



**Teachers Service Commission & another v Wanyonyi (Civil Application
E156 of 2024) [2025] KECA 330 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 330 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E156 OF 2024
AO MUCHELULE, JA
FEBRUARY 21, 2025
[IN CHAMBERS]**

BETWEEN

TEACHERS SERVICE COMMISSION 1ST APPLICANT

E J MITEI 2ND APPLICANT

AND

CONSTANTATINE NYONGESA WANYONYI RESPONDENT

(An application for extension of time to file a notice of appeal out of time against the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Bungoma (J. Keli, J.) dated 26th June 2023 in ELRC Petition No. E016 of 2023)

RULING

1. The dispute between the applicants, Teachers Service Commission and E.J. Mitei, and the respondent Constantine Nyongesa Wanyonyi, related to the respondent's employment as a teacher by the 1st applicant between 1994 and 2021. The respondent was dismissed following disciplinary proceedings chaired by the 2nd applicant. The respondent sued the applicants in a petition in the Employment and Labour Relations Court (ELRC) at Bungoma, claiming that the proceedings were unlawful and offended his constitutional rights. He asked that they be quashed by an order of certiorari and that, by a mandatory order, he be reinstated. There were other prayers. The applicants opposed the petition.
2. In a judgment delivered on 26th June 2024, the learned J.W. Keli, J. allowed the petition.
3. Before me is an application dated 28th October 2024 by the applicants in which they seek the extension of time to file a notice of appeal. In the supporting affidavit sworn by their counsel Allan Sitima, it was deponed that he diarised the date of judgment as 27th June 2024, instead of 26th June 2024; that on 8th August 2024 he sought a certified copy of proceedings and judgment in order to seek instructions from



the applicants; that on 9th September 2024, counsel moved to the superior court for stay of execution and leave to appeal out of time; on 15th October 2024 the stay of 30 days was granted, but leave to appeal out of time was declined for want of jurisdiction; and that all those caused the delay. He stated that the delay was occasioned by an honest mistake on his part. His case was that the intended appeal was arguable, and outlined the grievances the applicants had with the judgment. Lastly, he stated that no prejudice would be suffered by the respondents if leave to appeal out of time is granted.

4. In the replying affidavit sworn by the respondent, he opposed the application. His case was that the applicants were represented during the proceedings and were aware that judgment would be delivered on 26th June 2024. The applicant discounted the alleged mis-diarisation of the date, and wondered why no action was taken to appeal after the 27th June 2024. He stated that one of the orders in the judgment was that he reports to the 1st applicant within 30 days; that it was when he reported on 22nd July 2024 that the applicants filed the application of 9th August 2024. Lastly, he asked that if this Court is minded to grant stay, it be on condition that the entire decretal sum of Kshs.3,509,622 be deposited into an interest earning account.
5. It is now settled that the decision whether or not to extend time to appeal is a discretionary one, all the time the Court seeking to do justice between the parties. The Court will consider the length of delay, the reasons for the delay; the chances of the appeal succeeding, if the application is granted; the degree of prejudice that the respondent will suffer, and whether such prejudice will adequately be compensated (See *Pan African Paper Mills (E.A) Ltd v Olaka* [2001] eKLR.
6. Both counsel addressed the Court through their respective submissions on the principles applicable in determining such an application, and whether or not it should be allowed. I have considered them.
7. From 26th June 2024 to 28th October 2024 when the application was filed, it is a period of about four (4) months. Whether or not the period of delay is long depends on the facts of each case. It also depends on the explanation that the applicant has given for the delay. Learned counsel Allan Sitima is an experienced counsel, who, as a matter of caution, should have lodged a notice of appeal even as he sought instructions and proceedings, and so on. However, I consider that most of the four months was taken up by the applicants seeking stay of execution and extension of time before the superior court, applications that should have been filed before this Court, to save on time.
8. I have perused the grounds on which the intended appeal will be based. They are not frivolous grounds. On the question of prejudice, the applicant is a constitutional body that employs teachers, and is capable of paying the decretal sum at any stage. There is no prospect of the respondent losing the sum in the event that the application is allowed and the intended appeal ultimately succeeds. He will be reinstated back into employment, if the Court determines that at the conclusion of the appeal.
9. I recognise that the applicants have the right to appeal, and the respondent has a judgment whose fruits he is entitled to enjoy by the execution of the decree. I am asked to respect both rights, but still determine the justice of the application given the facts of this case.
10. I have considered the application and the arguments of the parties' counsel. Given the facts of the case, the period of delay was short and the explanation for the delay is plausible. The intended appeal raises arguable grounds, and the respondent will not be unduly disadvantaged, if the applicants are allowed to appeal.
11. Consequently, the application is allowed with costs to the respondent. The applicants shall within seven (7) days file and serve a notice of appeal and, within 45 days, file and serve the memorandum and record of appeal.



DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

A. O. MUCHELULE

JUDGE OF APPEAL

