



**Kenya Private Universities Non Teaching Workers Union v Pan African Christian University
(Civil Application E396 of 2023) [2025] KECA 143 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 143 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E396 OF 2023
M NGUGI, JA
FEBRUARY 7, 2025**

BETWEEN

**KENYA PRIVATE UNIVERSITIES NON TEACHING WORKERS
UNION APPLICANT**

AND

PAN AFRICAN CHRISTIAN UNIVERSITY RESPONDENT

*(Being an application for leave to file appeal out of time against the judgment
of the ELRC dated 23rd September 2021 in ELRC Cause No. 682 of 2015)*

RULING

1. Judgment in ELRC No. 682 of 2015, from which the applicant seeks to prefer an appeal out of time, was delivered on 23rd September 2021. Aggrieved by the judgment, the applicant filed a notice of appeal dated 27th September 2021 and also applied for certified copies of the judgment and proceedings by a letter dated 27th September, 2021. These were received on 16th June 2022. The applicant was issued with a certificate of delay dated 6th October 2022.
2. The applicant did not, however, file its memorandum and record of appeal within 60 days of receipt of the proceedings as required under rule 84(1) of the Rules of this Court. It has now filed the present application, dated 1st August, 2023, seeking leave to file and serve its appeal out of time, under rule 4 of the Rules of this Court.
3. It admits its failure to act in compliance with the Rules in the affidavit sworn in support of the application by one Kilausi Angulu Mbaya, a member of the applicant, on 1st August 2023. Mr. Mbaya avers to the above matters on the basis of information from the applicant's advocates. He further avers that the delay in filing the appeal was due to delay in obtaining the certified copies of the proceedings as shown in the certificate of delay issued on 6th October 2022.



4. Mr. Mbaya avers that a further delay was caused by a clerk in the advocates firm failing to file the record of appeal as instructed the applicant's advocates and failing to bring this failure to the attention of the advocates; that the said clerk had left the firm without informing the senior partner of his omission; and that the firm became aware of this omission during an audit of files in July 2023 and immediately sought to rectify the situation by filing the present application. The applicant avers that its advocates' mistake is regrettable and should not be visited on the innocent litigant.
5. There is no response to the application, nor have the parties filed submissions, though there's a hearing notice with respect to the application dated 2nd December 2024.
6. Rule 4 of this Court's Rules gives the Court discretion to extend time prescribed for the doing of any act under the Rules. In exercising this discretion, the Court is required to consider certain factors. In *Mwangi v Kenya Airways Limited* (2003) KLR 486 this Court stated:

“Over the years, the Court has set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus;

“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are; first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

7. Judgment in the matter that the applicant seeks to appeal against was delivered on 23rd September, 2021. A certificate of delay was issued on 6th October 2022, indicating a delay of 260 days on the part of the court in preparing the typed proceedings, from 27th September, 2021 to 16th June, 2022, when the certified copies of proceedings were furnished to the applicant.
8. In explaining the further delay from June 2022 to 1st August 2023 when this application was filed, the applicant lays the blame on an unnamed clerk in the applicant's advocates law firm who failed to file the memorandum and record of appeal, or to inform his employer that he had not followed instructions to file the appeal, and who had since left employment. Thus, for a period in excess of one year, neither the applicant nor its advocates took any action with respect to its appeal.

There is no affidavit by the advocate to explain the delay in filing the appeal, nor an affidavit by the (unnamed) clerk to explain the delay and omission to file the applicant's appeal.

Ultimately, responsibility for a matter lies on a party and its agent, the advocate. Failure to comply with the Rules cannot be blamed on an unnamed clerk, with no affidavit by the advocate to explain what action he or she, as the person in receipt of instructions and ultimately responsible to the client, did to carry out instructions. In these circumstances, the delay cannot be wished away by falling back on the trite statement that mistakes of counsel should not be visited on the litigant. As the Court observed in *Bains Construction Co. Ltd. v John Mzare Ogowe* (2011) eKLR:

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences”.



9. Similarly, in *Donald O. Raballa v Judicial Service Commission & Attorney General* [2018] KECA 641 (KLR), this Court observed that:

“But the circumstances disclosed in this case do not amount to a mistake of counsel but inaction after receiving instructions to act in the matter. In the case of *Rajesh Rughani v Fifty Investment Ltd. & another* (2005) eKLR this Court held:

“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.

10. I find that the delay of more than one year from the date when the proceedings in the matter were collected by the applicant’s advocates is inordinate. The explanation offered, blaming a clerk in the law firm, but with no averments of fact in relation to his alleged omissions from the advocate, is not sufficient to justify the exercise of discretion in favour of the applicant. I accordingly find no merit in the application dated 1st August 2023, and it is hereby dismissed. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

