



Kamau & 727 others v National Water Conservation & Pipeline Conservation t/a National Water Harvesting & Storage Authority; Ministry of Water and Sanitation (Interested Party) (Civil Application E278 of 2021) [2022] KECA 867 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KECA 867 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E278 OF 2021
S OLE KANTAI, JA
MAY 20, 2022**

BETWEEN

SAMUEL NGORU KAMAU & 727 OTHERS APPLICANT

AND

**NATIONAL WATER CONSERVATION & PIPELINE CONSERVATION
T/A NATIONAL WATER HARVESTING & STORAGE
AUTHORITY RESPONDENT**

AND

MINISTRY OF WATER AND SANITATION INTERESTED PARTY

(Being an application for extension of time to file a notice of appeal and intended appeal against the Ruling of the Environment and Labour Relations Court of Kenya at Nairobi (Mbaru, J.) dated 18th February, 2021 in ELRC Petition No. 6 of 2019)

RULING

1. Under Article 152(d) of *the Constitution* of Kenya, 2010; Sections 3, 3A, 3B of the *Appellate Jurisdiction Act*; Rules 1(2), 4, 75 and 82 of the *Court of Appeal Rules* and all other enabling provisions of law apply for leave to extend time within which the applicant ought to have lodged and served notice of appeal and record of appeal. In grounds in support of the Motion and in an affidavit sworn by Samwel Ngoru Kamau it is stated amongst other things that the applicants are aggrieved and intend to appeal against the ruling of the Employment and Labour Relations Court (ELRC), Mbaru, J., given on 18th February, 2021; that the applicants applied for a copy of the proceedings and ruling on the same day ruling was delivered but proceedings and ruling were not delivered on time; that the applicants' lawyer received a copy of the ruling from the respondent's lawyer but time for filing an appeal had since lapsed; that failure to file an appeal on time was occasioned by the trial court's delay in availing



proceedings and ruling and that there are serious issues to be taken on appeal and the intended appeal has high chances of success. It is deponed that the applicant and 727 others are former employees of the respondents who served in various capacities; that the enactment of the Water Act 2002 brought about water sector reforms and mobilization of staff from the respondents to various Water Service Boards and were not taken back as employees of the respondents; that failure to deploy or employ constituted redundancy which the applicants' term to be an unfair labour practice; that in the petitions to ELRC the applicants cited various constitutional breaches; there was a preliminary objection taken on the basis of *res judicata*; the Court being *functus officio*; the petitions being an abuse of the process of the Court; the petitions being incompetent. In a ruling delivered on 18th February, 2021 the petitions were dismissed and a Notice of Appeal was filed the next day 19th February, 2021, proceedings having been applied for the same day ruling was delivered.

2. Proceedings of ELRC and ruling were not supplied by the court to the lawyers on time to enable filing of an appeal; the applicants say that the Judge of ELRC erred in determining preliminary objection based on Section 80 of the Employment Act 2007 which issue had not been raised by any party before the court and that the Judge ignored the fact that the respondents had admitted part of the claim.
3. Ben Makasi Simiyu, an Advocate practicing in the firm of Simiyu and Partners Advocates on record for the respondent National Water Conservation & Pipeline Corporation t/a National Water Harvesting & Storage Authority in a replying affidavit says that he is conversant with all facts of the case. He does not say why an officer of the respondent could not file a replying affidavit and it is he, an Advocate of the High Court of Kenya, has to depone to facts on behalf of his client. He says that the Motion before me has no basis in law and lacks merit "... and amounts to a blatant abuse of the process of this Honourable Court for violently offending the provisions of, and proviso to, Rule 82 of the Court of Appeal Rules, 2010". He further says that the application is filed with the intention of delaying the conclusion of the long outstanding matter and it should thus be dismissed.
4. The principles that govern an application of this nature are well known and were well captured in the oft-cited case of Fakir Mohamed v Joseph Mugambi & 2 Others Civil Application No. 332 of 2004 thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See *Mutiso v Mwangi*, Civil Application No. NAI. 255 of 1997 (ur), *Mwangi v Kenya Airways Limited* [2003] KLR 496, *Major Joseph Mwereri Igweta v Murika Methare & Attorney General Civil Application No. NAI 8 of 2000* (ur) and *Murai v Wainaina (No. 4) 1982 KLR 38*.”
5. The innovation created by Sections 3A and 3B of the Appellate Jurisdiction Act creates a duty on the Court to ensure that factors considered are consonant with the overriding objectives of civil litigation which is to ensure just, expeditious, proportionate and affordable resolution of disputes before the Court – *City Chemist (Nbi) & Anor. v Oriental Commercial Bank Limited Civil Application NAI. 302 of 2008 (ur)*.
6. I have seen and considered written submissions filed in this matter.



7. ELRC dismissed petitions before it on 18th February, 2021 for various reasons. Proceedings were applied for the same day and notice of appeal was filed the following day 19th February, 2021. The reason why an appeal was not filed within the time specified by the rules is explained to be that the ELRC did not supply proceedings or ruling on time. The applicants say that the intended appeal has merit; that they should be heard; that the appeal has high chances of success. I cannot see how the respondents would be prejudiced if the applicants are allowed to pursue their alleged rights on appeal. I think that the Motion has merit and I allow it. Let an appeal be filed within 30 days of today. Costs of the Motion will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2022.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

