



REPUBLIC OF KENYA



Mwangi & 63 others v National Social Security Fund Board of Trustees (Civil Application E543 of 2023) [2024] KECA 611 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KECA 611 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E543 OF 2023**

LA ACHODE, JA

MAY 24, 2024

BETWEEN

MARGARET WANGUI MWANGI & 63 OTHERS APPLICANT

AND

**NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES RESPONDENT**

(An application for extension of time to file and serve a Record of Appeal out of time arising from the Judgment of the Employment and Labour Relations Court at Nairobi (Nzioki wa Makau J) delivered on 17th November 2022 in ELRC Cause No. 488 of 2015)

RULING

1. Before me is a Notice of Motion application brought by the Margaret Wangui Mwangi & 63 others, (Applicants) dated 7th November 2023, pursuant to Section 3A & B of the [Appellate Jurisdiction Act](#), Cap 9, Laws of Kenya and Rules 4, 44, 84 of the Court of Appeal Rules, 2022, seeking substantive orders that;
 - a. This Court be pleased to extend the time for the applicants for filing and serving the Memorandum of Appeal and Record of Appeal from the judgment of Nzioki wa Makau J delivered on 17th November 2022 in the Employment and Labour Relations Court Cause No. 488 of 2015.
 - b. The Record of Appeal lodged on 7th November 2023 be deemed as properly filed and correctly on record.
2. The Respondent herein is National Social Security Fund Board of Trustees. (Board of Trustees).
3. This application is supported by an affidavit sworn on 7th November, 2023 by M/S Ecrone O. Omulloh advocates on behalf of the applicants. Counsel acknowledged that the applicants filed a Notice of



- Appeal through their previous advocates M/S Enonda & Associates, against the judgment and decree on 24th November, 2022. They applied for copies of typed proceedings in the suit by a letter dated 24th November, 2022 which were then served upon the Respondent. The advocate then on record, Mr. Enonda A.M. Dickson passed away in 2022. On 23rd June, 2023 the applicants instructed the current firm of E. Omulloh Advocates, to take conduct of the matter.
4. The current advocates received a notification to collect proceedings from the registry on 13th July 2023 and were issued with a Certificate of Delay by the Registry. The Record of Appeal was filed on 7th November 2023, a delay of thirty-seven (37) days. The reason for the delay was stated to be jumbled up pleadings served upon the Applicant by the Respondent, which the applicants needed time to peruse and make copies thereof and also wrong computation of the days required to file an appeal.
 5. The Respondent filed a replying affidavit dated 5th December, 2023, sworn by their advocate, M/S Kent Omondi and opposed the application stating that the Applicants had failed to set out sound, factual and legal basis for the granting of leave to file their record of appeal out of time. The Respondent averred that the new advocates received instructions before the demise of the previous advocate as reflected in the letter dated 20th June, 2023 which was signed by both advocates.
 6. In response to the Applicants' assertion that the delay was occasioned by the nature of the documents, the Respondent stated that no effort was made to reach out to their firm to supply them with organized and more legible documents. Further, that the Applicants have not revealed the steps taken to make the documents legible and why such steps could not be taken within the prescribed timelines.
 7. The Respondent averred that the Applicants do not have an arguable appeal since the grounds raised in the Memorandum of Appeal dated 23rd June 2023 were dealt with substantively by the trial court. Further that the Applicants have failed to set out sound, factual and legal basis as to why they should be granted leave to file their record of appeal out of time. The Respondent stated that the new advocates received instructions before the demise of the previous advocates as reflected in the letter dated 20th June, 2023 which was signed by both advocates.
 8. This application stems from a judgement delivered on 17th November 2022, in ELRC Cause 488 of 2015, in which the Applicants/Claimants had filed a joint Memorandum of Claim dated 25th June, 2019, seeking compensation for unprocedural, unlawful and unfair termination of their employment. The Claim was that the respondent NSSF Board of Trustees, failed to uphold the terms of their Voluntary Early Retirement Scheme (VERS). They did not fulfil the offers provided in the three circulars which stated the benefits each employee was to receive upon agreeing to the terms of the exit. They further claimed that on several occasions, the Respondent's Managing Trustee went around intimidating staff to either take up the scheme, or lose out on the ex-gratia payment.
 9. The respondent filed an Amended Memorandum of Response dated 25th July, 2019 stating that all the issues raised in the Claim were res judicata, having been already litigated and concluded in Industrial Cause No. 984 of 2012, *Kenya Union of Commercial Food & Allied Workers Union v National Social Security Fund* (Cause No. 984 of 2012). The union represented the Claimants in the case. The court deliberated on the matter and held that a large number of employees had accepted the VERS package after it was approved by the government and that the offer by the Board of Trustees was lawful and did not amount to unfair labour practice.
 10. The respondent further stated that it informed its staff of the VERS that had been approved by its Board of Trustees but was yet to be approved by the Government. The VERS was later withdrawn for being expensive and unsustainable. The subsequent circulars were simply an update of the Board of Trustees' intention to offer the said terms and to shed light on the terms of the scheme that staff sought



clarifications on. They asserted that all the Claimants were paid their dues as per the VERS terms and cannot seek to reopen them for discussion.

