



Mwizangu & 61 others v Kenya Ports Authority (Civil Application 031 of 2022) [2022] KECA 1389 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1389 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 031 OF 2022
SG KAIRU, JA
DECEMBER 16, 2022**

BETWEEN

MWINYIHAJI MWINZANGU & 61 OTHERS APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

(An application for extension of time to appeal the judgment/order of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 29th May 2020 in ELRC Cause No. 57 of 2014 Formerly High Court Civil Case No. 149 of 2003)

RULING

1. In their application dated May 12, 2022 lodged on May 13, 2022, the applicants pray for an order that the “court be pleased to admit the appeal herein out of time”. Their claim before the Employment and Labour Relations Court (ELRC) that they were grossly underpaid their gratuity and other legal entitlements and that they were denied the right to belong to the respondent’s pension scheme and to draw pension from the scheme was struck out in a judgment delivered by Rika J on May 29, 2020 “for want of jurisdiction”.
2. In her affidavit in support of the application, Lucy Momanyi the advocate for the applicants deposed that the applicants’ suit was filed in the High Court 2003 and subsequently transferred to the ELRC in 2014; that the applicants are desirous of appealing the judgment; that being an old claim, many appellants have passed away and it has been difficult to obtain proper instructions; that her law firm applied for typed proceedings and a certificate of delay issued on November 23, 2021; that upon receiving the certificate of delay her law firm could not get instructions until January 20, 2022; that it is in the interest of justice that the applicants be granted leave and for their appeal to be admitted out of time; that the appeal is arguable and has high chances of success and the applicants stand to suffer irreparable loss if the orders sought are not granted.



3. During the hearing of the application before me on September 21, 2022, there was no appearance for the applicant despite notice of hearing having been served on the advocates. The advocates for the applicants had however filed written submissions dated June 28, 2022 and digest of authorities in support of the application which I have considered in line with the proviso to rule 58(1) of the [Court of Appeal Rules](#), 2022. Counsel for the applicant cited the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No Nai 251 of 1997 with regard to the principles on which the Court exercises its discretion in applications of this nature.
4. Also cited in support of the application is the decision of the court in the case of [Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet](#) [2018] eKLR for the proposition that all the law requires is satisfactory explanation for delay to unlock “the court’s flow of discretionary favour” and that the law does not set any minimum or maximum period of delay in that regard. Counsel submitted that sufficient reason has been given for the delay; that the applicants are very advanced in age and it was an uphill task to trace them to obtain instructions.
5. Appearing for the respondent, learned counsel Mr Imende in opposing the application relied on the respondent’s replying affidavit sworn by Stephen Kyandih, a Principal Legal Officer of the respondent and written submissions dated June 2, 2022 and authorities which he orally highlighted. Counsel submitted there is need for candor on the part of an applicant seeking exercise of the court’s discretion; that in this case the delays involved are not explained; that the notice of appeal was filed on July 12, 2020 which was 42 days out of time and the notice was not served until August 14, 2020, which is 44 days delay without explanation; that typed proceedings were ready on February 19, 2021 but certificate of delay issued 15 months later on November 23, 2022; that the applicants are not deserving of the exercise of the court’s discretion.
6. I have considered the application, the affidavits and the submissions. As the Supreme Court of Kenya stated in [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others](#), Supreme Court Application No 16 of 2014[2014] eKLR extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.
7. Similarly, in [Fakir Mohamed v Joseph Mugambi & 2 others](#) [2005] eKLR Waki, JA stated that:

“The exercise of this court’s discretion under rule 4... 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 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 Appl NAI 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl NAI 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
8. Although the court has unfettered discretion under rule 4 of the [Court of Appeal Rules](#), that discretion should be exercised judicially. Each case must be considered on its own facts. In relation to the present case the learned judge observed in the impugned judgment that the claim was filed “some 17 years ago”;



that judgment, as already stated, was delivered on May 29, 2020 and another two years have lapsed. The notice of appeal, which is not exhibited in the application before me, is said (based on material presented by the respondent) to have been filed on July 12, 2020, a delay which is not satisfactorily explained. The notice was not served until August 14, 2020. That too is not satisfactorily explained.

9. The certificate of delay was issued on November 23, 2021. The present application is dated May 12, 2022. Beyond the claim that “it has been difficult to give proper instructions to the advocates” no satisfactory explanation has been given for all the delays. Presumably the advocates for the applicants had instructions to appeal in July 2020 when they filed the notice of appeal. The subsequent delays cannot be on the basis that instructions were not given.
10. The argument that the appeal is arguable with high chances of success is somewhat tenuous having regard to the consideration that the suit was struck out for want of jurisdiction on the strength of a Supreme Court of Kenya decision. In that regard the learned Judge expressed:

“On material jurisdiction, the Supreme Court in *Albert Chaurembo Mumba & 7 others vs. Maurice Munyao & 148 others* [2019] eKLR, was unequivocal, that pension disputes are not in the province of the courts, whether it is the High Court or the ELRC. The Supreme Court was emphatic that courts cannot usurp the jurisdiction of the RBA mechanism in pension disputes. The ELRC therefore lacks material jurisdiction to hear and determine pension disputes following this decision of the Supreme Court.”

11. All in all, I have no basis on which to exercise the court’s discretion in favour of the applicants.
12. The application fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

