



**Attorney General v Ndambuki (Civil Application 35 of 2020)  
[2022] KECA 148 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 148 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 35 OF 2020**

**JW LESSIT, JA**

**FEBRUARY 18, 2022**

**BETWEEN**

**ATTORNEY GENERAL ..... APPLICANT**

**AND**

**RACHEAL MUTHEU NDAMBUKI ..... RESPONDENT**

*(Being an application for extension of time to file an appeal out of time against the ruling of the Employment and Labour Relations Court delivered by Hon. Rika, J. at Mombasa on 25th October 2019 In Constitutional Petition No. 2 of 2019)*

**RULING**

1. This application has been brought pursuant to Rules 4, 42 and 43 of the *Court of Appeal Rules*. It seeks in the main for extension of time to file and serve a notice of appeal and the appeal out of time against the ruling of the Employment and Labour Relations Court (ELRC) in Petition No. 2 of 2019 dated 25<sup>th</sup> October, 2019 in which the Cabinet Secretary, Ministry of Lands and Physical Planning was found in contempt of the court's the ruling and the order of the court dated 22<sup>nd</sup> February, 2019.
2. The application is supported by grounds on the face of the application, together with a supporting affidavit sworn by Nguyo Wachira, a Principal Litigation Counsel at the Attorney General's Chambers who has conduct of this case.
3. The application is opposed by way of a 'further' affidavit of the Respondent.
4. When this application came up for virtual hearing on the 24<sup>th</sup> November, 2021, only Ms. Katsiya for the Respondent was present. The Applicant's counsel was absent despite service of the hearing notice. Ms. Katsiya relied on the Respondent's replying affidavit and her written submission, she urged that the Applicant was undeserving of the orders sought for being in continued contempt of court even on the date of the hearing of the application.



5. I have considered this application, the affidavits sworn and against the application, together with the filed written submission and list of authorities relied on.
6. The principles which apply to this application are well settled. In the case of *Mwangi Vs Kenya Airways Ltd [2003] KLR* this court set out what a court should take into account in such an application as follows:
  - “(a) the period of the delay;
  - (b) The reason for the delay;
  - (c) The arguability of the appeal;
  - (d) The degree of the prejudice which could be suffered by the Respondent if the extension is granted;
  - (e) the importance of compliance with time limits to the particular litigation or issue, and
  - (f) The effect if any on the administration of justice or public interest if any is involved.”
7. The Applicant in its affidavit and grounds of the application on the face of the motion urged that it filed the Notice of Appeal on 5<sup>th</sup> February, 2020, and that the proceedings were not obtained until 13<sup>th</sup> March, 2020. The ruling intended to be appealed was delivered on 25<sup>th</sup> October, 2019. The length of delay sought to be excused by the granting of an extension would appear to start from the delivery of the ruling on 25<sup>th</sup> October, 2019 and to end on the filing of the current application for extension which application is dated 8<sup>th</sup> June 2020 which is a period of 224 days.
8. The intervening Christmas Vacation does need to be taken into account to reduce this period of 224 days. The Christmas vacation is from 22<sup>nd</sup> December to 13<sup>th</sup> January which is about 24 days. If this is then deducted from the 224 days, the relevant length of delay is 200 days.
9. The relevant paragraph of the Applicant’s affidavit where an explanation for the delay is attempted is numbers 6 to 10, where it is averred that the Applicant did not file the Notice of Appeal within the period prescribed by Statute, but that after deliberations and consultations, the Applicant deemed it necessary to challenge the impugned ruling. That there was delay in receiving instructions due to the fact the deponent of the affidavit was based in Nairobi, while the counsel for the Applicant is based in Mombasa the delay was also caused by delay in service of the order being appealed from. In submissions of counsel it is further that stated that the Christmas vacation and the Covid-19 pandemic contributed the delay. Counsel urged that the delay was excusable and not inordinate.
10. The Respondent has opposed the application and urged that there is no justifiable reason given for the delay in bringing the application. As to the covid-19 being a cause, the court was urged to take judicial notice that the same was declared a global pandemic in March 2020. As to the delay in service of the impugned, the Respondent urged that the Applicant was represented in court when the order was made.
11. As to the arguability of the appeal, counsel for the Applicant urged that the appeal raises substantial issues of facts, involving service deliver on matters of land which involves the public. arguable further the Applicant, a Cabinet Secretary, is a public officer who has been found to be in contempt, that there is great public interest involved in the outcome of this case as the Applicant is a high profile individual.



12. The Respondent in response urged that the Applicant was in contempt and should not be given audience until the contempt is purged.
13. First of all, on the delay, it is long and inordinate, contrary to the Applicant's argument. 200 days are half a year. The explanation given is not convincing. Covid-19 became a pandemic long after the period prescribed by law for the filing of the Notice of Appeal and the Appeal. It does not aid the Applicant at all. A delay of this magnitude without a reasonable explanation is, in the circumstances of this case, unacceptable.
14. Not to be ignored is the fact, which is admitted that the Applicant is in contempt of court. The Respondent has posited that in the circumstances the Applicant should not be given audience by the court.
15. In this court's decision in *Co-ordination of National Government Vs Miguna Miguna & 4 Others, Court of Appeal Civil Application No. Nai. 1 of 2017 (UR 1/2018)* is in all fours with this case. In that case the Applicant in a similar application was also a Cabinet Secretary. And the court had this to say:

“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

16. And to demonstrate the contempt, or disobedience of court's orders are frowned upon in many jurisdictions, in *Hadkinson vs. Hadkinson [1952] 2 ALL ER 562*, the English Court of Appeal returned these categorical holdings:

“Held (per Somervell and Romer, L.JJ.), that it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction.

Held Per Denning L.J.: The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice.”

17. I have come to the conclusion that on account of the Applicant's continued contempt of a court order which she has made no effort to either purge or seek to have a review or some other relief from the trial court, she is undeserving of any audience before this court. Furthermore, the delay is long, inordinate



and the without any justification, and for that too, the Applicant is undeserving of the exercise of my unfettered discretion in her favour for an extension of time.

18. The result is that the application lacks merit and is dismissed with costs to the Respondent.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF FEBRUARY 2022**

**JESSIE LESIIT**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

