



REPUBLIC OF KENYA



**KENYA LAW**  
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**Manyara v Teachers Service Commission (Civil Appeal  
E012 of 2022) [2022] KECA 878 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KECA 878 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E012 OF 2022  
F SICHALE, JA  
JUNE 10, 2022**

**BETWEEN**

**DUNCAN KABURU MANYARA ..... APPELLANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

*(An Application for Extension of Time to file and serve the Record of Appeal  
from the Judgment and Decree of the High Court of Kenya at Nairobi  
(Wasilwa, J.) dated 25th January 2017 IN Nairobi ELRC Cause No. 196 of 2013)*

**RULING**

1. Duncan Kaburu Manyara (the applicant herein), has vide an undated motion brought pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act CAP 21, Section 66 of the Appellate Jurisdiction Act CAP 9, Order 50 Rule 6 of the Civil Procedure Rules 2010, Article 159 of the Constitution of Kenya 2010 and all other enabling provisions of the Law sought the following orders:
  - “1. Spent.
  2. THAT the applicant herein be granted leave to file his appeal out of time since the time to file an appeal has already lapsed.
  3. THAT cost of this application be in the cause.”
2. The motion is supported by the grounds on the face of the motion and an affidavit sworn by the applicant who deposed *inter alia* that he was the claimant in Nairobi Employment and Labour Relations Cause No. 196 of 2013 whereby his claim was dismissed and that at the time of the dismissal, he had the full intention of filing an appeal but was unable to do so due to his advocate’s failure in filing the appeal within the lawfully stipulated time, despite his firm instructions to his advocate on to file the appeal.



3. He further deposed that as a result, he had filed a complaint against the aforesaid advocate both at the Law Society of Kenya and the Advocates Complaints Commission.
4. There was no response on part of the respondent.
5. It was submitted for the applicant that by dint of Rule 4 of this Court's Rules, the Court has wide discretionary powers in its consideration of applications for extension of time and that further the delay herein was not attributable to the applicant but rather on his counsel who was on record at the time.
6. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's submissions and the law.
7. The applicant's motion is brought inter alia, under Rule 4 of this Court's Rules. The said Rule provides:

"4

Extension of time

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 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

8. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously. In *Fakir Mohamed vs. Joseph Mugambi & 2 Others C.A. No. NAI. 332 of 2004*, this Court stated as follows regarding discretion under the Rule and the factors that ought to guide its exercise:

"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 ..."

9. In the instant case, Rule 4 of this Court which guides the Court in applications of this nature has not even been cited. Be that as it may, Article 159 (2) (d) of *the Constitution* of Kenya 2010, requires the Court to administer justice without undue regard to procedural technicalities. In any event the applicant has proceeded to quote Rule 4 (*supra*) in his submissions, I will therefore proceed to determine the matter on its merits or otherwise.
10. The impugned judgment that the applicant seeks to appeal against was delivered on 25<sup>th</sup> January 2017. There has therefore been a delay of more than 5 years in instituting the appeal. No doubt a period of more than 5 years is inordinate/unreasonable. As regards the reasons for the delay, the applicant has contended that the reasons for the delay in filing the appeal is as a result of his advocate's failure in filing the same within the lawfully stipulated time despite his firm instructions to file the appeal.



11. From the circumstances of this case, I am of the considered opinion that the reason put forth for the delay is plausible and the same has been explained to the satisfaction of this Court. Indeed, the applicant had filed complaints against his then advocate to both the Law Society of Kenya and the Advocates Complaints Commission.
12. With regard to the possibility of the appeal succeeding, no draft memorandum of appeal has been annexed to the motion to enable this Court make a finding on this issue. More so, I am alive to the fact that I cannot make a finding on this issue as a single Judge lest I embarrass the bench that will eventually be seized of the intended appeal.
13. As regards prejudice, I am satisfied that the applicant who is in person will be greatly prejudiced as his right of appeal will have been completely shut out.
14. Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of this Court's Rules to extend time to file an appeal out of time.
15. Accordingly, the applicant's motion is merited and the same is hereby allowed in terms of prayer 2. The applicant will file and serve the intended appeal within 30 days from the date of this ruling failure to which these orders shall stand vacated.
16. The costs of the motion shall abide the outcome of the intended appeal.
17. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2022.**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

