



**Kenya Council of Employment and Migration Agencies v National Police Service Commission & 8 others (Civil Application 35 of 2019) [2021] KECA 360 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 360 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 35 OF 2019  
J MOHAMMED, JA  
DECEMBER 17, 2021**

**BETWEEN**

**KENYA COUNCIL OF EMPLOYMENT AND MIGRATION  
AGENCIES ..... APPLICANT**

**AND**

**NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
JOHNSTON MAFENYI KAVULUNDI ..... 2<sup>ND</sup> RESPONDENT  
PETER KILONZO KAVILA ..... 3<sup>RD</sup> RESPONDENT  
ALHAJI OMAR ABDI SHURIE ..... 4<sup>TH</sup> RESPONDENT  
DEPUTY INSPECTOR GENERAL POLICE SERVICE ..... 5<sup>TH</sup> RESPONDENT  
DEPUTY INSPECTOR GENERAL ADMINISTRATION POLICE  
SERVICE ..... 6<sup>TH</sup> RESPONDENT  
INSPECTOR GENERAL NATIONAL POLICE SERVICE ..... 7<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT  
PRINCIPAL SECRETARY NATIONAL TREASURY ..... 9<sup>TH</sup> RESPONDENT**

*(An application for extension of time to file an appeal out of time from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (M. N. Nderi, J.) delivered on 30th May, 2018 in J. R. Application No. 11 of 2017)*

**RULING**

Background



- [1] Before me is an application dated 21st December, 2018 and filed on 5th February, 2019 brought under Rule 4 of this *Court's Rules* and all other enabling provisions of the law. Kenya Council of Employment and Migration Agencies (the applicant) seeks an extension of time to file an appeal out of time from the judgment of the Employment and Labour Relations Court (ELRC), (Nderi, J.) delivered on 30th May, 2018. The National Police Service Commission, Johnston Mafenyi Kavulundi, Peter Kilonzo Kavila, Alhaji Omar Abdi Shurie, The Deputy Inspector General Police Service, The Deputy Inspector General Administration Police Service, Inspector General National Police Service, The Attorney General And The Principal Secretary National Treasury are the respondents herein.
- [2] The application is premised inter alia on the grounds, that the applicant filed the notice of appeal dated 31st May, 2018 in time; and that the delay in filing the record of appeal was because the proceedings were stolen. The application is supported by the affidavit of the applicant's Chairman, Mr. Evans Nyambega Akuma, in which he reiterated the grounds on the face of the application.
- [3] A replying affidavit was filed on behalf of the 5th, 6th, 7th & 8th respondents and sworn by Ms Leah Odhiambo, a State Counsel at the Office of the Attorney General who opposed the application and averred that the reasons given by the applicant are not tangible to warrant issuance of orders sought by the applicant; that the memorandum of appeal does not disclose an arguable appeal; that there has been an inordinate delay by the applicant and if the orders sought are granted, the same the 5th & 6th respondents will suffer prejudice; that the applicant has not laid any basis to warrant the extension of time; and that litigation must come to an end.

#### Submissions

- [4] The application was canvassed by way of written submissions. In its written submissions, the applicant submits that the 5th to 9th respondents' submissions are incompetent since they have not filed an affidavit as per this Court's order of 25th July, 2019. The applicant also submitted that it shall be prejudiced if the instant application is not allowed.
- [5] The 1st and 2nd respondents opposed the application and submitted that the consent order which the applicant alleged was entered into with the Office of the Attorney General is not in existence and is not on record; and that the applicant has failed to place any material evidence before this Court to prove its case. Counsel urged this Court to dismiss the application with costs to the respondents.
- [6] In their written submissions the 5th to 9th respondents contended that the applicant has not given sufficient reason for the delay of over two (2) years to warrant an extension of time to file the appeal out of time. It was submitted that an applicant seeking enlargement of time to file an appeal or deem an already filed appeal as properly filed, must show that he has a good cause for doing so. For this proposition, the case of *Feroz Begum Qureshi and Another v Maganbhai Patel and Others [1964] EA 633* was cited.
- [7] Additionally cited was the case of *Daphne Parry v Murray Alexander Carson [1963] EA 564* where the Court held that if the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant. Further relied on was the case of *Alibhai Musajee v Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998*, where it was held that failure to act does not constitute a good or sufficient cause.
- [8] The 5th to 9th respondents further submit that the applicant's intended appeal has no chance of success. It is their submission that the intended appeal is frivolous and a total waste of judicial time.

