



Local Authorities Provident Fund Board of Trustees v Attorney General & 168 others (Civil Appeal (Application) E182 of 2023) [2024] KECA 276 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 276 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E182 OF 2023
SG KAIRU, JA
MARCH 8, 2024**

BETWEEN

THE LOCAL AUTHORITIES PROVIDENT FUND BOARD OF TRUSTEES APPELLANT

AND

- THE ATTORNEY GENERAL 1ST RESPONDENT**
- THE CABINET SECRETARY NATIONAL TREASURY 2ND RESPONDENT**
- THE RETIREMENT BENEFITS AUTHORITY 3RD RESPONDENT**
- KENYA COUNTY GOVERNMENT WORKERS UNION 4TH RESPONDENT**
- THE COUNTY PENSION FUND BOARD OF TRUSTEES 5TH RESPONDENT**
- T LOCAL AUTHORITIES PENSION TRUST BOARD OF TRUSTEES 6TH RESPONDENT**
- COUNTY PENSIONERS ASSOCIATION 7TH RESPONDENT**
- LAPTRUST RETIREMENT SERVICES LIMITED 8TH RESPONDENT**
- THE COUNTY PENSION FUND FINANCIAL SERVICES LIMITED 9TH RESPONDENT**
- MATILDA JEBET KEMETTO 10TH RESPONDENT**
- BENSON OLIANGA ORIARO 11TH RESPONDENT**
- BERNARD ATSIULA INYANGALA 12TH RESPONDENT**
- BONIFACE WAWERU GITUKE 13TH RESPONDENT**
- EMILY W MWANGI 14TH RESPONDENT**
- FRED BULUKU 15TH RESPONDENT**



CHARLES MAKINI	16 TH RESPONDENT
OKIYA OMTATAH OKOITI	17 TH RESPONDENT
COUNCIL OF GOVERNORS	18 TH RESPONDENT
WATER SERVICES PROVIDERS ASSOCIATION	19 TH RESPONDENT
COUNTY GOVERNMENT RETIREMENTS SCHEME	20 TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA	21 ST RESPONDENT
COUNTY GOVERNMENT OF KWALE	22 ND RESPONDENT
COUNTY GOVERNMENT OF KILIFI	23 RD RESPONDENT
COUNTY GOVERNMENT OF TANA RIVER	24 TH RESPONDENT
COUNTY GOVERNMENT OF LAMU	25 TH RESPONDENT
COUNTY GOVERNMENT OF TAITA TAVETA	26 TH RESPONDENT
COUNTY GOVERNMENT OF GARISSA	27 TH RESPONDENT
COUNTY GOVERNMENT OF WAJIR	28 TH RESPONDENT
COUNTY GOVERNMENT OF MANDERA	29 TH RESPONDENT
COUNTY GOVERNMENT OF MARSABIT	30 TH RESPONDENT
COUNTY GOVERNMENT OF ISIOLO	31 ST RESPONDENT
COUNTY GOVERNMENT OF MERU	32 ND RESPONDENT
COUNTY GOVERNMENT OF THARAKA NITHI	33 RD RESPONDENT
COUNTY GOVERNMENT OF EMBU	34 TH RESPONDENT
COUNTY GOVERNMENT OF KITUI	35 TH RESPONDENT
COUNTY GOVERNMENT OF MACHAKOS	36 TH RESPONDENT
COUNTY GOVERNMENT OF MAKUENI	37 TH RESPONDENT
COUNTY GOVERNMENT OF NYANDARUA.	38 TH RESPONDENT
COUNTY GOVERNMENT OF NYERI	39 TH RESPONDENT
COUNTY GOVERNMENT OF KIRINYAGA	40 TH RESPONDENT
COUNTY GOVERNMENT OF MURANG'Á	41 ST RESPONDENT
COUNTY GOVERNMENT OF KIAMBU	42 ND RESPONDENT
COUNTY GOVERNMENT OF TURKANA	43 RD RESPONDENT
COUNTY GOVERNMENT OF WEST POKOT	44 TH RESPONDENT
COUNTY GOVERNMENT OF SAMBURU	45 TH RESPONDENT
COUNTY GOVERNMENT OF TRANS NZOIA	46 TH RESPONDENT
COUNTY GOVERNMENT OF UASIN GISHU	47 TH RESPONDENT



