



REPUBLIC OF KENYA



Karua v Judicial Service Commission (Miscellaneous Civil Application E412 of 2023) [2024] KECA 156 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 156 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E412 OF 2023
LA ACHODE, JA
FEBRUARY 23, 2024**

BETWEEN

MARTHA KARUA APPLICANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

(An application under Rules 4 and 41 Court of Appeal Rules, 2010 for extension of time to file an appeal from the Judgment and decree of the High Court at Nairobi (Jairus Ngaah J) delivered on 27th January, 2023) in Judicial Review E1127/2020)

RULING

1. By the Notice of Motion dated 14th August, 2023, brought under Rules 4 and 41 of the [Court of Appeal Rules, 2022](#) (COA) (erroneously cited as [Court of Appeal Rules 2010](#) above) the applicant, Hon. Martha Karua, seeks the following orders:
 - a. That the time limited for the applicant to file and serve the Respondent with the Appeal be enlarged or extended to allow the Applicant to appeal out of time against the judgment of Hon. Justice Jairus Ngaah delivered on the January 27, 2023 at Nairobi High Court Judicial Review No. E1127 of 2020
 - a. That the Honourable court be pleased to issue any order it deems fit and just to grant in the circumstances.
 - b. That costs of this application be provided for.
2. The grounds of the application are on the face thereof.
3. The genesis of this application was an application dated November 13, 2020 that the applicant filed in the High Court seeking the following orders;



- a. An order of certiorari to quash the decision of the respondent dismissing the applicant's complaint against the Honourable Justice Lucy Gitari;
 - b. A declaration that the ex parte applicant is entitled to be heard on her complaint before a determination thereof pursuant to section 11 (1) of the [Fair Administrative Action Act](#), 2015;
 - c. An order of mandamus directed to the secretary of the respondent to release to the ex parte applicant within seven days the record of its proceedings that dismissed the complaint/petition summarily; An order pursuant to section 11 (1)(c) of the [Fair Administrative Action Act](#), 2015 directing the respondent to give the applicant an opportunity to be heard on her complaint;
 - d. An order of *certiorari* to quash the decision of the respondent communicated via letter dated March 16, 2020 and received by the applicant on June 15, 2020;
 - e. An order of *mandamus* directed to the respondent to hear the applicant's complaint in strict conformity with the Constitution, lastly;
 - f. A declaration pursuant to article 47 (1) that the applicant is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
4. In a judgment dated January 27, 2023 the High Court found that the application was devoid of merit and dismissed it, expressing that it was misconceived and an abuse of process of the court. Aggrieved by the decision, the applicant filed a Notice of Appeal dated 6th February 2023.
 5. On March 16, 2023, the applicant lodged a letter dated March 13, 2023 with the Registrar of the High Court seeking the extracted decree together with certified copies of the proceedings. The Registrar supplied the certified copies of the proceedings 78 days later on May 31, 2023 and issued a Certificate of Delay on June 15, 2023.
 6. M/S Muthoni Kangi, Counsel for the applicant avers in the supporting affidavit dated August 14, 2023, that she was on extended maternity leave at the time the certified copies of proceedings were issued. She was thus indisposed and not able to handle the matter and filed the appeal on time. In a supplementary affidavit she swore on 14th August 2023, counsel reiterates these grounds. She avers that the delay by the applicant to file the appeal was not deliberate and attributes it to the time it took the registry to supply the certified copies of the proceedings and counsel's own indisposition being on maternity leave at the time.
 7. The applicant further avers in the supplementary affidavit that the appeal is arguable and has reasonable chances of success. Hence, it is in the interest of justice that the Court considers this application and grants it.
 8. The respondent did not file any replying affidavit or submissions despite being duly served by the applicant on 6th October, 2021. The applicant has urged the Court to find merit in the application for extension of time and grant leave to enable her file the intended appeal against the decision of Ngaah J, which dismissed the applicant's application.
 9. The applicant filed submissions dated 5th October, 2023 and urges that this Court has the discretion to extend time under Rule 4. She refers to the guidelines to be considered whilst exercising discretion in cases of this nature as set out in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) (2014] e KLR.
 10. In her submissions the applicant reiterates the averments in the supporting and supplementary affidavits and goes further to submit that the respondent will not suffer prejudice if the leave is granted.



That the Court must balance the competing interests of the applicant with those of the respondent as was stated in the case of *M/S Portreizt Maternity v James Karanga Kabia* Civil Appeal No 63 of 1997. The applicant implores that since the court dismissed the applicant's application with costs to the respondent, the respondent will not be deprived of its right to enjoy the fruits of the said judgment, as the bill of costs has been filed.

11. This Court has considered the grounds of the application, the submissions, the authorities and the law cited to determine whether this application has merit. The applicant approached this Court under Rule 4 which provides that:

“...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 reference to that time as extended.”

12. The decision whether or not to extend the time for filing of an appeal is discretionary. However, the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in its favour. There must be a just cause for depriving the plaintiff of that right. This Court enumerated the factors which provide guidance in the exercise of that discretion in the case of *Leo Sila Mutiso v Rose Hellen Wangari*, Civil Application No. NAI 255 of 1997 thus:

“It is now well settled that the decision whether or not to extend the 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.”

13. The first issue for consideration is whether the applicant has provided a satisfactory explanation for the delay in filing the appeal. As stated in the case of *Paul M. Waweru & 2 others* [2003] KLR 361, the applicant is required to provide necessary proof for the reasons of such delay. The Court held that,

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under Rule 4 of the Rules of this Court. All that the applicant is required to do is to place sufficient material before the learned Judge explaining the reasons for what was clearly an inordinate delay.”

14. The applicant submits that the delay in filing the appeal was caused by an unexpected hold up in the court registry and has substantiated the claim by exhibiting a Certificate of Delay dated 15th June, 2023. That the applicant requested for certified copies of the proceedings by a letter to the Registrar of the High court dated 13th March, 2023 and the certified copies of the proceedings were availed on 31st May, 2023. The applicant further states that the appeal was not filed immediately after they finally received the copies of the proceedings because her counsel was away on maternity leave and could not perform her duties over the matter. In my view the reasons submitted for the delay in filing the appeal are reasonable and the delay was not inordinate.



15. The second issue for consideration is whether the respondent may suffer prejudice if the application is granted. In the case of Sir John Donaldson M. R. in *Rosengrens v Safe Deposit Centres Limited* [1984] 3 ALLER 198, the Court considered the balance between the rights of the two parties thus:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff..... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

16. The applicant herein submits that the respondent will not be deprived of its rights conferred by the judgement in any way, since the application was dismissed with costs and the bill of costs has already been filed. The burden of proof shifts to the respondent to show the contrary. The respondent’s failure to respond to the application despite being served, leaves this Court with no basis to hold that allowing the application will be injurious to the respondent.

17. In the premise, this Court finds that the reasons advanced for the delay in filing the appeal are reasonable. Consequently, the notice of motion dated August 14, 2023, is found to have merit and is allowed. The applicant is granted leave to file the appeal within seven days from the date of this ruling.

The applicant shall bear the costs of this application.

Dated and delivered in Nairobi this 23rd day of February, 2024.

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

