



REPUBLIC OF KENYA



KENYA LAW
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**Salaries and Remuneration Commission v Aidi & 47 others (Civil Application
E029 of 2021) [2024] KECA 1030 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 1030 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E029 OF 2021
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
APRIL 12, 2024**

BETWEEN

SALARIES AND REMUNERATION COMMISSION APPLICANT

AND

**KAMAU AIDI & 47 OTHERS & 47 OTHERS & 47 OTHERS & 47
OTHERS RESPONDENT**

(An application for setting aside the ruling made by the Court of Appeal (Koome, Warsame & Kiage, JJ.A.) dated 19th March, 2021 in Civil Application No. 25 of 2020)

RULING

1. By way of a notice of motion brought under Section 3A and 3B of the [Appellate Jurisdiction Act](#), Rules 42(1), 49(1) and 56(3) of the [Court of Appeal Rules](#), 2010, Article 159 of the [Constitution](#) and all other enabling provisions of the law dated 7th April, 2021, the Salaries and Remuneration Commission (the applicant) urges this Court to grant orders in the main:
 - a. That pending the determination of this application, this Court be pleased to stay the ruling delivered by this Court (Koome, Warsame & Kiage JJ.A.) on 19th March, 2021 in Civil Application No. 25 of 2020 Kamau Aidi & 47 others -vs- Salaries and Remuneration Commission.
 - b. That this Court be pleased to order that the respondents' notice of motion application dated 1st March, 2019 be heard de novo.

Kamau Aidi and 47 others are the respondents herein.
2. The application is supported by the affidavit of Anne R. Gitau, MBS, the Chief Executive Officer and the Commission Secretary of the applicant dated 7th April, 2021 and is based inter alia on the following grounds that:



- a. on 30th March, 2021, at precisely 1.57pm, the applicant received a letter dated 29th March, 2021 from the respondents' advocates on record stating that on 19th March, 2021 the Court of Appeal at Nyeri had rendered its ruling in Civil Application No. 25 of 2020 Kamau Aidi & 47 Others v Salaries and Remuneration Commission. The respondents thus required the applicant to implement the judgment and decree of the Employment and Labour Relations Court of 4th June, 2018 effective 1st April, 2021;
- b. the ruling of this at Nyeri in Civil Application No. 25 of 2020 Kamau Aidi & 47 Others v Salaries and Remuneration Commission struck out the applicant's notice of appeal dated 14th June, 2018;
- c. in rendering its ruling, this Court held that the applicant had violated the provisions of Rule 77 (1) and 82 (1) of the *Court of Appeal Rules*. This Court further held that the applicant had failed to furnish the respondents with proof that it had requested for typed proceedings from the Superior Court and did not attach a Certificate of Delay to justify the delay in lodging its appeal;
- d. the contents of the ruling and the respondents' letter in question came as an utter surprise to the applicant since:
 - i. the applicant had, on 16th December, 2019, already lodged an appeal, being Civil Appeal No. 320 of 2019 Salaries and Remuneration –vs Kamau Aidi and 47 Others, and was at the time awaiting directions from the Court of Appeal as to its disposal;
 - ii. the applicant was until 30th March, 2021, not aware of the existence of a motion seeking to strike out its notice of appeal dated 14th June, 2018;
- e. it is upon receipt of the respondents' letter dated 29th March, 2021, that the applicant commenced inquiries to ascertain what could have transpired and established as follows:
 - i. That on 3rd September, 2019, Ms. Rosalie Wafula, the applicant's counsel on record at the time, received a notice of motion application dated 1st March, 2019 and filed on 5th March, 2019 by the respondents seeking in the main to strike out the applicant's notice of appeal dated 14th June, 2018.
 - ii. That Ms. Rosalie Wafula did not disclose to the Applicant of the existence of the respondents' notice of motion dated 1st March, 2019 and neither did she seek instructions from the applicant regarding filing of a response to the said motion.
 - iii. That Ms. Rosalie Wafula did not respond to the respondents' notice of motion application dated 1st June, 2019, file any submissions in opposition thereto or attend any court proceedings in relation to hearing of the motion.
 - iv. That despite having been served with the record of appeal on 17th December, 2019, the respondents did not disclose to the Court that the applicant had lodged an appeal and had obtained a Certificate of Delay dated 5th November, 2019.
- f. Ms. Rosalie Wafula subsequently tendered her resignation on the morning of 30th of March, 2021 and is no longer on record for the applicant;
- g. had the respondents' notice of motion application dated 1st March, 2019 been brought to the attention of the applicant, the applicant would have instructed the said Ms. Rosalie Wafula to



strongly oppose the motion by way of a substantive response as the applicant had done before in the proceedings before the Superior Court.;