COUNTY GOVERNMENT OF ELGEYO/MARAKWET	48 TH RESPONDENT
COUNTY GOVERNMENT OF NANDI	49 TH RESPONDENT
COUNTY GOVERNMENT OF BARINGO	50 TH RESPONDENT
COUNTY GOVERNMENT OF LAIKIPIA	51 ST RESPONDENT
COUNTY GOVERNMENT OF NAKURU	52 ND RESPONDENT
COUNTY GOVERNMENT OF NAROK	53 RD RESPONDENT
COUNTY GOVERNMENT OF KAJIADO	54 TH RESPONDENT
COUNTY GOVERNMENT OF KERICHO	55 TH RESPONDENT
COUNTY GOVERNMENT OF BOMET	56 TH RESPONDENT
COUNTY GOVERNMENT OF KAKAMEGA	57 TH RESPONDENT
COUNTY GOVERNMENT OF VIHIGA	58 TH RESPONDENT
COUNTY GOVERNMENT OF BUNGOMA	59 TH RESPONDENT
COUNTY GOVERNMENT OF BUSIA	60 TH RESPONDENT
COUNTY GOVERNMENT OF SLAYA	61 ST RESPONDENT
COUNTY GOVERNMENT OF KISUMU	62 ND RESPONDENT
COUNTY GOVERNMENT OF HOMABAY	63 RD RESPONDENT
COUNTY GOVERNMENT OF MIGORI	64 TH RESPONDENT
COUNTY GOVERNMENT OF KISII	65 TH RESPONDENT
COUNTY GOVERNMENT OF NYAMIRA	66 TH RESPONDENT
COUNTY GOVERNMENT OF NAIROBI CITY	67 TH RESPONDENT
NAIROBI CITY WATER & SEWERAGE COMPANY.	68 TH RESPONDENT
MINISTRY OF WATER & IRRIGATION (NWPC) MOMBASA MUNICIPALITY	69 TH RESPONDENT
NZOIA WATER & SANITATION COMPANY	70 TH RESPONDENT
NAKURU WATER & SANITATION COMPANY	71 ST RESPONDENT
NYERI WATER & SEWERAGE COMPANY	72 ND RESPONDENT
MATHIRA WATER & SEWERAGE COMPANY	73 RD RESPONDENT
KISUMU WATER & SEWERAGE COMPANY	74 TH RESPONDENT
GARISSA WATER & SEWERAGE COMPANY.	75 TH RESPONDENT
AMATSI WATER SERVICES COMPANY	76 TH RESPONDENT
WESTERN WATER SERVICES COMPANY	77 TH RESPONDENT
OTHAYA MUKUREINI WATER & SANITATION COMPANY ...	78 TH RESPONDENT



KIRINYAGA WATER & SANITATION COMPANY	79 TH RESPONDENT
ELDORET WATER & SANITATION COMPANY	80 TH RESPONDENT
RURAL NAKURU RURAL WATER & SANITATION COMPANY	81 ST RESPONDENT
GUSII WATER & SANITATION COMPANY	82 ND RESPONDENT
MURANG'Á SOUTH WATER & SANITATION COMPANY	83 RD RESPONDENT
KAHUTI WATER & SEWERAGE COMPANY	84 TH RESPONDENT
MALINDI WATER & SEWERAGE COMPANY	85 TH RESPONDENT
NANYUKI WATER & SEWERAGE COMPANY	86 TH RESPONDENT
KERICHO WATER & SANITATION COMPANY	87 TH RESPONDENT
MURANGA WATER & SANITATION COMPANY	88 TH RESPONDENT
TETU ABERDARE WATER & SANITATION COMPANY ...	89 TH RESPONDENT
MERUTI WATER SEWERAGE COMPANY	90 TH RESPONDENT
OLOOLAISER WATER & SEWERAGE COMPANY	91 ST RESPONDENT
IMETHA WATER & SANITATION COMPANY	92 ND RESPONDENT
KAHUTI WATER & SEWERAGE COMPANY	93 RD RESPONDENT
EMBE WATER & SANITATION COMPANY	94 TH RESPONDENT
TAVEVO WATER & SEWERAGE COMPANY	95 TH RESPONDENT
TUURU WATER ASSOCIATION	96 TH RESPONDENT
GATAMATHI WATER & SANITATION COMPANY	97 TH RESPONDENT
EMBU WATER & SANITATION COMPANY	98 TH RESPONDENT
NYAHURURU WATER & SANITATION COMPANY	99 TH RESPONDENT
NAROK WATER & SEWERAGE COMPANY	100 TH RESPONDENT
ISIOLO WATER & SEWERAGE COMPANY	101 ST RESPONDENT
LAMU WATER & SEWERAGE COMPANY	102 ND RESPONDENT
NANDI KAPSABET NANDI WATER & SANITATION COMPANY	103 RD RESPONDENT
SOUTH NYANZA WATER SERVICES COMPANY	104 TH RESPONDENT
MIKUTRA WATER SERVICES COMPANY	105 TH RESPONDENT
KITUI WATER & SANITATION COMPANY	106 TH RESPONDENT
YATTA WATER COMPANY LTD	107 TH RESPONDENT
NITHI WATER & SANITATION COMPANY	108 TH RESPONDENT



