



**Itumbi v Public Service Commission & 3 others (Civil Application
E081 of 2023) [2023] KECA 911 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 911 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E081 OF 2023
GWN MACHARIA, JA
JULY 24, 2023**

BETWEEN

DENNIS ITUMBI APPLICANT

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

STATE HOUSE COMPTROLLER 2ND RESPONDENT

**CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION
OF NATIONAL GOVERNMENT 3RD RESPONDENT**

THE HONORABLE ATTORNEY GENERAL 4TH RESPONDENT

*(Being an application for leave to enlarge time within which to file and
serve a Notice of Appeal out of time against the Judgment of J. Gakeri,
J. delivered on 26th January, 2023 in ELRC Petition No. 101 of 2021)*

RULING

1. The applicant has filed a Notice of Motion dated March 9, 2023, brought under Articles 48, 50, 159(2) (d) of the Constitution, Rules 4 and 77 of the Court of Appeal Rules and Section 3A and 3B of the Appellate Jurisdiction Act, seeking leave to file a notice of appeal out of time and that the annexed notice of appeal filed and lodged on February 24, 2023 be deemed as duly filed, and time be enlarged to file and serve the record of appeal.
2. The application is supported by the grounds stated on the face of it and the affidavit sworn by the applicant, who proffers that the reason for the delay in filing the Notice of Appeal on time was an error on his counsel's part. It is alluded that, upon judgment being delivered on January 26, 2023, he was aggrieved and informed his advocate of his desire to appeal, and by a letter dated February 3, 2023 a request was made for typed certified proceedings; that his advocate later informed him that he had



inadvertently failed to lodge the Notice of Appeal within the prescribed period; that though the same was lodged on February 24, 2023, 14 days within which it should have been lodged had lapsed; that the mistake of counsel should not be visited upon an innocent litigant; that his appeal is arguable with a high chance of success; that the respondents are unlikely to suffer any prejudice if the application is allowed; and that the delay is not so inordinate as to be inexcusable.

3. The application is similarly supported by the affidavit sworn by Anne Wangari, the advocate who inadvertently made the mistake.
4. The application is opposed by the 1st respondent vide a replying affidavit sworn on May 5, 2023, by one Remmy N Mulati, MBS, the Deputy Commission Secretary (Corporate Services) of the 1st respondent. He states that the reason proffered to explain the delay is unsatisfactory; that the non-compliance with prescribed timelines can solely be attributed to the applicant who was well aware of the law but chose to ignore it; that even after realizing the error this application was filed 2 weeks later and therefore, this Court's discretion should not be exercised in his favour; and that the application lacks merit and should be dismissed with costs.
5. The applicant filed submissions dated March 29, 2023. He submitted that this Court has unfettered discretion under rule 4 of the Court of Appeal Rules to extend time for filing and serving the Notice and Record of Appeal. He placed reliance on the cases of *Nicholas Kiptoo Korir Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR and *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, for the principles that a court should consider when exercising its discretion to extend time. He submitted that the delay was not inordinate; that the mistake of his counsel should not be visited on him, thus deny him the right to be heard.
6. The 1st respondent filed submissions dated May 5, 2023, which are a duplication of the averments in the replying affidavit and I will therefore not rehash them. It relied on the case of *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR (F Sichale, JA), where a similar application was dismissed.
7. I have considered the application, the supporting and replying affidavits as well as the respective submissions. This Court's discretion under rule 4 of the *Court of Appeal Rules, 2022*, is unfettered, and the principles that guide the Court in the exercise of its mandate under the rule were well enunciated in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No Nai 251 of 1997 where the Court stated that:

“It is now settled that the decision whether to extend the time for appeal is essentially discretionary. It is also well stated 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 delay; secondly, the reasons 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.”

8. In the present application, the Court is satisfied by the reasons given by the applicant for the delay in lodging the Notice of Appeal in time. He annexed to the application a letter dated February 23, 2023 and filed on the same date requesting for certified proceedings together with the notice of appeal. The period of delay was not inordinate, as it was of 14 days. Furthermore, the advocate who failed to file the notice of appeal within the stipulated period has admitted her error and assigned herself the blame. Upon realizing the mistake, counsel filed this application within 2 weeks, which again, was relatively timeous. The Memorandum of Appeal discloses grounds of appeal which cannot be considered as



unarguable. From the facts presented to Court in this application, nothing points that the respondent will suffer any prejudice if the Court exercises its discretion in favour of the applicant.

9. I have also taken note of the authority relied upon by the respondent, more specifically the case of *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR. The same is distinguishable from the circumstances of the instant case. That case related to an application in which leave was being sought vide an application dated January 31, 2019 against a ruling delivered on May 3, 2018. Although leave to extend time for lodging of a notice and record of appeal had been sought, the applicant failed to seek leave for extension of time to serve. This meant that, even if the Court extended time to file the appeal, the same could not be served. There was also no explanation proffered for the delay in filing the appeal on time, of almost 9 months. The facts in this case are totally different, and they compel the Court to exercise its inherent discretion in favour of the applicant.

10. In the premises therefore, I allow the application as follows;

- a. The applicant's Notice of Appeal dated February 23, 2023, is hereby deemed as duly filed and properly on record.
- b. The applicant is granted seven days to serve the Notice of Appeal. Thereafter, the applicant has a further thirty (30) days to file and serve the Record of Appeal.
- c. The costs of this application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2023.

G.W NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

