



**Kitany v Chief of Staff and Head of Public Service & 2 others (Civil Application E387 of 2021) [2022] KECA 138 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 138 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E387 OF 2021  
RN NAMBUYE, JA  
FEBRUARY 18, 2022**

**BETWEEN**

**MARIANNE J. KITANY ..... APPLICANT**

**AND**

**CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(An application brought under Order 50 rule 1 of the Constitution (sic) Rule 4 of the Court of Appeal Rules, sections 1A, 1B, 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law against the decision of the Employment and Labour Relations Court (N. Makau, J.) dated 2nd June, 2021 in Nairobi ELRC No. 831 of 2017)*

**RULING**

1. Before me is a Notice of Motion dated 5th November, 2021, under Order 50 of the Constitution, Rule 4 of the *Court of Appeal Rules*, sections 1A, 1B, 3A and 3B of the *Civil Procedure Act*. The motion seeks several reliefs namely;
  - 1.) Spent.
  2. THAT this Honourable Court be pleased to grant leave to the applicant to file the memorandum of appeal out of time.
  3. THAT if prayer (1) above is granted, the draft memorandum of appeal herein marked as annexure “SC-7” to the supporting affidavit be deemed as duly filed upon payment of requisite fees.



4. THAT this honourable court be pleased to grant leave to the applicant to serve the memorandum of appeal out of time.
  5. THAT the notice of appeal dated 26th June, 2021 be deemed as properly filed and served.
  6. THAT the honourable court be pleased to issue any further orders as it deems fit.
  7. THAT the costs of this application be in the cause.
2. It is supported by grounds on its body, a supporting affidavit sworn by Sheila Cheron, an advocate of the High Court of Kenya from the firm of C & K Advocates, LLP together with annexures thereto, applicant's written submissions dated 5th November, 2021 together with legal authorities. It has been opposed by the 1st respondent's replying affidavit sworn by Dido Jillo Gababo, the Director Human Resource Management and Development in the Office of the Deputy President conversant with the issues in controversy in the application under consideration together with annexures thereto and written submissions dated 2nd February, 2022.
  3. The Notice of Motion was canvassed through rival pleadings, written submissions and case law relied upon by the respective parties herein in support of their opposing positions, in the absence of advocates for the respective parties pursuant to directions given in the hearing notice served electronically by the Deputy Registrar of this Court on the advocates for the parties on Wednesday, January 26, 2022 at 7.48am.
  4. On the facts, the applicant submits cumulatively that she was aggrieved with the judgment delivered by Nzioka wa Makau, J. on 2nd June, 2021. She gave instructions to her advocates then on record for her to initiate the appellate process. The advocate filed a notice of appeal on 26th June, 2021 out of time. The said advocate left the service of the firm of advocates then on record for her without any notice to them hence the failure to regularize her timeously initiated appellate process.
  5. She pleads that as a litigant she should not be made to suffer for the mistakes of her advocate which she pleads is excusable. She should therefore be accorded an opportunity to ventilate her appellate right which is now constitutionally underpinned and entrenched in Article 50 of the Constitution of Kenya, 2010. It is also her position that the delay in seeking the court's intervention to regularize her appellate process is not inordinate having filed the application under consideration within four (4) months of the date of the delivery of the judgment. No prejudice will be suffered by the respondents if the reliefs sought were granted.
  6. On the law, the applicant relies on the case of *Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi Civil Application No. NAI 255 of 1997 (UR)* the locus classicus case on the prerequisites for this Court's exercise of its mandate under Rule 4 of this Court's Rules in an application of this nature; *Ceneast Airlines Limited vs. Habib Bank A. G. Zurich [2010] eKLR* on the application of the doctrine that "a litigant should not be punished for the mistakes of his advocate"; *Agip (Kenya) Limited vs. Highlands Tyres Ltd [2001] eKLR* in which the court ruled that a delay of eight (8) months is not inordinate and lastly, *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR* for the holding, inter alia, 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 and that a plausible and satisfactory explanation for delay is the key that unlocking the court's flow of discretion favour."
  7. In opposition to the application, the 1st respondent asserts cumulatively that the factual position as put forth by the applicant is not only incorrect but is also misleading. According to the 1st respondent, all that the trial Judge did in the judgment was to direct the applicant to clear with the respondent within fourteen (14) days of the date of the judgment. Upon applicant's compliance with the directions on