KWALE WATER & SEWERAGE COMPANY	109 TH RESPONDENT
KAPENGURIA WATER & SANITATION COMPANY	110 TH RESPONDENT
RUMURUTI WATER & SANITATION COMPANY	111 TH RESPONDENT
OLKALOU WATER & SANITATION COMPANY	112 TH RESPONDENT
NAIVASHA WATER & SANITATION COMPANY	113 TH RESPONDENT
MAVOKO EPZA WATER & SEWERAGE COMPANY	114 TH RESPONDENT
KIBWEZI MITTO WATER & SEWERAGE COMPANY	115 TH RESPONDENT
MAKINDU WATER & SEWERAGE COMPANY	116 TH RESPONDENT
UPPER CHANIA WATER SERVICES	117 TH RESPONDENT
TACHASIS WATER SUPPLY	118 TH RESPONDENT
NYANDARUA NORTH WATER & SANITATION COMPANY ...	119 TH RESPONDENT
TARGA – KIAMBERE WATER & SANITATION COMPANY ...	120 TH RESPONDENT
MUTHAMBI 4K WATER ASSOCIATION	121 ST RESPONDENT
VIHIGA DISTRICT WATER OFFICE	122 ND RESPONDENT
MT. ELGON DISTRICT WATER OFFICE	123 RD RESPONDENT
NYAKANJA WATER SERVICE PROVIDERS SOCIETY	124 TH RESPONDENT
GITEI WATER SOCIETY	125 TH RESPONDENT
TIA WIRA WATER PROJECT	126 TH RESPONDENT
ENGINEER TOWN WATER PROJECT	127 TH RESPONDENT
MAWINGO WATER SOCIETY PROJECT	128 TH RESPONDENT
NDARAGWA WATER PROJECT	129 TH RESPONDENT
KINJA WATER PROJECT	130 TH RESPONDENT
ELDAMA RAVINE WATER & SANITATION COMPANY ..	131 ST RESPONDENT
MANDERA WATER & SANITATION COMPANY	132 ND RESPONDENT
MARALAL WATER & SEWERAGE COMPANY	133 RD RESPONDENT
LIBOI LOCATION WATER SERVICE PROVIDERS ASSOCIATION ...	134 TH RESPONDENT
MOYALE WATER & SEWERAGE COMPANY LTD	135 TH RESPONDENT
NGAGAKA WATER CONSUMERS ASSOCIATION	136 TH RESPONDENT
NGANDORI/NGINDA WATER CONSUMERS ASSOCIATION ...	137 TH RESPONDENT



