

IN THE COURT OF
APPEAL AT NAIROBI
(CORAM: JAMILA MOHAMMED, J.A. (IN
CHAMBERS)) CIVIL APPLICATION NO E187 OF
2025

BETWEEN

BISHAR ADAN MOHAMED.....APPLICANT

AND

JUDICIAL SERVICE COMMISSION.....RESPONDENT

(Being an application for extension of time within which to serve the Notice of Appeal dated 6th February, 2025 and to file an appeal out of time against the Ruling of the Employment and Labour Relations Court (Anna Ngibuini Mwaure, J.) delivered on 24th January, 2025

in

ELRC CAUSE NO. E645 OF 2022)

**

RULING

Background

1) By a Notice of Motion dated 23rd March 2025, the applicant seeks, pursuant to Rule 4 of the Court of Appeal Rules, 2022, an order extending time within which to serve the Notice of Appeal dated 6th February 2025 together with costs of the application.

The Judicial Service Commission is the respondent herein.

2) The application is supported by an affidavit sworn on 23rd March 2025 by **Mr. Solomon Wamwayi**, learned counsel for the applicant. The background to the application is that a ruling was delivered on 24th

January 2025 in

ELRCC No. E645 of 2022 in which the applicant herein was the claimant. By that ruling the learned Judge (**Anna Ngibuini Mwaure, J.**) dismissed the applicant's application for review dated 30th July 2024 for want of merit.

- 3) Being dissatisfied with that decision, the applicant instructed counsel to lodge an appeal. Consequently, a Notice of Appeal dated 5th February 2025 was lodged with the Registrar of the trial court and signed on 6th February 2025.
- 4) Counsel for the applicant explains that due to inadvertence and human error, he believed that the Notice of Appeal had already been served upon counsel for the respondent. It was only when counsel attempted to lodge the Memorandum of Appeal that it was discovered that service of the Notice of Appeal had not been effected.
- 5) Although the record indicates that the application was served upon the respondent, no response has been filed.

Determination

- 6) The principles governing the exercise of discretion under Rule 4 are well settled. In **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231**, this Court stated that the matters to be considered include the length of delay, the reason for the delay, possibly the chances of the appeal succeeding, and the degree of prejudice to the respondent.

- 7) In **Mwangi v Kenya Airways Ltd [2003] eKLR** the Court emphasized that the length of delay alone is not decisive and that the Court must also consider the explanation offered for the delay and any prejudice likely to be occasioned to the respondent.
- 8) In **Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR** this Court reiterated that the discretion under Rule 4 is unfettered, though it must be exercised judicially and upon sound reason.
- 9) Similarly, in **Imperial Bank (In Receivership) & another v Alnashir Papat & others [2018] eKLR**, M’Inoti, JA. emphasized that although Rule 4 grants the Court wide discretion, that discretion is not exercised in a vacuum and an applicant must place before the Court material sufficient to justify the extension sought.
- 10) The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v IEBC & others [2014] eKLR** reiterated that extension of time is not a right of a litigant but an equitable remedy available only to a deserving party who has demonstrated a basis for the Court’s discretion.
- 11) Guided by those principles, I now turn to the circumstances of the present application.
- 12) Under Rule 79(1) and (2) of the Court of Appeal Rules, a Notice of Appeal must be served within seven (7) days of lodging.
- 13) In the present case, the notice of appeal was lodged on 6th February 2025 and ought therefore to have been served on or before 13th

February 2025.

The present application seeking extension of time was filed on 23rd March 2025.

- 14) The explanation advanced by counsel for the applicant is that he believed that service of the notice of appeal had already been effected. That explanation, however, is not accompanied by any detail as to how the misunderstanding arose or what steps were taken to ensure compliance with the timelines stipulated under the Rules.
- 15) A bare assertion of inadvertence or oversight, without more, does not constitute a satisfactory explanation for failure to comply with mandatory procedural timelines. As this Court has repeatedly stated, a party seeking the Court's indulgence under Rule 4 must place before the Court sufficient material explaining the delay so as to enable the Court exercise its discretion judicially.
- 16) The applicant has annexed to the supporting affidavit a draft memorandum of appeal. While it is not the function of the Court at this stage to determine the merits of the intended appeal, the Court is required to consider whether the proposed appeal raises at least one arguable point deserving of the Court's consideration. A perusal of the draft memorandum of appeal shows that the applicant intends to challenge the learned Judge's dismissal of the application for review. Without expressing any concluded view on the merits, I am satisfied that the draft memorandum discloses at least one arguable issue.

- 17) As regards prejudice, there is no replying affidavit or written submissions opposing the application and there is no material suggesting that the respondent would suffer specific prejudice if the extension sought were granted. Nevertheless, the absence of opposition does not relieve the applicant of the obligation to satisfy the Court that a proper basis exists for the exercise of discretion.
- 18) While the draft memorandum of appeal discloses arguable issues, the absence of a satisfactory explanation for the delay remains a significant factor in the exercise of the Court's discretion.
- 19) In the circumstances, I am not persuaded that the applicant has laid a sufficient basis for the exercise of this Court's discretion under Rule 4.
- 20) Accordingly, the Notice of Motion dated 23rd March 2025 is dismissed.
- 21) As the application was not contested, I make no order as to costs.

Dated and delivered at Nairobi this 6th day of March, 2026.

JAMILA MOHAMMED

.....
JUDGE OF APPEAL

I certify that this is a true
copy of the original
Signed

DEPUTY REGISTRAR