- clearance, the 1st respondent was to release the tabulated payments within fourteen (14) days of the clearance failing which execution was to issue.
8. Pursuant to the above directions by the court, the applicant's advocate wrote to them a letter dated 4th June, 2021 through M/s Sheila Cheronno forwarding to the Office of the Attorney General, the applicant's clearance certificate and the Official Secrets Act Declaration form, while at the same time impressing upon the 1st respondent to expedite the processing of the payment to the applicant in accordance with the directions given in the judgment. On 7th June, 2021, the applicant's advocate through the same M/s Sheila Cheronno forwarded to the 1st respondent a copy of the decree and their firm's bank accounts into which the money to be paid by them to the applicant was to be channeled. M/s Sheila Cheronno followed up the above communication with another communication from the same firm of advocates dated 24th June, 2021 asking them to expedite the settlement of the claim to which the 1st respondent acceded by paying the amount due to the applicant from them vide a payment voucher dated 29th June, 2021.
  9. Notwithstanding the position taken above by the 1st respondent that the matter is concluded, they assert that the notice of appeal dated and lodged on 26th June, 2021 and served electronically on them on 14th July, 2021 was lodged and served out of time without the leave of the court and therefore invalid. It was also an afterthought especially when they have not been served with a letter by the applicant bespeaking proceedings to demonstrate applicant's seriousness in intending to pursue her intended appellate right. Her plea to file the memorandum and record of appeal out of time is therefore a nonstarter. In the alternative, the 1st respondent submits that they will be highly prejudiced if the relief sought were granted having complied with the judgment. They maintain the application is an afterthought and should be rejected.
  10. On the law, the 1st respondent relies on the case of *National Bank of Kenya Limited vs. Hamimda Bana & 103 Others [2017] eKLR* on the parameters for invoking and applying the doctrine of estoppel and the case of *Teachers Service Commission vs. Simon P. Kamau & 19 Others [2015] eKLR* in which the Supreme Court of Kenya struck out a notice of appeal improperly filed and in respect of which no application had been made by the applicant to regularize the same.
  11. My invitation to intervene on behalf of the applicant has been invoked under the provision of law indicated in the heading of the application. What is indicated erroneously as Order 50 of the Constitution is in fact Article 50 of the Constitution. It underpins the right to a fair hearing. Sections 1A, 1B, 3A and 3B of the Civil Procedure Act have no application to the exercise of mandate by this Court. They are therefore discounted. The proper provision for accessing the relief sought is Rule 4 of the Court of Appeal Rules, which provides as follows:

“ 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 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.”
  12. The principles that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled. I take it from the position taken by the Supreme Court of Kenya (M. K. Ibrahim & S.C. Wanjala SCJJ.) in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* in which these were crystallized 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 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 respondent of the extension is granted.
  6. Whether the application has been brought without undue delay; and
  7. Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
13. From the above, the factors I am enjoined to take into consideration in the determination of the application under consideration are first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
  14. On the period of delay in seeking the Courts intervention, the parameter I find appropriate to apply in determining issue as to whether the applicant has satisfied this prerequisite is that set out in the case of *George Mwendu Muthoni vs Mama Day Nursery and Primary School, Nyeri CA No. 4 of 2014, (UR)*, in which extension of time was declined on account of the applicant’s failure to explain a delay of twenty (20) months.
  15. The application under consideration is dated 5th November, 2021, a period of five (5) months and about five (5) days from the date of the delivery of the judgment.
  16. Applying the threshold in the George Mwendu Muthoni case [supra] to the rival positions herein, I find that the period involved in the application under consideration is much less than what was the basis for declining to exercise discretion in favour of the applicant in the above referred to case. The applicant’s satisfaction of this prerequisite alone is however not sufficient to warrant granting of the relief sought. It has to be considered in conjunction with the other prerequisites falling for consideration in an application of this nature. The above reasoning now leads me to interrogate the next prerequisite, namely, reasons for the delay.
  17. The applicant has pinned blame for inaction on her advocates, a position disputed by the 1st respondent terming the applicant’s assertions misleading. This is because the 1st respondent has annexed documents to the replying affidavit explicitly showing that the advocate currently on record for the appellant and the one who filed the application under consideration on behalf of the applicant is the same advocate who engaged them over the issue soon after the delivery of the judgment, impressing upon them the need of complying with their part of the judgment as was required of them by the said judgment. The 1st respondent asserts that upon their compliance with their part of the judgment as directed by the court and required of them by the applicant’s advocates they released the decretal sum in obedience to the decree extracted and served on them by the very advocate who filed the application under consideration.
  18. There has been no rebuttal by the applicant of the above 1st respondent’s assertions. This conduct on the part of the applicant gives rise for an adverse inference drawn against them that they were economical with the truth in their supportive facts bordering on lack of candidness on their part. It may



also means coming to seek equity with unclean hands which in my view would disentitle the applicant to the relief sought.

19. The above conclusion notwithstanding, I am obligated in law to address all the prerequisites that fall for consideration in an application of this nature. The next in line for consideration is the prerequisite dealing with the possibility of arguability of the intended appeal which in law is not a mandatory requirement hence the use of the word “possibly arguability of the intended appeal”. There is a draft memorandum of appeal on the record sought to be regularized. It is now trite law that in law an arguable ground of appeal is not one that must necessarily succeed but one that is bona fide and would not only call for a response from the opposite party but also warrant the court’s interrogation. See *Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank [2020] eKLR*. The grounds annexed by the applicant in my view, satisfy the threshold for arguability of the intended appeal notwithstanding its ultimate outcome.
20. Next is issue of any prejudice to be suffered by the opposite party if the relief sought were granted. The 1st respondent says that they have satisfied the decree at the instigation of the applicant’s advocate currently on record for her and that they should therefore be spared the inconvenience of being dragged into an appellate litigation which according to them will be an exercise in futility, a position not controverted by the applicant. I therefore hold that indeed the 1st respondent will suffer prejudice in the uncontroverted circumstances demonstrated above.
21. I appreciate that the applicant has a right to pursue and be heard on the grievances intended to be raised on appeal, a position now constitutionally entrenched.
22. See the case of *Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR*; *Mbaki & Others vs. Macharia & Another [2005] 2EA 206*; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003*; in which it was variously held inter alia that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.
23. I have revisited the threshold set in the above case law. I find nothing in the above case law to suggest that according an opportunity for the enjoyment of an appellate right is to be granted as a matter of course. It demands demonstration of basis for the court to accord that right which is wanting in the circumstances of this application for reasons given above.
24. The upshot of the above assessment and reasoning is that I find no merit in this application. It is accordingly dismissed with costs to the 1st respondent.

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

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

