



**Wanyoike v Teachers Service Commission & another (Civil Application  
E418 of 2022) [2023] KECA 854 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 854 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E418 OF 2022  
HM OKWENGU, JA  
JULY 7, 2023**

**BETWEEN**

**KANGARA WANYOIKE ..... APPLICANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL UNION OF TEACHERS ..... 2<sup>ND</sup> RESPONDENT**

*(An application under Article 259 (2)(d) sections 1A, 1B & 3A of the Civil Procedure Act, Order 51, 50 (6) of the Civil Procedure Rules and Rules 4 and 12 of the Court of Appeal Rules for extension of time to appeal against the judgment of the Employment and Labour Relations Court (Mbaru J.) delivered on 28th November 2012 in ELRC No. 271 of 2011)*

**RULING**

1. The applicant who is a teacher, was the claimant in the Employment and Labour Relations Court (ELRC) in which he had sued his employer, the Teachers Service Commission seeking *inter alia*, an order of reinstatement and a declaration that he is entitled to be admitted in Murang'a South Branch of the Kenya National Union of Teachers (2<sup>nd</sup> respondent) in all union activities.
2. On November 28, 2012, the ELRC (Mbaru, J) delivered a judgment in which the applicant's claim was dismissed. The applicant has now moved this Court through a notice of motion dated November 7, 2022 seeking leave of the Court to file an appeal out of time against the judgment delivered on November 28, 2012.
3. According to the grounds stated on the face of the motion, the applicant maintains that he has an arguable appeal; that the delay in filing the record of appeal is excusable; that he has sufficient reasons for the delay to warrant extension of time; that he will be prejudiced if his application is not allowed; that the jurisdiction of the Court under Article 159 of the Constitution is unfettered; that no prejudice will



- be suffered by the respondents if leave is granted; and that it is in interest of justice that the application be allowed.
4. The applicant has also filed a supporting affidavit in which he explains that he filed a notice of appeal on December 7, 2011, which was within the statutory period of two weeks. The year indicated, must be a mistake as the applicant has exhibited a notice of appeal which is dated December 7, 2012 and lodged on the same date.
  5. The applicant explains that he was unable to file the memorandum of appeal within 60 days because he was unable to raise the high fees that were required, due to his financial crisis arising from the termination of his employment; that at some stage his court file could not be traced until recently when it was located. He maintains that he has an arguable appeal as his interdiction and dismissal were not proper, nor was he given an opportunity to be heard.
  6. The applicant has filed written submissions and further submissions in which he maintains that the delay in filing the appeal was not inordinate due to the peculiar circumstances of his case, as his file was missing. He therefore submits that the period of delay was excusable.
  7. The 1<sup>st</sup> respondent has opposed the motion through a replying affidavit sworn by its director in charge of Human Resource Management and Development Directorate, Dr Julius Olayo (Dr Olayo). Dr Olayo swears that the applicant has come to court with unclean hands; is guilty of material nondisclosure and deliberate distortion of facts with intention to mislead the Court; and is therefore undeserving of the equitable remedy of extension of time. Dr Olayo challenges the applicant's contention that he was unable to file the memorandum of appeal due to high fees required, contending that the *Court of Appeal Rules* provide for pauper appeals, and the applicant could therefore have filed his appeal without incurring any costs.
  8. Dr Olayo maintains that the applicant is guilty of inordinate and inexcusable delay; that it has taken the applicant over 10 years to lodge his application and this demonstrates bad faith, indolence and lack of respect for the rules of the court; and that the applicant has not offered any cogent or justified reason for the delay in filing the appeal or his application for extension of time. Finally, Dr Olayo maintains that granting the order sought will grossly prejudice the 1<sup>st</sup> respondent, and that it is in the interest of justice to allow it to benefit from the fruits of its judgment.
  9. In its written submissions the 1<sup>st</sup> respondent has raised 3 issues namely; whether the applicant is guilty of inordinate and inexcusable delay; whether irreparable loss and prejudice will be occasioned to the respondent; and thirdly, whether the applicant is entitled to the relief sought.
  10. The 1<sup>st</sup> respondent argued that the applicant was guilty of inordinate and inexcusable delay. It relied on *Ivita vs Kyumbu* [1975] eKLR. The 1<sup>st</sup> respondent submitted that equity as a general principle is meant to aid the vigilant and not the indolent, and that the applicant having slumbered on his rights in addition to not respecting the court, he is not deserving of the exercise of the court's discretion. The 1<sup>st</sup> respondent maintained that it would be prejudiced if the orders sought are granted, as the applicant was dismissed about 24 years ago. The 1<sup>st</sup> respondent urged that the conduct of the applicant has been wanting and tainted by sheer complacency; and that no compelling or conceivable reasons have been adduced for the failure to file the record of appeal within time. The 2<sup>nd</sup> respondent did not file any response to the application nor did they file any submissions.



11. The applicant’s motion being one for extension of time, the principles upon which the court can exercise its discretion have been clearly laid down by the Supreme Court in *Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. The principles are:
- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
  3. Whether the Court ought to exercise the discretion to extend time is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay;
  7. Whether in certain cases like election petition, public interest ought to be a consideration for extending time.”
12. In this case, the judgment subject of the intended appeal was delivered on November 28, 2012. The notice of appeal was filed on December 7, 2012 which was within 14 days from the date of judgment as required by Rule 77(2) of the *Court of Appeal Rules*. The application for extension of time was filed on November 7, 2022. This means that the application was brought 10 years after the filing of the notice of appeal.
13. As stated in *Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others* (*supra*), the applicant has the responsibility of laying the basis for the exercise of the court’s discretion by demonstrating that the delay is not unreasonable and that there was a good reason for the delay. The applicant has given two main reasons for the delay. First, is the fact that he was unable to raise the required money for filing the appeal, and secondly, that the court file went missing at some stage for quite a while.
14. Regarding the costs for filing an appeal, the 1<sup>st</sup> respondent has rightly pointed out that the *Court of Appeal Rules* provide for relief. Rule 115 of the *Court of Appeal Rules, 2010* in particular, empowers the Court if satisfied on the application of an appellant that he/she lacks the means to pay the required fees or to deposit the security for costs, to allow the applicant to file an appeal without payment of the required court fees. Much as the applicant claims that he could not raise the required fees, he has not demonstrated to this Court that he tried to take advantage of Rule 115 of the *Court of Appeal Rules*.
15. As regards the alleged loss of the court file, the applicant has only produced a copy of a letter dated October 5, 2022 which he allegedly wrote to the Registrar indicating that he has been unable to trace the file for 5 years. There is no evidence that this letter was forwarded to the Registry nor is there any evidence of any follow-up or earlier communication. If indeed the file could not be traced for 5 years, there would have been a trail of correspondences or some evidence in support of such loss. I reject this explanation as a mere attempt to shift the blame for his own indolence. I find that the delay of 10 years was grossly inordinate as the applicant has not been able to provide any plausible explanation for the delay.



16. I come to the conclusion that the applicant is not deserving of the exercise of this Court's discretion. Accordingly, the motion dated November 7, 2022 is dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

