



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, (P). (IN CHAMBERS)

CIVIL APPLICATION NO. E102 OF 2021

BETWEEN

TEACHERS SERVICE COMMISSION.....APPLICANT

AND

MUCHIRI KIRAITHE.....RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal out of time in an intended appeal against the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) dated 27th October 2020

in

ELRC Cause No. 1966 of 2015.)

RULING

1. Before me is a Notice of Motion dated 6th April 2021 brought under **Article 159** of the **Constitution of Kenya 2010, Section 3, 3A and 3B of the Appellate Jurisdiction Act, rules 4, 41, 42, 43 and 47** of this **Court's Rules**, seeking grant of leave to the applicant to file and serve a notice of appeal out of time.
2. The application is supported by the grounds appearing on the face thereof and a supporting affidavit sworn by **Flora Manyasa**, who is an advocate practicing with the applicant and who had the conduct of the matter on behalf of the applicant before the trial court. The applicant avers that at the time judgment was delivered, Flora Manyasa was indisposed and presenting with covid-19 related symptoms and she therefore had to go into isolation as per the directives of the Ministry of Health; that a different advocate known as **Faith Kaluai** was requested to attend to the matter but she was not present when judgment was delivered as she was attending to a different matter, to wit, Kisumu, **Jackson Auko Opondo v. TSC; ELRC No. 240 of 2014**.
3. The applicant further avers that upon learning that judgment had been delivered in favour of the respondent, instructions were issued to the applicant's court clerk known as **Tom Bokea** to prepare and file a notice of appeal as well as write a letter requesting for typed proceedings from the trial court. However, the said court clerk and unbeknown to the applicant only wrote the letter requesting for typed proceedings and omitted to file the notice of appeal. The applicant argues that this was an inadvertent mistake on the part of their clerk which should not be visited upon an innocent party. With regards to the issue of delay in making the instant application, the applicant argues that upon its counsel resuming office, an application for enlargement of time was made before the trial court but the court ruled that it had no further jurisdiction on the matter since it was no longer seized of it.
4. The applicant further argues that the delay in filing the notice of appeal was not inordinate or deliberate and is therefore excusable; and that it has an arguable appeal with high chances of success. It is the applicant's further argument that the respondent will not suffer any prejudice if this application is allowed but if the respondent was to suffer any prejudice then the same would not be so great that it cannot be adequately compensated in damages.
5. The applicant has filed written submissions which are dated 29th April 2021. In its submissions, the applicant reiterates the grounds

appearing in the application and argue that it is in the interest of justice that it be given an opportunity to pursue its intended appeal so that substantive justice is achieved.

6. The application was opposed through a document titled ‘supporting affidavit’ but which is in the form of a replying affidavit sworn by the respondent on 28th April 2021. The respondent argues that the applicant has not adduced any evidence to confirm that its counsel was indisposed and/or was in isolation owing to covid-19 related complications. Further, that even assuming that she was in isolation, she could still have filed the notice of appeal in time through the Court’s e-filing system. It is the respondent’s further argument that the applicant has not given satisfactory reasons for the delay; that the application is an abuse of the Court process; and that the respondent stands to suffer prejudice if the application is allowed. The grounds cited in opposing this application are replicated by the respondent in his written submissions dated 29th April 2021.

7. I have considered the application, grounds in support and opposition thereof, the submissions as well as the law. The principles upon which this Court determines an application for extension of time under **rule 4** are well settled. The Court considers the length of the delay; the reason for the delay; the chances of success of the intended appeal; and the degree of prejudice that would be occasioned to the respondent if the application is granted. See Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2 EA 231; Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR; and Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019.

8. In Njuguna v Magichu & 73 Others [2003] KLR 507, Waki, J.A. expressed himself thus:

“The discretion exercisable under Rule 4 of this Court’s Rules is unfettered. The main concern of the Court is to do justice between the parties. Nevertheless, discretion has to be exercised judicially, that is on sound factual and legal basis.”

9. The trial court delivered judgment in this matter on 27th October 2020. Pursuant to **rule 75** of the **Rules** of this Court, the applicant was supposed to have filed its notice of appeal within fourteen days from the date of delivery of the judgment. There is a time gap of about 161 days between the date of delivery of the judgment and the date of filing of this application. The applicant has explained the reasons for the delay in the supporting affidavit by Flora Manyasi and in two separate affidavits sworn by Faith Kaluai and Tom Bokea. I am of the opinion that the even though there was delay, the reasons adduced by the applicant for the delay are plausible. I am alive to the various complications and disruptions brought about by the Covid-19 pandemic and going by the explanation tendered in the application, I am of the view that the applicant is deserving of the exercise of my discretion in its favour.

10. On the aspect of the chances of success of the intended appeal, it is not my role at this stage to determine definitively the merits of the intended appeal. That is the duty of the full court when it is ultimately presented with the intended appeal. In this regard, I am guided by the case of Athuman Nusura Juma v Afwa Mohamed Ramadhan [2016] eKLR where this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

11. Going through the draft memorandum of appeal annexed to this application, I am satisfied that the applicant has bona fide issues for determination by way of appeal, which in effect means that the applicant has an arguable appeal.

12. On the issue of the degree of prejudice to be occasioned on the respondent if the application is allowed, the applicant argues that no prejudice will be suffered by the respondent; and that if the respondent was to suffer any prejudice then the same would not be so great that it cannot be adequately compensated in damages. The respondent on the other hand, argues that he stands to suffer prejudice for reasons, *inter alia*; that he will not be able to access the award of the court despite having a decree against the applicant and, being denied access to credit facility by different lending institutions because of being listed adversely by the Credit Reference Bureau. Taking the circumstances of the dispute between the parties herein into consideration, it is my opinion that the degree of prejudice that the respondent stands to suffer if this application is allowed is outweighed by the prejudice that the applicant will suffer if this application is not allowed

13. Consequently, I allow the application and direct the applicants to file a proper notice of appeal within **fourteen (14)** days from the date of this ruling. The applicant shall also bear the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 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