TANA RIVER BOREHOLES & SANITATION COMPANY	138 TH RESPONDENT
DOM KATHITA GATUNGA WATER SOCIETY	139 TH RESPONDENT
DOM RUIRU THAU WATER ASSOCIATION	140 TH RESPONDENT
NGARIAMA/NJUKIINI WATER ASSOCIATION	141 ST RESPONDENT
KATHITA KIIRUA (CEFA) WATER ASSOCIATION	142 ND RESPONDENT
MURUNGI MUGUMANGO WATER SOCIETY	143 RD RESPONDENT
TANA RIVER MINISTRY OF WATER AND IRRIGATION HOLA TANA RIVER	144 TH RESPONDENT
KILIFI-MARIAKANI WATER & SEWERAGE COMPANY	145 TH RESPONDENT
NOL TURESH BULK WATER COMPANY	146 TH RESPONDENT
MACHAKOS WATER & SEWERAGE COMPANY	147 TH RESPONDENT
KARIMENU WATER & SEWERAGE COMPANY	148 TH RESPONDENT
THIKA WATER & SEWERAGE COMPANY	149 TH RESPONDENT
MATUNGULU WATER & SEWERAGE COMPANY	150 TH RESPONDENT
KANGUNDO WATER & SEWERAGE COMPANY	151 ST RESPONDENT
KIKUYU WATER & SEWERAGE COMPANY	152 ND RESPONDENT
GATUNDU WATER & SEWERAGE COMPANY	153 RD RESPONDENT
KARIMENU WATER & SEWERAGE COMPANY	154 TH RESPONDENT
RUNDA WATER & SEWERAGE COMPANY	155 TH RESPONDENT
WAMUYA WATER & SEWERAGE COMPANY	156 TH RESPONDENT
OLKEJUADO WATER & SEWERAGE COMPANY	157 TH RESPONDENT
KIAMBU WATER & SEWERAGE COMPANY	158 TH RESPONDENT
GITHUNGURI WATER & SANITATION COMPANY	159 TH RESPONDENT
LIMURU WATER & SEWERAGE COMPANY	160 TH RESPONDENT
GATANGA WATER & SEWERAGE COMPANY	161 ST RESPONDENT
RUIRU-JUJA WATER & SEWERAGE COMPANY	162 ND RESPONDENT
BOYA WATER PROJECT	163 RD RESPONDENT
AHONO SINAGA WATER PROJECT	164 TH RESPONDENT
NYANAS WATER & SANITATION COMPANY	165 TH RESPONDENT
GULF WATER & SANITATION COMPANY	166 TH RESPONDENT
NYASARE WATER SUPPLY ASSOCIATION	167 TH RESPONDENT
CHRISTINE SONGO	168 TH RESPONDENT



COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE COUNTY
GOVERNMENT OF KAKAMEGA 169TH RESPONDENT

(An application seeking orders that the time within which to serve the Notice of Appeal dated 25th January 2023 be extended to 5th April 2023; that the Notice of Appeal dated 25th January 2023 and served electronically on 5th April 2023 be deemed as properly served; that the time to serve the Record of Appeal dated 25th March 2023 be extended to 4th April 2023; and that the Record of Appeal dated 25th March 2023 and served electronically on 4th April 2023 be deemed as properly served; and that the costs of the application be costs in the appeal)

RULING

1. In its Notice of Motion dated 18th April 2023, the appellant/applicant Local Authorities Provident Fund Board of Trustees seeks orders that the time within which to serve the Notice of Appeal dated 25th January 2023 be extended to 5th April 2023; that the Notice of Appeal dated 25th January 2023 and served electronically on 5th April 2023 be deemed as properly served; that the time to serve the Record of Appeal dated 25th March 2023 be extended to 4th April 2023; and that the Record of Appeal dated 25th March 2023 and served electronically on 4th April 2023 be deemed as properly served; and that the costs of the application be costs in the appeal.
2. Aggrieved by the judgment of the Employment and Labour Relations Court (ELRC) delivered on 20th December 2022, the applicant filed a Notice of Appeal dated 25th January 2023 which was duly served on some of the respondents and belatedly on others. Subsequently, the applicant lodged its memorandum and record of appeal dated 25th March 2023. Based on the memorandum of appeal, the applicant intends to challenge that judgment on the grounds, among others, that it was made without jurisdiction to the extent that the dispute was for determination of the constitutionality of the County Government Retirement Scheme Act, 2019 which according to the applicant is not a dispute within Article 162 of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*.
3. I heard the application on 21st November 2023. The parties were represented by learned counsel as follows: Mr. Ngatia, SC appeared for the applicant. Miss. Mbilo appeared for the 1st and 2nd respondents. Mr. Munene appeared for the 3rd respondent. Dr. Thiankolu appeared with Ms. Jeruto for the 5th and 6th respondents. Mr. Okeyo appeared for the 7th respondent. Miss. Ngigi held brief for Miss. Olendo for the 24th respondent. Ms. Maritim appeared for the 56th and 169th respondents. Mr. Mutembei appeared for the 62nd respondent. Mr. Omtatah, the 17th respondent appeared in person.
4. At the onset of the hearing, Dr. Thiankolu pointed out that his clients, the 5th and 6th respondents filed an application, also dated 18th April 2023, seeking an order to strike out the appeal. He sought adjournment of the present application so that his clients' application and the present application could be heard together. I however declined that request considering that the application for extension of time under Rule 4 of the Court of Appeal Rules is a single judge application whereas the application to strike out the appeal should be heard by the full court.
5. Based on the grounds set out on the face of the application; the affidavits in support of the motion sworn by Fredrick Ngatia advocate, Alex Kimele Mwanzi, process server and Andrew Onyango, a court clerk in the firm of Ngatia & Associates Advocates and the submissions by learned counsel, the basis on which extension of time is sought is that the notice of appeal was filed on time on 25th January 2023; that on the following day, 26th January 2023, it was entrusted on the process server Alex Kimele



