



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: NAMBUYE, JA – IN CHAMBERS)**

**CIVIL APPLICATION NO. 144 OF 2020**

**BETWEEN**

**TEACHERS SERVICE COMMISSION.....APPLICANT**

**AND**

**JOB KISINJILU ALIERO.....RESPONDENT**

*(An Application for extension of time and serve a notice of appeal out of time from the*

*Judgment and decree of the Employment and Labour Relations Court (Nderi, J.)*

*dated 16th July, 2020*

*in*

*Kisumu ELRC No. 326 of 2017)*

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**RULING OF THE COURT**

Before me is a Notice of Motion dated 18th November, 2020 under **Article 159** of the Constitution, **sections 3, 3A and 3B** of the **Appellate Jurisdiction Act** and **Rule 4, 42, 43 and 47** of the **Court of Appeal Rules**, and all enabling provisions of law. The Notice of Motion substantively seeks leave of the Court to file and serve the notice of appeal out of time pursuant to **Rule 4** of the **Court of Appeal Rules** against the whole Judgment of **Nduma Nderi, J.** delivered on 16th July, 2020 on line via email. Second that the Notice of Appeal and Memorandum of Appeal annexed hereto be deemed as duly filed and served together with an attendant order for provision for costs. It is supported by grounds on its body and a supporting affidavit sworn by **Sylvia Ngere** together with annexures thereto. It has been opposed by the respondent’s grounds of opposition. It was canvassed through the sole applicant’s pleadings and rival written submission of the respective parties in the absence of advocates for the respective parties and without oral highlighting.

Supporting the application, the applicant relying both on grounds on the body of the application, averments in the supporting affidavit and written submissions, submitted that judgment was delivered on 16th July, 2020 online and relayed to the respective parties Advocates via email. Unfortunately, the copy

relayed to their Advocates' email ended up in the spam folder and by the time their advocate became aware of its presence time for lodging an appeal as of right had run out hence the application under consideration to validate that process, the intended appeal is not only arguable but also has high chances of success, the application has been presented expeditiously upon learning of the procedural lapse. They will suffer irreparable loss and damage if the intended impugned orders were to be sustained without them being accorded an opportunity of being heard on their intended appeal. It is in the interests of justice, fairness and public policy and interests that they be accorded an opportunity to be heard on the merits of the intended appeal. They have, therefore, brought themselves within the ambit of the prerequisites for exercising of the Court's discretionary mandate under **Rule 4** of the Rules of the Court in their favour.

The applicant relies on the case of **Pan African Paper Mills (EA) Limited vs. Olaka [2001] eKLR** adopting the decision in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2 E.A 231** on factors for consideration in an application of this nature which I will revert to at a later stage of this ruling.

On the reasons for delay, applicant relies on the case of **Multi Media University of Kenya vs. Kenya Union of Entertainment and Music Industry Employees [2019] eKLR** and submits that the reasons proffered above for the delay in timeously initiating the intended appellate process are plausible and therefore excusable.

On the arguability of the intended appeal they rely on the case of **Kenya Medical Lab Technician and Technologist Board vs. Prime Communication Limited [2014] eKLR** and submit that the grounds of appeal contained in the annexed draft memorandum of appeal are not only arguable but also raise substantial issues of law with a likelihood of success.

On the degree of prejudice to be suffered by the opposite party if the relief sought were to be granted, the applicant relies on the case of **Multi Media University of Kenya vs. Kenya Union of Entertainment and Music Industry Employees** (supra); **Imperial Bank Limited (In Receivership) & Another vs. Alnashir Popat & 18 Others [2018]eKLR**; and **African Safari Club Limited vs. Safe Rentals Limited [2010] eKLR** and submits that the respondent stands to suffer no prejudice if the orders sought were granted. Instead, it is the applicant that will be greatly prejudiced if it's right to be heard on a well-founded appeal shall be extinguished without being accorded an opportunity to be heard thereon.

In rebuttal, the respondent filed grounds of opposition and written submissions contending that the applicant is guilty of inordinate delay devoid of satisfactory explanation as to why the notice of appeal was not filed within the required time. The applicant is also guilty of inordinate delay in filing the notice of motion under consideration which was belatedly served electronically on them on 8th March, 2021 after the deputy registrar of the Court had issued a hearing notice directing parties to file written submissions for the hearing of the application on 11th March, 2021. It is also fundamentally defective, bad in law, incompetent and a mere abuse of the due process of the Court aimed at denying the respondent enjoyment of the fruits of the judgment delivered in his favour and should therefore be dismissed with costs.

Further that they were constrained to file grounds of opposition on account of the applicant failure to serve them with the application in good time for them to file a replying affidavit; judgment was duly delivered on 16th July, 2020 and sent electronically to all counsel on record for the respective parties, judgment date was given in open court in the presence of all counsel for the parties, applicant has not given any demonstration on precautionary steps taken to inquire if judgment had been delivered; applicant's allegation that the email from the Court ended up in the spam folder holds no water as they wrote to them vide their letter dated 19th August, 2020 notifying them of the outcome of the case and attaching a copy of the decree dated 19th August, 2020. Despite the above mentioned letter being received on 29th September, 2020, it was only on 18th November, 2020 that the application under consideration was filed which according to them was an afterthought as it was filed more than one and a half month's from the date of receipt of their letter. They therefore maintain that no satisfactory explanation has been given as to why applicant waited that long to seek the Court's intervention to

capacitate them progress their intended appellate process. Neither was any reason given as to why they waited till 8th March, 2021, three days to the hearing of the application to serve them with the application under consideration.

