



Law Society of Kenya v National Assembly & 4 others (Civil Appeal (Application) E309 of 2022) [2022] KECA 1346 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KECA 1346 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E309 OF 2022
GWN MACHARIA, JA
DECEMBER 2, 2022**

BETWEEN

LAW SOCIETY OF KENYA APPLICANT

AND

NATIONAL ASSEMBLY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

COMPETITION AUTHORITY 3RD RESPONDENT

**ASSOCIATION OF PROFESSIONAL SOCIETIES IN EAST
AFRICA 4TH RESPONDENT**

**INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF
KENYA 5TH RESPONDENT**

(Being an application for extension of time to file an appeal out of time from the decision of H. Ong'udi, J. dated 21st July 2022 in H.C. Constitutional Petition No. 215 of 2020)

RULING

Brief background

1. The applicant filed a Petition before the High Court dated 25th June, 2020, seeking to invalidate Section 29 (8) of the [Competition Act](#). The Court in its Judgment dated 21st July, 2022 dismissed the Petition, it is this decision the applicant is desirous of appealing against.



Application

2. The appellant filed a Notice of Motion dated 26th August, 2022, brought under Section 3A of the [Appellate Jurisdiction Act](#), Chapter 9 Laws of Kenya and Rules 4 and 42 of the Court of Appeal Rules, seeking the following orders; -
 - a. This Honourable Court be pleased to grant the Applicant extension of time for filing the Notice and Memorandum of Appeal against the Judgment of Honourable Lady Justice H. Ong'udi delivered on 21st July, 2022 in Constitution Petition No. 215 of 2020 - Law Society of Kenya v The National Assembly & 2 others.
 - b. The Honourable Court upon the grant of extension of time for filing the Notice and Memorandum of Appeal be pleased to grant an Order that the Notice of Appeal dated 22nd August, 2022 and lodged on 23rd August, 2022 be deemed, properly filed within time.
 - c. The applicant be at liberty to apply for further Orders and/or directions as this Honourable Court may deem fit and just to grant; and
 - d. The costs of this application do abide the outcome of the appeal.
3. The application is supported by the grounds on the face of it and the supporting affidavit sworn by Florence W. Muturi, the Secretary/Chief Executive Officer of the applicant Society dated 26th August, 2022. She avers that the applicant filed a Constitutional Petition dated 25th June, 2020 seeking to invalidate Section 29(8) of the [Competition Act](#) and by a judgment dated 21st July, 2022 the Petition was dismissed. A copy of the judgment was forwarded to the applicant by its advocate vide a letter dated 25th July, 2022 and received on 26th July, 2022 but due to an increase in correspondence being sent to the applicant, a copy of the letter and the judgment was misplaced at the applicant's offices and was never delivered to the Secretary/Chief Executive Officer of the Applicant even though she was the intended recipient of the letter. As a result, the applicant was unable to give instructions to its advocates on record to file a Notice of Appeal within the time set by law and it was not until The Business Daily newspaper on Friday, 19th August, 2022 published an article titled "Watchdog stops lawyers from price-fixing in court fight" that the applicant learnt of the judgment of 21st July, 2022. The applicant proceeded to issue instructions to its advocates to institute an appeal vide a letter dated 22nd August, 2022.
4. That therefore, the failure to file the Notice of Appeal on time has thus been occasioned by an unfortunate circumstance that resulted in the applicant's Secretary/Chief Executive Officer not receiving a copy of the judgment and it is in the interest of justice that the court extends the time for filing of a Notice and Memorandum of Appeal against the judgment of 21st July, 2022 and upon granting the same, the Notice of Appeal dated 22nd August, 2022 and lodged on 23rd August, 2022 be deemed as properly filed within time. That there will be no prejudice suffered by the respondent if the application is allowed and the intended appeal raises weighty issues that are of public interest.
5. The respondent did not file a response to the application.

Submissions

6. The applicant's submissions are dated 3rd November, 2022 in which it states that the delay has been explained and humbly implores the court to appreciate that this was an error which would justify an extension. That its conduct in the entire process is indicative of its intention to appeal the judgment, it was never willfully indolent and allowing the application would be in the interest of justice. Further, that no prejudice will be suffered by the respondents. The applicant implored the court to have regard



to the cases of *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.

Analysis & Determination

7. I have considered the application, submissions and authorities relied upon.
8. Rule 4 of the *Court of Appeal Rules*, 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.”
9. This Court differently constituted in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determining an application under Rule 4. The Court held that:

“ The decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
10. It is not disputed that the judgment in the High Court was delivered on 21st July, 2022 and the Notice of Appeal on 23rd August, 2022. This was beyond the 14 days for compliance stipulated in Rule 77(2) of the Court of Appeal Rules. The delay translates to 14 days which is admitted by the applicant and has been explained as an error in which the applicant did not receive a copy of the judgment despite the same being sent by their counsel due to the increased correspondence it was receiving at the time, more so on applications for election observers. The applicant did however annex the said call for applications whose deadline was 26th July, 2022.
11. Be that as it may, the explanation given by the applicant for the delay is reasonable in the circumstances and, in any case, the delay is not inordinate.
12. As to whether or not an arguable appeal exists, it is the applicants’ assertion that they have an arguable appeal which raises weighty issues of public interest. A glance at the Draft Memorandum of Appeal annexed to the Motion shows that the appeal is challenging the enactment and constitutionalism of some sections of the *Competition Act*. These are no mean points of arguments that this court can wish away. I am therefore satisfied that the applicant has demonstrated that the intended appeal is not spurious but for a worthy cause. I accordingly find the appeal arguable.
13. For the above reasons, I find and hold that the application dated 26th August, 2022 is merited. The same is allowed with the following orders:
 - a. The Notice of Appeal dated 22nd August, 2022 is deemed as duly filed within the prescribed time and it shall be served within seven days of this ruling.
 - b. The Record of Appeal shall be filed within 45 days of this Ruling.
 - c. Costs of the Motion shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.



G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