Mwanzi to effect service; that Mr. Mwanzi effected service on some of the parties and not on others; that it was not until 5th April 2023 when the 6th respondent requested for a copy of the notice of appeal from the applicant's advocates that it dawned on Mr. Ngatia that some of the parties may not have been served; and that thereupon Mr. Ngatia sent out the notice of appeal, by electronic mail, to all the parties. At the same time, Mr. Ngatia embarked on investigating whether the process server, Mr. Mwanzi, had indeed effected service on all the parties. He dispatched his court clerk, Andrew Onyango to establish the position.

6. Andrew Onyango deposed that he traced the process server Alex Kimele Mwanzi to his home in Mulindi Village in Kitui on 6th April 2023; that Mwanzi informed him that he had only managed to serve four parties with the notice of appeal before receiving news of the sudden and mysterious death of his uncle and that Mwanzi forgot to inform the advocates of his predicament on account of the family issues that he was dealing with in connection with his uncle's death.
7. Alex Kimele Mwanzi deposed in his affidavit that having been contacted by the secretary to the firm of Ngatia & Associates on 26th January 2023, he on the same day collected the notices of appeal with instructions to serve on all the parties; that on 27th and 30th January 2023 he managed to serve some of the parties; that on the evening of 31st January 2023, before he had completed serving the notice of appeal, he received news of the death of his uncle and left Nairobi for Kitui "in a state of shock and mental anguish"; that in the days that followed he was engaged in the burial preparations as well as in efforts to establish the cause of death of his uncle and overlooked informing the applicant's advocates what had transpired; that he subsequently gave the notices of appeal to Andrew Onyango when he (Onyango) went to his home in Kitui on 6th April 2023.
8. Regarding the record of appeal, Mr. Ngatia deposed that the same was prepared in time and lodged in court on 25th March 2023 and on the assumption that the process server had already served the notice of appeal, he thereafter instructed his clerk, Andrew Onyango, to effect physical service of the record of appeal on all counsel in the matter; that the 7 days prescribed for service of the record of appeal lapsed on 1st April 2023 and given that counsel on record for the parties were situated in different parts of Nairobi and Nakuru, it was not possible to serve the record of appeal on all of them within the specified period; that ultimately he resolved to serve the record electronically which he did on 4th April 2023. On his part, Mr. Onyango deposed that on 4th April 2023, he informed Mr. Ngatia that despite exerting himself, he was not able to physically serve the record of appeal on all counsel in the matter.
9. The application is supported by Ms. Mbitio for the 1st and 2nd respondents and by Mr. Okiya Omtatah on grounds that the delay involved is not inordinate and the reasons given are plausible; that there is a similar appeal by the Attorney General and the matter is weighty and concerns many employees and public interest will be served.
10. The application is opposed by the 5th and 6th respondents; 7th respondent; 19th respondent; the 24th and 62nd respondents; 56th and 169th respondents; 148th respondent.
11. The grounds on which the application is opposed are represented in the replying affidavit of Kimutai Hosea Kili, Secretary of the Boards of Trustees of the 5th and 6th respondents and the forceful submissions by Dr. Muthomi

Thiankolu. It is urged that the service of the notice of appeal on 5th April 2023 was out of time by 62 days and even then service was only effected after the respondents raised issue with service while the record of appeal was late by two days and twenty-three hours; that application for extension of time was a re-action to the application to strike out the appeal; that there was also delay of 13 days in filing



the present application; that the delay involved “betrays a nonchalant or haughty attitude of persisting in indolence and latches”.

