



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, (P).)**

**CIVIL APPLICATION NO. 396 OF 2020**

**BETWEEN**

**PRESBYTERIAN UNIVERSITY OF EAST AFRICA.....APPLICANT**

**AND**

**SHADRACK MUCHEMI MBAU.....RESPONDENT**

(Being an application for extension of time to file Notice of Appeal against the Judgment of the Employment and Labour Relations Court at Nairobi (Byram Ongaya, J.) delivered on 16th October 2020 *in E.L.R.C Cause No. 732 of 2016.*)

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**RULING**

1. By an application dated 11th December 2020, the applicant sought extension of time to file a notice of appeal against the judgment of *Ongaya, J.* dated 16th October 2020. The application is brought under *section 7* of the *Appellate Jurisdiction Act* and *rule 4* of this *Court's Rules*.
2. The brief background to this matter is that sometime in 2014, the respondent was employed by the applicant as an Assistant Registrar on a permanent and pensionable basis. Sometime in 2016, the applicant redeployed the respondent to serve as a Tutorial Fellow, which position the respondent declined to take up and instead instituted *Cause No. 732 of 2016* at the Employment and Labour Relations Court seeking, *inter alia*, a permanent injunction to restrain the applicant from deploying or redeploying him to sections and/or departments in which he lacked qualifications, experience and/or training.
3. On 16th October 2020, Ongaya, J. entered judgment for the respondent and amongst other orders directed that the respondent be reinstated as an Assistant Registrar with full pay without break in service, victimization or any loss of salary privileges, entitlement or benefits that prevailed prior to his suspension on 7th April 2016.
4. Aggrieved by that judgment, the applicant intends to prefer an appeal to this Court, hence the filing of the instant application. The application is supported by an affidavit sworn by *Mugao Dominic*, the applicant's Human Resource Manager. Mr. Mugao deposes, *inter alia*, that the delay in filing the notice of appeal against the impugned judgment was as a result of non-communication of the date of delivery of the judgment by the applicant's advocate; that the intended appeal has high chances of success, and therefore the orders sought ought to be granted.
5. The application is opposed by the respondent. In his replying affidavit, the respondent challenges the legal representation of the applicant by the firm of *J.K. Mungania & Company Advocates* on the basis that the provisions of *order 9 rule 9* of the *Civil Procedure Rules 2010* had not been complied with since the firm Muhuhu & Company Advocates was previously on record for the applicant; that there was inordinate in filing the application and the delay had not been sufficiently explained; that the judgment was delivered on 16th October 2010 and the same was communicated on 29th October 2020; that the respondent went back to the applicant's university on 13th November 2020 and delivered a letter dated 12th November 2020 to which was attached a copy of the impugned judgment; that the respondent filed a bill of costs dated 20th November 2020 and the applicant's advocate were aware of it. For those reasons the respondent urged this Court to dismiss the application.
6. The application was canvassed by way of submissions filed by both parties, which I have carefully perused. The principles under which this Court exercises its discretionary power under *rule 4* of the *Court Rules* is well settled. In *Leo Sila*

**Mutiso v Rose Wangari Mwangi, Civil Application No. Nai 255 of 1997**, it was held that: -

***"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay, secondly, 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."***

7. In this matter, the impugned judgment was delivered on 16th October 2020 and the applicant filed its application on 11th December 2020, almost three months from the date of delivery of the impugned judgment. The applicant's reason for not filing their notice of appeal within 14 days as prescribed under **rule 75(2)** of this **Court's Rules** is that there was delay that was occasioned by non-communication of the delivery date of the judgment by its former advocate. However, that argument was rebutted by the respondent who produced a letter dated 29th October 2020 sent to the applicant's advocate notifying them of the judgment.

8. The applicant averred that it only became aware of the judgment on 12th November 2020 through a letter from its former advocates. However, the applicant filed its application for extension of time on 11th December 2020. There is no explanation why the applicant did not file its application immediately it became aware of the impugned judgment. In **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR**, the Supreme held that: ***"It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court."*** In an earlier decision of this Court, **Abdul Azzizi Ngoma v Mungai Mathayo [1976] eKLR**, it was held: -

***"We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered."***

9. Bearing in mind the circumstances of this case, I am not satisfied that the delay in filing the application has been sufficiently explained by the applicant. There is sufficient evidence that the applicant's former advocates were aware of the impugned judgment way back on 29th October 2020. But even if they did not notify the applicant about it in time, the applicant concedes that it became aware of the judgment on 12th November 2020, yet for almost a period of one month thereafter, the applicant did not take any step if indeed it was keen on challenging the trial court's decision. Since no **"sufficient reason"** for the delay has been established, I have no basis of considering the other principles under **rule 4** of this **Court's Rules**. In the upshot, I find this application unmerited and dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 18th day of June, 2021.**

**D.K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

*Signed*

**DEPUTY REGISTRAR**