



**Federation of Kenya Employers v Law Society of Kenya (Civil Appeal (Application)
E410 of 2023) [2023] KECA 1299 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1299 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E410 OF 2023
MSA MAKHANDIA, JA
OCTOBER 27, 2023
(IN CHAMBERS)**

BETWEEN

FEDERATION OF KENYA EMPLOYERS APPLICANT

AND

LAW SOCIETY OF KENYA RESPONDENT

*(An application for extension of time to serve the notice of appeal out of time in
an intended appeal against the judgment and decree of the High Court of Kenya
(Ongudi, J.) dated 23rd May 2023 in Milimani HC Petition No. 505 of 2019)*

RULING

1. By an application dated 12th June 2023, the applicant prays for: extension of time within which to file and serve the notice of appeal dated 23rd May 2023; that the notice of appeal filed and served on the respondent on the 9th June 2023 be deemed as properly filed and served, and finally, that the costs of the application be provided for.
2. The grounds in support of the application are found in an affidavit of Jacqueline Mugo, the Executive Director of the applicant sworn on 12th June 2023. The applicant deposes that the judgment was entered on 26th May 2023 in favour of the respondent against the applicant which judgment according to the applicant denies its members their constitutional and fundamental freedoms under Articles 22, 36, and 258 of the Constitution. That if the judgment is executed, it will discriminate against the in-house advocates employed by the applicant in that they will be denied the right to practice. That failure to file and serve the notice of appeal on the respondent was due to inadvertent omission by its counsel but was later served without further delay. That the applicant has an arguable appeal with reasonable chances of success to the extent that the applicant is being forced to abandon services that it has offered to its members through in-house lawyers and is currently representing members in over



1000 cases in court who stand to suffer if the judgment stands. That the Judge erred when she failed to appreciate that there existed alternative specialized dispute settlement mechanisms created under the constitution pursuant to which the subject matters in dispute should have been ventilated. Further, that these services had been supported by the Constitution under Articles 22, 36, 41 and 258 and there were statutory provisions which allowed the appellant to provide legal services by way of in-house lawyers. The applicant stands to suffer loss and damage as its in-house lawyers' operations have practiced alongside those of the respondent and its members for over 30 years.

3. The application is opposed. The respondent filed a replying affidavit sworn by Florence W. Muturi dated 13th July 2023. She deposes that the applicant should not get any audience from the Court until its contempt is purged for disobeying the judgment that the applicant seeks to appeal against. According to the respondent, the applicant's appeal lacks merit and is not arguable at all. That contrary to the applicant's assertions in its memorandum of appeal that its statutory rights under sections 22 and 48 of the Employment and Labour Relations Court Act (ELRCA) and those under section 73 (3) of the Labour Relations Act (LRA) are not affected by the judgment in any way as the High Court acknowledged the limitation of the applicant to offer legal representation under section 22 of the ELRCA and as such, can continue to offer legal representation subject to this limitation under section 22 of the ELRCA. That the High Court had no jurisdiction over the matter on account of exhaustion of alternative dispute resolution mechanisms cannot be a ground of appeal as the High Court dealt with the said issue exhaustively. That the ground that the learned Judge did not appreciate the legal issues raised in the applicant's submissions is vague and un-particularized and does not also constitute a valid ground of appeal.
4. Parties filed written submissions to the application. The applicant through its submissions submitted that the judgment was delivered on 23rd May 2023, and it filed a notice of appeal on the same day. The same was not however served within the required timelines but was effected after nine days. That thereafter, the applicant filed the record of appeal on 9th June 2023 and then the current application on 12th June 2023.
5. Citing the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* (1999) 2 EA 231, the applicant submits that this application meets the threshold set out in the said case being, that the notice of appeal was filed timeously, the applicant is apologetic for the omission of not serving the respondent with the notice within the strict timelines set out in this Court's rules. Furthermore, that the respondent would not suffer any prejudice if the extension of time to serve the notice of appeal on the respondent is granted.
6. The respondent filed submissions dated 13th July 2023, although the same are not directed at the current application as they deal with an application for stay of execution of the judgment. The respondent's submissions thus do not focus on whether or not the application meets the necessary threshold for the grant of leave.
7. I have carefully considered the application, the grounds, supporting and replying affidavits, respective written submissions, authorities cited and the law.
8. My take is, an applicant for extension of time must show good reason(s) for the delay, whether the intended appeal will be arguable, whether the application was filed timeously and any prejudice that may be occasioned to the respondent(s).



9. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR set out the considerations to guide the court in exercising its discretion in applications nature as follows:

- “1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a 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 should 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. The delay should 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; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

10. Rule 75 (1) and (2) of the *Court of Appeal Rules* requires

“any person who desires to appeal to the Court” to “... give notice in writing within 14 days of the date of the decision against which it is desired to appeal.”

Rule 77 (1) requires that the notice be served on the respondent within 7 days next following. Although the applicant complied with Rule 75 as regards the lodging of the requisite notice of appeal, the delay in issue relates to service thereof on the respondent within the time prescribed under Rule 77 (1).

11. It is imperative to note that the record of appeal has since been filed. The applicant states that the notice of appeal was filed on the same day the judgment was delivered, but there was a delay in serving it on the respondent within time and the delay was for only 2 days as it was served after 9 days. Counsel for the applicant attributes this delay to inadvertence on his part and has apologized profusely to the Court for the omission. The question then boils down to whether the delay is excusable. A delay of two days cannot be said to be inexcusable at all. The same was occasioned by the inadvertence of counsel and I think the reason is excusable.

12. In *National Union of Mineworkers vs. Council for Mineral Technology* [1998] ZALAC 22 at para 10, the court held:

“The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without



prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

13. That leaves me with the decisive issue as to whether the intended appeal is arguable with the possibility of success. With regard to the merit of the appeal, it is sufficient for the applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. From the memorandum of appeal, I am satisfied that the grounds set out therein are arguable. I have already alluded to some of the grounds elsewhere in this ruling.
14. Further, I am of the considered view that allowing the applicant to exhaust the appellate process would not unduly prejudice the respondent. See *Muchungi Kiragu vs. James Muchungi Kiragu & Another* [1998] eKLR.
15. On the whole, I am satisfied that the delay is excusable and that it has been satisfactorily explained. The intended appeal is arguable, the application has been brought timeously and no prejudice will be suffered by the respondent if the prayers sought are granted. Accordingly, I allow the application dated 12th June 2023 and order that time limited for serving the notice of appeal dated 23rd May, 2023 on the respondent, is hereby extended. As the said notice has already been served, it is hereby deemed as duly and properly served. Similarly, the record of appeal already filed is deemed to be properly filed and served. Costs of the application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