#### Determination



[9] I have considered the application, the grounds in support thereof, the submissions by the parties and the law. The discretion that I am called to exercise in the determination of this application is provided under Rule 4 of the Court of Appeal Rules which provides thus:

“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 or 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”.

[10] The parameters that must be established in such an application were aptly stated by this Court in *Leo Sila Mutiso v Hellen Wangari Mwangi 1999*] 2 EA 231 as follows:

“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.”

[Emphasis supplied].

[11] Further, factors that the court can take into consideration are discretionary and non-exhaustive. This Court in *Fakir Mohammed v. Joseph Mugambi & 2 Others (2005) eKLR* held that:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it 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, (possible) 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 factor”. [Emphasis supplied].

[12] Additionally, in *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019* this Court held that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.” [Emphasis supplied].

[13] The issue for determination is whether the application is merited in view of the principles set out in the cases cited above. Following the delivery of the impugned judgment on 30th May, 2018, the applicant lodged a notice of appeal on 31st May, 2018. The record of appeal ought to have been filed 60 days



from 31st May, 2018, on or before 30th July, 2018. The instant application is dated 21st December, 2018 and was filed on 5th February, 2019, about 190 days after the timeline. In the circumstances of this case, I find that the delay is inordinate and has not sufficiently been explained.

[14] This Court in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR* aptly stated that:-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable”.

[15] The applicant explains that the delay in filing the record of appeal arose from loss of proceedings arising from a robbery. However, the reason given for the delay has not been satisfactorily explained in the application as well as in the supporting affidavit sworn by the applicant’s Chairman.

Further, the applicant has not explained when the proceedings were collected, when the robbery occurred and the steps that were taken thereafter to obtain copies of the proceedings or to file the instant application. It is upon the applicant to place sufficient material before the court which would explain the delay in filing the record of appeal. There have to be valid and clear reasons upon which discretion can be favourably exercised. In this respect, this Court in *Waweru & Another v. Karoni [2003] KLR 448* stated that:

“The rules of the Court must prima facie be obeyed and in order to justify a Court in extending the time during which some step in the procedure requires to be taken there must be material on which the Court can exercise its discretion”.

[16] I now turn to the question of whether the applicant has demonstrated that it has an arguable appeal. The 5th, 6th, 7th, 8th, & 9th respondents contend that the applicant’s appeal has no chances of success, is frivolous, and a waste of judicial time; and that it has no chances of success as there is no consent agreement adopted by the parties for any monies to the applicant or at all.

[17] The draft memorandum of appeal on record is incomplete. That default notwithstanding, in the absence of a draft memorandum of appeal, the Court can gauge the arguability of the intended appeal from other supportive evidence. An arguable appeal is not one that must succeed, but one which is not frivolous and merits consideration by the Court. However, a single judge cannot determine definitively the merits of the intended appeal. In *Athuman Nusura Juma V. Afwa Mohamed Ramadhan, CA No 227 of 2015*, 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’”.

[18] On the degree of prejudice to the respondents, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying it an extension, against the prejudice to the respondents in granting an extension. The respondents have claimed that they will suffer prejudice if the orders sought are granted.

[19] From the circumstances of the application before me, the applicant has failed to demonstrate the existence of the parameters set out in *Leo Sila Mutiso (supra)*. The upshot is that I decline to grant the



prayer to extend the time within which the record of appeal may be filed and served. The application is accordingly dismissed. Each party to bear its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

DEPUTY REGISTRAR