My invitation to intervene on behalf of the applicant has been invoked substantively under **Rule 4** of the **Court of Appeal Rules**, save to mention for purposes of the record that **Rules 42, 43** and **47** are merely procedural and do not fall for interrogation, while **sections 3, 3A** and **3B** enshrines the general mandate of the Court and the overriding objective of the Court whose ideal is to dispense justice expeditiously.

The principles that guide the Court in the discharge of its mandate under **Rule 4** of the Court's **Rules** now form a well trodden path as enunciated numerously both by the Court and the Supreme Court. I take it from **(M.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013]eKLR**

*as follows:- 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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.*

From the above, the factors I am enjoined to take into consideration in the discharge of the above mandate are the length of the delay, the reasons for the delay possibly the arguability of the appeal and, lastly, the degree of prejudice to be suffered by the opposite party should the relief sought be granted.

Starting with the length of delay it is common ground that judgment was delivered on the 16th July, 2020. The applicant if aggrieved with the said judgment as asserted above ought to have filed a notice of appeal within fourteen days of that date pursuant to **Rules 75(1)** and **(2)** of the Court's Rules and then cause it to be served on the opposite party within seven (7) days pursuant to the prerequisite in **Rule 77(1)** of the **Court of Appeal Rules** both of which were not complied with hence the filing of the application under consideration.

The application seeking the Court's intervention is dated 18th November, 2020 a period of four (4) months and four (4) days. In **George Mwendu Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)**, extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in **Aviation Cargo Support Limited vs. St. Marks Freight Services Limited [2014]eKLR**, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

Applying the threshold in the above highlighted cases, it is my view that a period of (4) months and four (4) days is not so inordinate so as to disentitle a party to the nature of relief applicant has sought from the Court. The reason for the delay is relevant. It is alleged the judgment forwarded to them found its way into the spam folder and by the time counsel came across it time for initiating the appellate processes as of right had long lapsed.

In rebuttal, the respondent has mentioned in his submissions that the delivery of the judgment was brought to the applicant's advocates notice vide their letter dated 26th September, 2020, a position though not rebutted by the applicant with further submissions, it is evident that by that time, time for initiating the appellate process as of right had long lapsed. Applicant would have taken similar steps to resuscitate that process in the manner done. In any case failure to react promptly can only be pinned against the advocate who was addressed by his/her counterpart and not the innocent litigant. On the above assessment and reasoning, I rule that the reasons given for the delay in initiating the intended appellate

process is plausible and therefore excusable.

Turning to the arguability of the intended appeal, the applicant has exhibited a memorandum of appeal intending to raise six grounds of appeal. It is their intended complaint that the trial Judge exceeded jurisdiction by granting relief that was neither pleaded in the memorandum of claim nor canvassed at the trial thereby denying the applicant the right to fair hearing; commuted respondent's dismissal to normal termination which decision negated evidence, law, facts and submissions put forth by the respective parties at the trial, erroneously ordered payment of the respondent's pension dues which was excessive and unjustified thereby disregarding the relevant circumstances under which he exited service, erroneously rendering a decision which did not flow from the facts presented by parties at the hearing and in disregard of the documentary evidence and material tendered by the applicant; misdirecting himself by making an unsupported finding that the appellant had disentitled the respondent of pension dues a matter not pleaded and also arrived at in total disregard of evidence on record that the process followed in exiting from the applicant's service was fair, procedural, justified and therefore lawful; and lastly that the decision arrived at as a whole was contrary to law, facts and the body of the evidence adduced, submissions and authorities relied upon by the rival parties and judicial precedent; all of which in my view are arguable notwithstanding that they may not ultimately succeed.

The position in law is that an arguable appeal is not one that must necessarily succeed, but one that is bona fide. By bona fide, it means it is one that will invite a response from the opposite party; and second, one that warrants interrogation by the Court, a threshold the above highlighted grounds of appeal satisfy.

As for prejudice likely to be suffered by the respondent, it is their submission that he will be withheld from the enjoyment of the fruits of his judgment. When such competing rights arise, the Court has to perform a balancing act under the principle of equality of arms, that is, weighing the right of the successful party (the respondent) to access and enjoy the fruits of his judgment against the applicant's right to exercise its undoubted appellate right which is now constitutionally entrenched and is also now trite that it is the cornerstone of the **Rules** of law. When all is said and done, it is my view that the interests of justice in the peculiar circumstances of this application would demand that the applicant be accorded an opportunity to resuscitate its appellate process while the respondent is compensated for by way of costs.

In the result, the orders that command themselves to be made herein are as follows:

- 1) The applicant has leave of the Court to file and serve a notice of appeal within fourteen (14) days of the date of the delivery of the ruling.**
- 2) The applicant has sixty days from the date of the lodging of the notice of appeal to lodge and serve the record of appeal.**
- 3) In default, of any of items 1 and 2 above, the leave granted herein shall stand lapsed.**

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