- h. the failure by the applicant to respond to the respondents' notice of motion application dated 1st March, 2019 despite having a valid defence was thus occasioned by Ms. Rosalie Wafula's failure to disclose to the applicant of the notice of motion, failure to seek instructions, failure to file a response to the motion and failure to attend court;
- i. the error and/or inadvertence by Ms. Rosalie Wafula to respond to the respondents' notice of motion application dated 1st March, 2019 should not be visited on the applicant;
- j. it is in the interests of justice that the applicant's appeal, being Civil Appeal No. 320 of 2019 Salaries and Remuneration -vs- Kamau Aldi and 47 Others, which is of great public interest as it relates to the grading structure in the County Assemblies should be heard and determined on merit;
- k. it is in the interest of justice that the applicant be allowed to defend the respondents' notice of motion application dated 1st March, 2019;
- l. as a result of the ruling rendered on 19th March, 2021, the 48th respondent has, by way of letter dated 31st March, 2021, written to the Principal Secretary, Ministry of Public Service and Gender seeking support in the adjustment of the system to allow implementation of the Superior Court's orders that they banded at band "E" of the Patterson grading system which translates to Job Group T. If this were to be implemented by the Principal Secretary, the remuneration structure of the 1st to 47th respondents shall definitely be altered;
- m. unless the court stays the ruling of this at Nyeri delivered on 19th March, 2021 in Civil Application No. 25 of 2020 Kamau Aidi & 47 Others v Salaries and Remuneration Commission, the Applicant's appeal shall be rendered absolutely nugatory in the event that the applicant's notice of motion application is allowed;
- n. unless the court stays the ruling of this Court at Nyeri delivered on 19th March, 2021 in Civil Application No. 25 of 2020 Kamau Aidi & 47 Others v Salaries and Remuneration Commission, the Respondents are likely to cite the applicant for contempt of Court;
- o. unless the applicant's notice of motion application is allowed, the Applicant shall be denied an opportunity to argue its appeal, being Civil Appeal No. 320 of 2020 Salaries and Remuneration v Kamau Aidi and 47 Others, which is of great public interest as it relates to grading structures in the county assemblies, and have the Court determine it on merit.
 1. The application was opposed by the respondents through a replying affidavit dated 28th May, 2021 sworn by Kamau Aidi, the 1st respondent. The respondents also filed written submissions. In the replying affidavit, the 1st respondent contended:
 - a. That the application by the applicant should be dismissed as the grounds raised therein are vexatious, frivolous and amount to an abuse of the court process to ensure that the applicant does not comply with the court's judgment; that there is no loss or injury demonstrated that the applicant stands to suffer in the event the application is not allowed; that the balance of convenience tilts in favor of the respondents and not the applicant and that there are no exceptional circumstances raised by the application that would warrant re-hearing of the respondents application dated 1st March 2019.



- b. That the respondents stand to continue to suffer great prejudice in the event the ruling is stayed in that they will be denied the enjoyment of the fruits of the judgment entered in their favor for no good or lawful reason. The applicant is only seeking to benefit from its own negligence.
- c. That the assertion by the applicant that the decision of the superior court will have a ripple effect within the counties as other similarly placed employees as the respondents are presumptuous and preemptive and is irrelevant in the consideration of the issue beforehand; and
- d. That the ruling in respect of which this application was brought proffers no positive requirements on the applicant which would require an order for stay. That it is trite law that this honorable court cannot issue an order of stay of a ruling which does not contain positive requirements which would be tampered or affected by stay.

