



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, JA.)**

**CIVIL APPLICATION (NAI) NO. 169 OF 2018**

**BETWEEN**

**NATIONAL POLICE SERVICE.....APPLICANT**

**AND**

**BASTIAN KIRUNYA LIMBUTA.....RESPONDENT**

(Being an application under Rule 4 of the Court of Appeal Rules, for leave to file and serve Notice of Appeal and Appeal out of time from the Judgment of the Employment and Labour Relations Court at Nairobi (Nderi, J.) dated 23rd day of October, 2017

*in*

***ELRC Petition No. 41 of 2016.)***

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**RULING**

1. On 23rd October, 2017 **Nderi, J.** delivered a judgment in which the following orders were issued;

i. The petitioner's fundamental rights and freedoms have been violated.

ii. An order of certiorari is hereby issued to quash the entire proceedings and the decision of the 1st respondent declaring that the petitioner had failed vetting and had been discontinued from the Kenya Police Service including the decision summarily rejecting the petitioner's application for review.

iii. The petitioner is awarded damages in the sum of Kshs.3 million for the violation of his right to fair administrative action under Article 47 of the Constitution of Kenya 2010

v. The award in (iii) above is payable with interest at court rates from date of filling petition till payment in full.

2. Following the above orders, the Kenya National Police Service, (applicant), filed the instant application dated 7th June, 2018 that is anchored under **Rule 4** of the Court of Appeal Rules. The applicant applies for leave to file and serve a Notice and Record of Appeal out of time against the said judgment on the grounds that they were not notified when the judgment was delivered by the court. The application is supported by the affidavits of Johnson Kavuludi sworn on 7th June, 2018 and a supplementary affidavit by Joseph Vincent Onyango sworn on 19th December, 2018.

3. It is asserted in the said depositions that the applicants were served with the judgment on 24th November, 2017 after the date for filing a Notice of Appeal had lapsed. That given the judgment was served upon the applicant towards the end of the year, the same could not be deliberated on by the applicant's Board which only convened in March upon the swearing in of the new Deputy Inspector General of Police as Commissioner of the National Police Service by the Hon Chief Justice. After deliberating on the judgment at the board meeting held on the 14th May, 2018 the Board resolved to appeal against the judgment and instructed their legal team to seek leave to appeal.

4. During the hearing of this application, Mr. Ojwang, learned counsel for the applicant, argued that the appeal has merit because the vetting exercise was carried out according to the National Police Service Act and was a matter of public interest. Moreover, the applicant was not aware of the date of the judgment and when the judgment was brought to their attention the Commission did not have the requisite quorum. On prejudice, counsel argued that the applicant complied with the judgment by reinstating the respondent but they are aggrieved by the order

that requires that he be paid damages and costs. According to counsel, the delay in filing the Notice of Appeal was not intentional, and he urged the Court to allow the application.

5. Opposing this application was Miss Tarus, learned counsel for the respondent, who relied on the replying affidavit sworn by Sabastian Kirunya Limbitu (respondent) on 15th November, 2018. It was argued that the applicant was aware of the judgment date, therefore they ought to have taken the necessary steps to peruse the court file and find out the decision of the court in order to lodge the appeal within the prescribed timelines. It was further stated by the respondent that no basis was laid for extension of time nor were the reasons advanced satisfactory.

6. Also the respondent challenged the application on account of the delay which in his view was prejudicial to him as he contended that he was reinstated after almost one year after judgment. Thus granting leave will go against the policy that disputes should be resolved in a timely manner and litigation should come to an end. Miss Tarus emphasized that the applicant was aware of the date of judgment but failed to attend the court; better still they could have perused the court file to see the decision of the court and in her view the delay of six months was inordinate. Counsel agreed however that the respondent was reinstated back in office by a letter dated 29th November, 2018. She also argued that there is no draft memorandum of appeal to demonstrate that the appeal is arguable.

7. In a brief rejoinder, Mr. Ojwang submitted that he was not served with a judgment notice which should have been served by the court. Further the supporting affidavit detailed the grounds of appeal that clearly pointed out there is a question of law to be settled by the Court of Appeal on whether the police officers who were vetted in accordance with the law should be awarded damages.

8. The prayers sought in this application for extension of time call for exercise of discretion which is generally unfettered. However, exercise of judicial discretion, is always done on reasonable basis; it must be based on facts or law that demonstrate the applicant is deserving of the orders of extension of time. In other words, judicial discretion cannot be exercised out of sympathy, whimsically or capriciously. The parameters that guide the Court are well set out in a long line of authorities. See the case of; -Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur):-

***“It is now 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.”***

The above list is of course not exhaustive as held in the case of; - Mongira & Another vs. Mukaria & Another, 2005 2 KLR 103 at page 106-107, where the Court again cited Leo Sila Mutiso, (supra), and went on to state:

***“Those, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general” Rule 4 gives the Judge unfettered discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above. ... To limit such issues only to the grounds set out in the above paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”***

9. With the above principles in mind, I now approach the application before me, to answer the question whether the applicant has offered justifiable reasons for the delay and whether granting leave will prejudice the respondent.

10. The reasons advanced by the applicant that they were not aware of the date when the judgment was delivered until when they were served with a copy of the judgment on the 24th November, 2017 sounds plausible. This is because the respondent did not present any material to show that the court notified the applicant of the date for delivery. The second argument presented by the applicant which is also a matter of general knowledge is that the National Police Service Commission which is a constitutional Commission did not have the requisite quorum until some Commissioners were sworn in office and a meeting was held on 14th May, 2018 when the Commission deliberated on the judgment and resolved to appeal.

11. To me this explanation is also not farfetched considering a couple of weeks were also taken up by the Christmas vacation.

12. On whether the appeal is arguable; although the applicant did not attach a draft memorandum, paragraph 13 of the supporting affidavit alludes to what the applicant refer to as ‘arguable grounds’. Whether the grounds are arguable of course is within the province of the full bench, because even what may appear arguable may not succeed. Nonetheless, I discern there are issues of law that can benefit from the interpretation of this Court such as, the award of damages to a police officer who was subjected to vetting process that is provided in a statute. The other issue is whether the respondent will suffer prejudice. Other than delay in getting this dispute settled which inconvenience is a price to pay in the quest for justice, the respondent was reinstated in office.

13. In the event, I find the motion dated 7th June, 2018 has merit, I allow the same and I order as follows:-

- 1. The applicant shall lodge and serve on all the respondents its Notice of Appeal within seven (7) days of the date hereof.**
- 2. Thereafter, the applicant shall lodge his Record of Appeal within thirty (30) days from the date hereof and serve the same on all the respondents within seven (7) days of its lodgment.**
- 3. The respondent shall have the costs of this application.**

**Dated and delivered at Nairobi this 5th day of April, 2019**

**M. K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original

**DEPUTY REGISTRAR**