to appeals to this Court and not from the court to the Court of Appeal.

9. The *Employment and Labour Relations Court Act* provides for automatic appeal to the Court of Appeal with respect to judgment of the court under section 17 as follows:-

“17. Appeals

- (1) Appeals from the Court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.” Consequently, no leave of the court is required to appeal against judgment of this Court to the Court of Appeal.

10. Does the court then have jurisdiction to extend the time for lodging of an appeal against its judgment? Under section 17 of the *Employment and Labour Relations Court Act* appeals from judgment of the court are as a matter of right. It follows that the court has no jurisdiction to extend the time for filing an appeal against its own decision to the court of Appeal. The Court of Appeal is governed by its own rules. The *Court of Appeal Rules, 2022*, Rule 4, provides for an extension of time by the Court of Appeal as follows:-

“4. The Court may, on such terms as may be 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.” The Court of Appeal is thus the correct forum to seek an extension of time to appeal.

11. The Applicants relied on the decision of the Court of Appeal, Nairobi Civil Application no. 54 of 2020 *Martin W Nguru v The Hon Attorney General* where Justice Nambuye (JA) applied the said Rule 4 of the *Court of Appeal Rules*, and stated that an appeal ought to be filed within 14 days of the decision of the superior court failing which it is incompetent unless regularized by the Court. The Court of Appeal in the application exercised its discretion in favour of the Applicant and allowed for the filing of the notice of appeal out of time. Consequently, the prayer for leave to file the appeal out of time falls under Rule 4 of the *Court of Appeal Rules* for the exercise of the discretion of the Court of Appeal accordingly. This Court has no such jurisdiction. The prayer for leave to file an appeal out of time is disallowed for want of jurisdiction.



Whether the court to order a stay of execution of judgment and all consequent orders pending the lodgment hearing and determination of the intended appeal.

12. The application is brought under Order 42 Rule 6 and 8 of the [Civil Procedure Rules](#) to wit “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (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.”
13. The Applicants further relied on Order 42 Rule 8 of the [Civil Procedure Rules](#) which states:- No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.” The 1st applicant stated that it was government hence not required to provide security of performance of decree.
14. Further, the applicants stated that their appeal would be rendered nugatory if the stay of the judgment was not issued as there was a risk of loss of payable monies under judgment and the respondent had not filed an affidavit of means to demonstrate his capacity to refund monies paid under the Decree in event of a successful appeal. To buttress the foregoing submission the applicants relied on the decision in Civil Application Nairobi 238 of 2005 [National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another](#) where the court held that once an Applicant expresses fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge. I totally agree with the decision.
15. The respondent was served with the application and failed to respond. The Court finds that if leave is eventually granted to appeal out of time the appeal may be rendered nugatory if successful on appeal as the Respondent has not demonstrated ability to refund the decretal amount. The risk of substantial loss is established.
16. The Court to preserve the substance of the intended appeal, taking into consideration the decision and reasons given for the non-compliance, and in the interest of the promotion of the right to access justice to the appellate court, the Court hereby issues a temporary Order of stay of 30 days of its judgment dated 26th June 2024 in [Bungoma ELRC PET/E016 OF 2023](#) between the parties from the ruling date to afford opportunity to the applicants to seek extension of time from the Court of Appeal including for any extension of the said stay of execution if they so wish.
17. The application was not defended. I make no order as to costs.
18. It is so Ordered.



DATED, SIGNED, AND DELIVERED IN OPEN COURT NAIROBI THIS 15TH DAY OF OCTOBER 2024.

JEMIMAH KELI

JUDGE

In the Presence of: -

Court Assistant: Caleb

Respondents/Applicants: - Allan Sitima Advocate

Petitioner /Respondent: Absent.