12. It was urged that the Court’s discretion should not be exercised in favour of the applicant because: the 4th respondent’s notice of appeal was struck out at the instance of the applicant; that in the interest of fair and orderly administration of justice litigants should be treated equally; that on the strength of the Supreme Court decision in *County Executive of Kisumu vs. County Government of Kisumu & 8 others*, Civil Application No. 6 of 2016, [2017] eKLR there is no basis for regularizing an illegality or irregularity by deeming belated pleadings as properly served; that the affidavits in support of the application are contradictory and the explanations given are bizarre; that the applicant’s firm has a recent history of inexcusable failure to serve notices of appeal; and that the applicant has not met the legal threshold for the Court to exercise its discretion in its favour. Mr. Munene, Ms. Maritim, Mr. Okeyo, Miss. Ngigi joined Dr. Thiankolu in opposing the application.
13. I have considered the application and the material presented in support and in opposition to the same. The principles on which applications of this nature are considered are established. In the case of *Fakir Mohammed vs. Joseph Mugambi & 2 others* [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04)) Waki, JA expressed that:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”
14. Subsequently, and in the same vein, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014 [2014] eKLR pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and public interest should be a consideration.
15. Guided by those principles, I have considered the application, the affidavits, and the submissions. Under Rule 77 of the Court of Appeal Rules, the applicant had 14 days within which to file the notice of appeal. There is no contest that the notice of appeal was filed within time. Having filed the notice of appeal on the 25th January 2023, the applicant had 7 days under Rule 79(1) to serve the notice of appeal. Under Rule 84, the memorandum and record of appeal should have been filed within 60 days after the date when the notice of appeal was lodged. Under Rule 92(1) the memorandum and record of appeal should have served within 7 days after lodging.
16. As already indicated the impugned judgement was delivered on 20th December 2022. The notice of appeal was lodged on 25th January 2023. Whereas it was served physically on some of the respondents on time, it was not served on others until 5th April 2023. At the latest, the notice of appeal should have been served by 1st February 2023. Thus, a delay of 62 days in serving those not physically served.



17. Was that delay satisfactorily explained? Having entrusted the notice of appeal on the process server on 26th January 2023, the applicant's advocates should in my view have followed up with the process server to ascertain whether service had duly been effected. As it is, the opposing respondents are justified in complaining that there was a lapse on the part of the advocates and that they went into slumber after entrusting the notice of appeal on the process server. Whereas there is an explanation by the process server and the court clerk as to why there was no prompt return of service or communication in that regard, there is no explanation why the advocates for the applicant did not follow up with the process server and only woke up to the reality when a request for the notice of appeal was made by counsel for the 5th and 6th respondents. That said, Mr. Ngatia was candid that there was a mistake in not doing so.
18. Regarding service of the memorandum and record of appeal, the delay involved is two days. The explanation given for that delay is that the applicant had opted for physical service on the respondents but given the number of parties to be served and their locations, the process server was unable to complete service within the time permitted under the rules and resort was had, belatedly, to service by electronic mail.
19. Clearly, the applicant's advocates were less than vigilant in their handling of service of the notice of appeal and of the record of appeal on the respondents. Why they opted for physical service in the first place only to resort to service by electronic mail when they were out of time is not clear.
20. Madan, JA, had this to say of mistakes by a lawyer in the case of *Belinda Murai & 9 others v Amos Wainaina* [1979] eKLR:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”
21. I am in the circumstances of this case reluctant to shut out the applicant on account of the mistakes by their counsel. Based on the grounds raised in the memorandum of appeal, the matter raises a matter touching on public interest namely the constitutionality of the County Governments Retirement Scheme Act 2019, and the jurisdiction of the lower court. In *University of Nairobi v Kevin Mbwya & 62 others* [2018] eKLR, I considered, as I do here, that public importance is a relevant consideration in applications of this nature. Moreover, it has not been demonstrated that the opposing respondents stand to suffer prejudice which cannot be adequately compensated by an award for costs if the application for extension of time is allowed.
22. I am also not persuaded that I should decline the application based on ‘the principle of an eye for an eye’; that because the applicant moved the Court to strike out a notice of appeal by one of the respondents, granting the applicant's application would be unfair. The facts and circumstances under which that application was made or allowed are not matters before me.
23. In the end, I allow the application dated 18th April 2023 to the extent that I hereby extend the time within which the applicant should serve the notice of appeal dated 25th January 2023 and the record of appeal dated 25th March 2023. The applicant shall do so within 14 days from the date of delivery of this ruling.
24. The 5th, 6th, 19th, 24th, 56th, 62nd, 119th, 148th and 169th respondents will have the costs of this application.



DATED AND DELIVERED AT NAIROBI THIS, 8TH DAY OF MARCH 2024.

S. GATEMBU KAIRU, FCIarb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