11. By a judgement dated 17th November, 2022 Hon Nzioki wa Makau J. found that prior to institution of the suit, another suit was filed and determined on behalf of the Claimants being Industrial Cause no 984 of 2012, [Kenya Union of Commercial Food & Allied Workers Union v National Social Security Fund](#). The learned Judge held that the matter was res judicata and dismissed it with no order as to the costs.
12. The judgement of the court grieved the Applicants and by this application they are seeking leave to file the appeal out of time.
13. The application was disposed of by way of written submissions. Mr. Omulloh Advocate filed submissions dated 4th December, 2023 on behalf of the Applicants. He acknowledged the unfettered discretion of this Court in applications of this nature and referred to the Court of Appeal decisions of [Liberato Kivanga Manga v Prime Bank Limited](#) [2021] eKLR) and [Imperial Bank Limited \(In Receivership\) & another v Alnashir Popat & 18 others](#) [2018] eKLR to highlight the guiding principles in exercising such discretion.
14. The Applicants presented threefold reasons for the delay: First, the passing on of the Applicants' previous advocates and the procedure taken by the Appointees of the Nominees in winding up of the law firm on record; Second, the Applicants required time to peruse and make copies of all material documents received from the Appointees of the Nominees on winding up the previous law firm on record; Lastly, wrong computation of the days required to file the appeal from the date of the certificate of delay.
15. The Applicants further submitted that the appeal is arguable on the ground that the trial court wrongly applied the doctrine of res judicata and as a result, reached a wrong decision in dismissing the suit. The Applicants implored that the redundancy of the VERS is the substratum of the suit and for the reason that it was regulated by laws under the [Employment Act](#), the appeal has high chances of success, and that the Respondents will not suffer prejudice if the application is allowed.
16. M/S Okoth & Kiplagat Advocates filed their submissions dated 5th December 2023 on behalf of the Respondent. They relied on [Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others](#) Supreme Court Application No. 16 (2014) eKLR for the guiding principles this Court ought to apply in an application for extension of time.
17. The Respondent submitted that the Applicants do not have an arguable appeal, since the learned Judge found in his judgment that the issues had been dealt with in the earlier case, Industrial cause 984 of 2012, (supra) and the case was considered res judicata.
18. The respondent further submitted that extension of time being an equitable remedy, should only be granted to a party deserving under equitable principles. They contended that the applicants have provided contradictory reasons to justify the delay and that the demise of the former advocate took place after the current advocates had taken over conduct of the matter and notified the court of that fact. Additionally, the Respondents questioned how the Applicants' advocates were able to produce a memorandum of appeal on the same date they received instructions, 20th June, 2023. They implored this Court to dismiss this application.



19. I have considered the application, the supporting and replying affidavits, the rival submissions and the law, to determine whether it has merit. The unfettered discretion of this Court to extend time for the filing of appeal is donated by rule 4 of the [Court of Appeal Rules, 2022](#), as follows:
- “The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or 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 a reference to that time as extended.”
20. The principles applicable are not limited and were set out in the Court of Appeal case of [Fakir Mohamed vs. Joseph Mugambi & 2 others](#) [2005] eKLR as follows:
- “The exercise of this Court’s discretion under Rule 4... 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, (possibly) 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 factors...”
21. The main issue is in regard to whether the Applicants provided adequate reasons for their delay in filing the Notice of Appeal. The Applicants submitted that the delay is not inordinate and should be excused because upon the demise of their initial advocate, their current advocates needed time to go through the jumbled up, and illegible court documents transferred to their firm from the firm of the deceased advocate and those provided by the Respondents. The second reason for the delay was said to be due to an error in the computation of the dates. The respondent rebutted this claim, stating that the Applicants failed to reach out to them and request for organized and legible documents.
22. In [Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet](#) [2018] eKLR the Court of Appeal addressed the question of delay and held that;
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
23. I considered the undisputed fact that the Applicants’ previous advocate passed away and the procedure to wind up his law firm took some time. Further, that the new advocate required time to peruse and make copies of all material documents received from the Appointees of the Nominees in the winding up, which were jumbled up. I find that these reasons, as provided by the Applicants are satisfactory and that the delay was excusable.
24. The second issue for determination is whether the appeal has chances of succeeding if the application is granted. It is trite that whether the intended appeal has merits or not is not an issue to be determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”. See- [Athuman Nusura Juma v Afwa Mohamed Ramadhan](#) [2016] eKLR. The issue to be taken up in the intended appeal is whether the matter is res judicata and it is my view that it should get a chance to be considered on appeal.



- 25. The last issue for consideration is whether allowing this application may prejudice the respondent. The Applicants have expressed that allowing this application shall not prejudice the Respondent in any way. The Respondent did not submit on this issue and thus, there is no basis to conclude that they will suffer prejudice if the application is allowed.
- 26. After a careful analysis of the matter before me, I am satisfied that the application dated 7th November, 2023 herein has merit. It is therefore allowed with orders that:
 - i. The applicants shall have fifteen (15) days to file and serve the Memorandum of Appeal and Record of Appeal from the date hereof
 - ii. The appellants shall bear the costs.

DATED AND DELIVERED IN NAIROBI THIS DAY 24TH OF MAY, 2024.

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