Submissions by Counsel

4. The applicant submitted that the mistakes of an advocate should not be visited upon the applicant as the failure to attend court for the hearing of the respondents' application dated 1st March, 2019 was entirely attributable to the mistake of the counsel who was seized of the matter on behalf of the applicant; and that it would be disproportionately punitive to the applicant to visit upon it the consequence of the advocates mistake more so when it was unaware of the application. Reliance was placed on the authority of *Belinda Murai & others v Amos Wainaina* [1978] KLR 2782.
5. As to whether it was in the interest of justice that the application be allowed, it was submitted that while there are consequences for lapses in litigation this ought to be balanced against substantive justice which in this case is affording the applicant an opportunity to defend the respondents motion dated 1st March, 2019. Reliance was placed on the authority of *Ngugi v Thogo* Civil Application No 372 of 2018.
6. As to whether the applicant has an arguable appeal it was submitted that the supporting affidavit filed confirms the existence of an appeal and a certificate of delay at the time the respondents' motion dated 1st March, 2019 was heard. We are urged to consider that the applicant has an arguable and solid defence to the respondents' application to strike out its notice of appeal dated 14th June, 2018.
7. As to whether public interest would be served in allowing the applicant's motion it was submitted that the appeal herein involves grading, remuneration and benefits for the position of clerk of the County Assembly a position held by the 1st to 48th respondents in the County Assembly. It is submitted that the said respondents being public officers are paid out of public funds based on the job grade and that the public would suffer enormous financial loss should the applicant be denied an opportunity to respond to the respondents' motion dated 1st March, 2019, further, that I successful in opposing the said motion the applicant would be availed of the opportunity to prosecute its appeal. Counsel urged us to allow the application and to set aside the impugned ruling dated 19th March, 2021 and order that the respondents notice of motion dated 1st March 2019 be heard de novo.

Determination

8. We have considered the application and the parties' submissions. This application has been expressed to be brought under Rules 42(1), 49(1) and 56 (3) of this *Court's Rules*, 2010 (Rules 44(1), 51(1) and 58 (3) of this *Court's Rules*, 2022) which sets out the consequences of failure by a party to attend court



on the day fixed for hearing of an application. It is specified that the Court may dismiss the application, or in the absence of the respondent, the Court may proceed to hear the applicant. In the instant case the applicant failed to attend Court on the date fixed for hearing, as a consequence of which the Court granted the prayers sought by the respondents in their application dated 1st March, 2021.

9. Rule 58 (3) of this *Court's Rules, 2022* goes further to provide that:

“Where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the court to restore the application for re-hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for the hearing.”

10. The instant application seeks to restore the applicant’s application dismissed by this Court on 19th March, 2021. We are required to consider whether the applicant has shown that it was prevented by sufficient cause from attending Court on the material day for the hearing of the said application.

11. The applicant’s counsel conceded that he was not in court on the date fixed for hearing of the application for the reason that its advocate namely Ms. Rosalie Wafula, had despite receiving the said application dated 1st March, 2021 failed to file a response and further failed to attend court on the date the application was set down for hearing; that the applicant only realized of such a hearing and the this Court’s ruling dated 19th March, 2021 upon receipt of a letter dated 30th March, 2021 from the respondents ordering it to comply with the orders of the ELRC of 4th June, 2018.

12. Counsel for the applicant contents that they did not attend Court on the date the application was heard as it was not aware of the same through the mistake of its advocate as a consequence of which the application filed by the respondents was allowed. The applicant states that if at all they knew of the application they would have defended the application since they had already lodged an appeal being Civil Appeal No. 320 of 2019 Salaries and Remuneration v Kamau Aidi and 47 Others on 16th December, 2019.

13. We have perused the record and confirmed that the applicant had indeed filed its appeal. This Court has variously stated that counsel’s mistakes should not be visited upon the applicant. In *Belinda Murai & others v Amos Wainaina* 1978 LLR 2782 this Court stated as follows:

“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 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.”

14. In *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR KAR 103, Apaloo JA. stated as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”

15. In the circumstances, we are satisfied that the applicant has sufficiently demonstrated that it failed to respond to the application dated 1st March, 2021 mistakenly due to non-communication of the same



by its then advocate. That was the reason for their failure to respond to the said application and to attend court, and had that not been the case, they would have attended Court for the hearing of the said application for striking out of its notice of appeal filed on 14th June 2018 on the date fixed for hearing.

16. In the result, we allow the application dated 7th April, 2021. We set aside the order of this Court made on 19th March, 2021 allowing the respondents application dated 1st March, 2021. The application dated 1st March, 2021 is restored for hearing. The applicant shall have leave to file its response within fourteen days of this Court's orders with corresponding leave to the respondents to file a supplementary affidavit. Parties will then exchange written submissions. The application having been certified as urgent; we direct that it shall be fixed for hearing in the registry on priority basis. We make no orders as to costs.

17. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024.

JAMILA MOHAMMED

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

.....

A. O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

