



Mumo & 168 others v Retirement Benefits Appeal Tribunal Co-Operative Bank of Kenya Staff Retirement & 2 others (Civil Appeal (Application) E524 of 2023) [2023] KECA 1300 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KECA 1300 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E524 OF 2023
MSA MAKHANDIA, JA
OCTOBER 27, 2023**

BETWEEN

ALICE ANYONA MUMO & 168 OTHERS APPLICANT

AND

RETIREMENT BENEFITS APPEAL TRIBUNAL CO-OPERATIVE BANK OF KENYA STAFF RETIREMENT 1ST RESPONDENT

BENEFITS SCHEME 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(An application for extension of time to file and serve a record of appeal against the entire ruling and orders of the High Court of Kenya (A.K. Ndungu, J) dated 9th February, 2023 in Nairobi HCJR No. E157 of 2021)

RULING

1. By an application dated 14th July 2023, the applicants pray for extension of time within which they may file and serve the record of appeal on the respondents in respect of the judgment and decree delivered on 9th February, 2023 in High Court Judicial Review Case No E157 of 2021: *Republic v Retirement Benefits Appeal Tribunal & 3 Others*. That the record of appeal filed on 4th July 2023, be deemed to be duly filed and served upon the respondents. They also pray that the costs of the application be in the appeal.
2. The grounds in support of the application which are restated in the supporting affidavit of Alice Anyona Mumo, the representative of the other applicants sworn on 14th July 2023 are that: the judgment was delivered on 9th February, 2023 and the applicants being dissatisfied with the decision filed a notice of appeal. That, the applicants ought to have filed the record of appeal within 60 days from



the date the notice of appeal was lodged in accordance with rule 82 of the [Court of Appeal Rules, 2010](#). This was not done for the reason that the applicants had not obtained typed proceedings, which were only availed to them on 3rd July 2023 after the lapse of the said 60 days. It is the applicants' contention that the notice of appeal and letter bespeaking proceedings both dated 9th February, 2023 and lodged in Court on 10th February, 2023 were served on the respondents within the stipulated time. That the intended appeal is not frivolous and raises substantial matters of law capable of being ventilated in this Court going by the grounds of appeal indicated in the memorandum of appeal. That if the extension of time is not granted, the applicants will suffer substantial loss and damages. That from the date the judgment was delivered on 9th February 2023 to the time of filing the instant application, is about 139 days which is not inordinate considering that the certificate of delay was issued on 6th July, 2023 and the record of appeal filed on 12th July, 2023.

3. The respondents did not oppose the application, as despite the hearing notice and directions by the court as to the disposal of the application being served on them, the respondents did not bother to respond to the application.
4. The applicant pursuant to the directions of this Court filed written submissions dated 15th September 2023. Those submissions merely reiterate the reasons for the delay as set out in the motion and the supporting affidavit and there is no need for me to rehash the same. The applicants reverted to the case of [Kenya Ports Authority v Maur Abdalla Banamaka](#) [2018] eKLR for the proposition that if there is an application for a copy of the proceedings in a trial court, having been made within 30 days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the Court as having been required for the preparation and delivery of the proceedings. That having filed and served the notice of appeal and the letter bespeaking of the proceedings within the required time, it follows that the delay should be excused as the same is not inordinate.
5. My jurisdiction to entertain this application is derived from rule 4 of this Court's rules which provides *inter alia*:
 - “(4) 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 of 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.”
6. The principles that guide the Court in the exercise of its mandate under the said rule are set out in several case law. The principles have now been crystallized by this Court in the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231. In summary, the factors I am supposed to take into consideration in the determination of an application of this nature are firstly, the length of the delay. Secondly, the reason for the delay. Thirdly, arguability of the intended appeal, and fourthly but not least, any prejudice that may be suffered by the opposite party should the application be granted.
7. Starting with the period of delay, it is evident from the record that the impugned judgment was delivered on 9th February 2023. The notice of appeal and the letter bespeaking typed proceedings both dated 9th February 2023 were lodged in court on 10th February 2023 and served on the respondents. The typed proceedings were availed to the applicant on 3rd July 2023. The record of appeal was filed on 12th July 2023 and the application under consideration was dated and filed on 14th July 2023, being a period of about 12 days from the date they received typed proceedings and a total of 139 days from the date of judgment.



8. In the case of *George Mwendu Muthoni v Mama Day Nursery and Primary School, Nyeri* C. A No 4 of 2014 (UR), extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in *Aviation Cargo Support Limited v St. Marks Freight Services Limited* [2014] eKLR, a similar application was declined for the applicant's failure to explain a delay of 60 days. In the instant case, the period of delay is much less than what was under consideration in the *George Mwendu case* [supra]. It is therefore not inordinate. This finding alone, however, cannot per se entitle the applicants to the relief sought. It is imperative for me to consider the other factors. The other consideration is the explanation for the delay. The applicants have proffered reasons for their failure to initiate the appellate process timeously as highlighted elsewhere in ruling. I find the reason for the delay plausible and therefore excusable.
9. On the arguability, the applicants have in the record of appeal set down 23 grounds of appeal. One of the grounds is that the learned Judge erred both in fact and law when he failed to evaluate properly the evidence that had been adduced by the appellants in support of their case when he proceeded to dismiss the application. Yet the applicants had made out an arguable case that raised legitimate questions worthy of consideration among others, which I have had a chance to go through.
10. In law, an arguable appeal is one that need not succeed but one that warrants the court's interrogation. In my view, the aforesaid grounds are definitely arguable. See *Sammy Mwangi Kiriethi & 2 Others v Kenya Commercial Bank* [2020] eKLR.
11. As to the prejudice that will be suffered by the respondent if the application is allowed, as earlier noted, the application is not opposed and therefore I am inclined to agree with the applicants that indeed the respondents will not suffer any prejudice.
12. On discretion, I reiterate that the principles that guide this Court in the exercise of such discretion were restated in the case of *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR. It was stated therein that the court's inherent power is a residual intrinsic authority which it may resort to in order to put right that which would otherwise be an injustice. In light of the above crystallized position, shutting out the applicants and sending them away from the seat of justice in the wake of the existence of provisions of law donating power to the Court to extend time within which to validate an appellate process in the absence of any valid reason for withholding the relief sought, would in my view be tantamount to rendering justice on technicalities. The interest of justice herein, therefore, would demand that the applicants be accorded an opportunity to pursue their already initiated appellate process by granting the order sought. On the totality of the above assessment and reasoning, I am satisfied that the applicant has satisfied the prerequisites for granting of a relief under rule 4 of this Court's rules. I therefore proceed to make orders as follows:
 1. The application dated 3rd October, 2019 be and is hereby allowed on the following terms:
 - a. Leave of extension of time within which to file and serve a record of appeal is granted to the applicant.
 - b. The record of appeal filed on July 12th 2023 is hereby deemed as properly filed and served.
 - c. Costs of the application to abide the outcome of the appeal already filed.

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

