



Nyangau v National Police Service Commission & 3 others (Civil Application E146 of 2021) [2023] KECA 1247 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1247 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E146 OF 2021
F TUIYOTT, JA
OCTOBER 6, 2023**

BETWEEN

PETER MAOSA NYANGAU APPLICANT

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

NATIONAL POLICE SERVICE 2ND RESPONDENT

DEPUTY INSPECTOR GENERAL KENYA POLICE SERVICE 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

(Being an application for extension of time to file an Appeal out of time from the judgment of Employment and Labour Relations Court at Bungoma (Mathews N. Nduma, J.) Dated 30th January, 2020 in Constitutional Petition No. 5 of 2018)

RULING

1. In the end the Notice of Motion dated October 27, 2021 was a superfluity. It is brought pursuant to Rule 4 of the Rules of this Court and in which the applicant seeks the leave of this Court to file and serve a notice of appeal out of time against the decision of Mathews N Nduma, J delivered on January 30, 2020 in Bungoma Constitutional Petition No 5 of 2018. He further seeks that the Notice of Appeal filed on January 30, 2020 be deemed to have been properly filed.
2. In support of the application is his affidavit sworn on October 27, 2021 where he deposes that once the judgment was delivered on January 30, 2020, he instructed his advocates M/s M’Njau and Mageto Advocates to appeal, which they did by lodging a notice of appeal promptly on the same day. On that very day, as well, his advocates wrote a letter to the Deputy Registrar requesting for certified copies of the proceedings and judgment. He deposes that the notice of appeal and a copy of the letter were



served upon the Attorney General representing the 2nd, 3rd and 4th respondents on that day, January 30, 2020 and upon the 1st respondent, National Police Service, a day later on January 31, 2020. His further depositions relate to the issue of delay in filing his appeal not Notice of Appeal.

3. The application is opposed by the 1st respondent in a replying affidavit of Silas Oloo Mc'Opiyo, the acting Chief Executive Officer of the National Police Service Commission, sworn on March 31, 2022. On the issue of whether the notice of appeal was duly filed and properly served, he agrees that the notice of appeal was lodged on January 30, 2020 at the Employment and Labour Relations Court registry. He does not contest that it was served on the 1st respondent on time.
4. The other respondents have not put in any response to this application.
5. The parties' submissions are substantially a regurgitation of the positions taken in their respective affidavits.
6. The first prayer in the application is for leave to file a notice of appeal out of time. A second prayer seeks to validate the Notice of Appeal filed on January 30, 2020. Yet the Notice does not need to be validated as it was filed on the same day the judgment was delivered and was therefore filed well within the timelines set by the Rules of this Court, that is, Rule 75(2) (now 77) being the operative law then. Again the same was also served on all parties as required by Rule 77 (now 79). This is not contested.
7. It is clear to me that the applicant's real tribulation is that he has not instituted the appeal within the time prescribed by Rule 82 (now 84) but he has expended his energy seeking leave to file a notice of appeal and not the appeal itself out of time. The application barks up the wrong tree and cannot be granted.
8. The application of October 27, 2021 was needless and is hereby dismissed with costs to the 1st respondent who has had to resist it.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

