



Gatiti v Teachers Service Commission (Civil Application E582 of 2023) [2024] KECA 379 (KLR) (28 March 2024) (Ruling)

Neutral citation: [2024] KECA 379 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E582 OF 2023**

**PO KIAGE, JA
MARCH 28, 2024
IN CHAMBERS**

BETWEEN

FELIX G GATITI APPLICANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

(An application for leave to file and serve record of appeal out of time in respect of an intended appeal against the judgment of the Employment and Labour Relations Court at Nairobi (Kabira Ocharo, J.) dated 16th June, 2022 in ELRC No. 759 of 2017)

RULING

1. The application Felix K. Gatiti by his notice of motion dated 5th December 2023 prays that the time for filing and serving a record of appeal in an appeal against the judgment of the Employment and Labour Relations Court (Kabira Ocharo, J.) delivered on 16th June 2023 be extended and he be allowed to file and serve the same out of time.
2. The grounds disclosed on the face of the application, and in the applicant’s supporting affidavit sworn on 5th December 2023, are to the effect that after judgment was delivered the applicant’s advocates were unable to contact and advise him as he was unreachable. They nevertheless did file, out of abundance of caution, a notice of appeal on 20th June 2023. They also requested for the typed proceedings, which were ready on 25th April 2023 and they collected them on the same date, but they could not proceed to file the record for lack instructions. The grounds state that

“the applicant has just recently gotten in touch with his advocates,”

and given, instructions to proceed with the appeal but the 60 day time frame had lapsed.



3. The applicant swears that he came to learn of the judgment "some time last month," when he reached out to his advocates and only managed to give instructions to the said advocates "recently," and he was keen to pursue his appeal. The loss of his job with the respondent ushered in a season of difficulties both financially and mentally and he had to relocate back to the village. He did not have money to follow up the case and his phone got lost and he could not afford to replace it. He believes he has a good appeal and

“prescriptions of procedure and form should not trump the primary object of dispensing substantive justice.”

4. I have considered this motion and weighed it with care, notwithstanding that there appears to be no papers filed by the respondent. An application such as this is a plea to my discretion to forbear and extend time for an applicant who has fallen short of timelines set by the Rules. My discretion is free and unfettered but it is exercised on the basis of settled principles, not on whim, caprice or sympathy. The Supreme Court has set out the matters falling for consideration in *Nicholas Kiptoo Korir Arap Salat v. IEBC & 7 Others* [2014]eKLR, which I bear in mind.

5. As what is sought is extension of time, the length of delay is a major consideration. In the present case the period is nearly 6 months, by no means a short period. Long and inordinate though it be, that is not the end of the story as an applicant may well satisfactorily explain that delay. In this case, it is said that the applicant was facing financial and mental difficulties, and he also had gone to the village and could not be reached. His phone was spoilt and he could not repair it. It is only on some unspecified recent date that he got in touch and gave instructions.

6. Whereas I do empathize with the applicant, I do think that it was incumbent upon the applicant to be in touch with his legal advisors on the progress of the case. It must be that he did testify at the trial and he should have been anxious to know the outcome of the case which, obviously, held significance for him. I thus am quite incredulous that the difficulties spoken of, though without supporting proof, so incapacitated the applicant that he was unable to keep any tabs on his case. Nor am I satisfied there the advocates did all they could to get in touch with the applicant and failed. I have already alluded to the palpable vagueness of some of the statements and averments made, and the net effect is to leave me unpersuaded that I should exercise my discretion in favour of extending time.

7. Being of that mind, and notwithstanding the sympathy I have, given the down turn of the applicant's fortunes, I am afraid I cannot grant the application and the same is disallowed.

8. I make no order as to costs given the respondents do not seem to have taken any steps to oppose it.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR

