



REPUBLIC OF KENYA



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Kitsapha v Teachers Service Commission & another (Civil Application E049 of 2023) [2023] KECA 1340 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KECA 1340 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E049 OF 2023
KI LAIBUTA, JA
NOVEMBER 10, 2023**

BETWEEN

CHARLES WILLIAM KITSAPHA APPLICANT

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

DIRECTOR OF PENSION 2ND RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal out of time against the Ruling and Orders of the Employment and Labour Relations Court of Kenya at Mombasa (M. Mbaru, J.) dated 28th March 2023 In E.L.R.C. Cause No. 71B of 2022)

RULING

1. Coming for hearing before me is a Notice of Motion dated June 7, 2023 made under rule 4 of the [Court of Appeal Rules](#), and by which the Applicant, Charles William Kitsapha, prays for extension of time to file and serve a notice of appeal against the ruling and orders of Mombasa ELRC Cause No 71B of 2022 dated March 23, 2023, and that costs of this Motion be in the intended appeal.
2. The applicant's Motion is supported by the annexed affidavit of learned counsel for the applicant, Farida K Jadi, sworn on June 7, 2023. The application is also made on the following grounds set out on the face of the motion, namely: that the impugned ruling was delivered on March 28, 2023 dismissing the applicant's claim; that no notice had been issued for delivery of the impugned ruling; that time for filing the notice of appeal lapsed before the applicant could lodge the notice as his counsel was not aware of the date of delivery; that the intended appeal raises serious triable issues; that the respondent would not be prejudiced if the orders sought were granted; and that the applicant would suffer irreparable loss if extension of time is not granted as prayed.



3. The affidavit in support of the applicant’s Motion merely deposes to the grounds aforesaid and only adds that counsel only became aware of the ruling on May 31, 2023. She has also annexed an undated draft Memorandum of Appeal containing 7 grounds of appeal to which I will shortly return.
4. Counsel filed undated written submissions and a list of authorities citing the cases of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR; *LSG Lufthansa Service Europa/Africa Gmph & another v Eliab Muturi Mwangi* [2019] eKLR; and *Vishwa Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR, for the proposition that the law does not set out any minimum or maximum period of delay; and *Stanley Koiyongi Mwenda v Cyprian Kubai* [2000] eKLR, highlighting the principles to be considered in determination of an application under rule 4 of the *Court of Appeal Rules*.
5. In response to the application, Ms. Edwiq Musundi, learned counsel for the 1st respondent, the Teachers Service Commission, filed a replying affidavit sworn on June 27, 2023 stating: that the averment by the applicant’s advocate that the ruling was delivered without notice was untrue and misleading; that the trial court issued a mention notice dated March 7, 2023 to all parties directing that the matter be mentioned for directions on March 16, 2023; that applicant has not given sufficient explanation as to why he failed to attend court when the ruling was delivered; that counsel for the applicant was represented in court when the ruling was delivered; that it has taken the applicant 70 days to make the application; and that the orders sought will grossly prejudice the 1st respondent.
6. In addition, counsel filed written submissions dated June 29, 2023 citing the cases of *Patrick Wanyonyi Khaemba v the Teachers Service Commission* [2019] eKLR and *Hamendra M Shah v Alnoor Kara & another* [2000] eKLR, submitting that the applicant is guilty of inordinate delay, and that no cogent or justifiable reason has been offered for the delay in filing the notice of appeal or the instant application. She also cited *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA 231, highlighting the principle that extension of time is an equitable remedy at the discretion of the Court; and *Charter House Investments Limited v Simon K. Sang & 3 others* [2012] eKLR, submitting that the applicant is guilty of material non-disclosure and deliberate distortion of facts with the intention of misleading the Court and, hence, undeserving of the orders sought. She urged me to dismiss the applicant’s motion with costs.
7. The respondent’s submission that the applicant is guilty of material non-disclosure and deliberate distortion of facts with the intention of misleading the court, and that his advocates were represented in court when the impugned ruling was delivered, finds answer in the ruling and order setting out the coram on March 28, 2023. According to the learned Judge, counsel for the applicant was represented by “Waweru holding brief for Kariuki”. In her answer, Ms Jadi of M/s Madzayo Mrima and Jadi, Advocates, explains that the firm does not have in their employment an advocate by the name Kariuki, and that they had not been notified of the date for delivery of the ruling.
8. In the absence of any evidence to the contrary, I am inclined to find that counsel for the applicant were not present at, and had no notice of, the delivery of the impugned ruling. To my mind, to find otherwise would prejudice the applicant, particularly in view of the fact that he had no control of such attendances by his advocates.
9. Rule 4 of the *Court of Appeal Rules* gives the court unfettered discretion to “... 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 ...,” on such terms as it thinks just (see *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR).



10. This Court in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The court held that “the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, the reason 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.”
11. 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. In his undated draft memorandum of appeal, the applicant advances 7 grounds on which his intended appeal is anchored. According to him, the learned Judge erred in law and in fact in, among other things: failing to appreciate that his claim was purely with regard to payment of pension benefits and not of terminal dues; holding that the applicant ought to have made an application to file the claim out of time; holding that the claim ought to have been handled under the *Retirement Benefits Act*; and in failing to appreciate that the parties had already commenced mediation and filed a partial mediation agreement and initiated the process of payment.
12. This Court has observed that an arguable appeal is not one that must necessarily succeed, but is one which ought to be argued fully before the Court. Sitting in Mombasa in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR, this Court observed:

“Whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly”.”
13. In *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, the Court held that:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”
14. It is noteworthy, though, that demonstration by an applicant that he or she has an arguable appeal is not the only requirement or qualification for extension of time under rule 4 to file an intended appeal. It is merely the first step that must be followed by satisfaction of the other requirements relating to the period of delay; the reasons for the delay; whether such delay is inordinate; and whether the adverse party would be prejudiced by grant of the orders sought under the Rule. In other words, is it too late in the day to approach the court under Rule 4? Has the applicant explained to the satisfaction of the Court the reason for the delay in filing the intended appeal?
15. I take note of the fact that the impugned ruling was delivered on March 28, 2023. The applicant filed his Notice of Appeal on 2nd June 2023 (only 51 days late) and his Motion seeking extension of time to file and serve the notice of appeal on June 7, 2023 (56 days late), which I do not consider to be inordinate delay.
16. I take to mind this Court’s decision in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR where it was observed that “... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.” It is only then would



consideration as to whether the intended appeal is arguable would be worthy of the Court's attention in exercise of its discretion under Rule 4.

17. In my considered view, the applicant has given plausible and satisfactory explanation for the 51 days delay in filing his notice of appeal. His application for extension of time was presented 6 days after counsel became aware of the ruling.
18. Finally, I find that the respondent does not stand to suffer any prejudice if the applicant's Motion is allowed. Having carefully considered the applicant's Motion, the grounds on which it is made, the affidavits filed in support thereof and in reply, and having further considered the written submissions and list of authorities by the respective learned counsel, I am satisfied that the applicant's notice of motion dated June 7, 2023 has merit. Accordingly, I hereby order and direct that:
 - a. time be and is hereby extended for the applicant to file and serve her notice of appeal;
 - b. the notice of appeal filed on June 2, 2023 be admitted and deemed as duly filed and served;
 - c. the costs of this application be in the intended appeal.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

