



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAI J.J.)

CIVIL APPLICATION NO. NAI 114 OF 2017

BETWEEN

OMARIBA ELIJAH KEMONDE.....APPLICANT

AND

THE SECRETARY, TEACHERS SERVICE COMMISSION.....RESPONDENT

(Being a reference from the ruling of G.B.M Kariuki J.A. dated 24th November, 2017 in an

application to be relieved from court fees and security for costs and for extension of time to

file a record of appeal out of time from the judgment of the Employment and Labour Relations

Court at Nairobi (Abuodha J.) delivered on 10th February 2017 in E.L.R.C Cause No. 1783 of 2014)

RULING OF THE COURT

Mr. Omariba Elijah Kemonde (the applicant), was a teacher employed by the **Teachers Service Commission** (TSC) (the respondent) on contractual basis at the Sheikh Ali High School in Mandera County from **27th September, 2010**. In **October 2011**, the government, through TSC, commenced a process to convert the terms of the teachers employed under contract to permanent and pensionable terms. In order to qualify for the new terms, the teachers were required to meet a certain threshold regarding their academic and professional qualifications. Unfortunately, the applicant failed to meet the requirements and his services were terminated with effect from **1st February 2012**.

The applicant undertook a bridging course to fulfil the missing requirements in the hope of getting his job back. Fortunately for him, he was reinstated and re- deployed to Sheikh Ali High School. Needless to say, through a series of unfortunate circumstances, the applicant found himself, once again, without employment as the new offer lapsed before he could accept it.

The circumstances surrounding the delay in acceptance of the new offer and the consequences thereto were examined during trial by **Abuodha J.** In a judgment rendered on **10th February, 2017**, the learned judge declined to reinstate the applicant or to grant any of the other prayers that the applicant had sought in his claim against TSC. Instead, the learned judge directed the respondent to give the applicant priority and recruit him in its next recruitment exercise.

The applicant was dissatisfied with this outcome and sought to lodge an appeal against the decision of **Abuodha J.** Regrettably, the notice of appeal dated **13th February 2017** was lodged out of time on **2nd March, 2017** and the applicant did not seek or obtain leave to file it out of time. It is only on **24th May, 2017** that the applicant filed an application seeking relief from paying court fees and security for costs as well as leave to file the intended appeal out of time. The application was premised on the grounds that there was a delay in obtaining certified copies of the typed proceedings and judgment to enable him file the application to be exempted from paying court fees and costs.

In his supporting affidavit sworn on **12th May, 2017**, the applicant explained that he was financially constrained and thus unable to secure legal representation or come up with the necessary court fees required to file the appeal. He further deposed that the extension of time would not cause undue prejudice to the respondent as the delay was not inordinate and the record of appeal had already been prepared.

G.B.M. Kariuki, JA heard the application and in his ruling delivered on **24th November, 2017** dismissed the application for lack of merit.

The Judge held that the applicant had failed to proffer any explanation for the delay in lodging the notice and record of appeal out of time especially when the proceedings from the ELRC were ready for collection before the statutory 60 days for filing the record of appeal had lapsed. There was also unexplained delay in the filing of the application seeking leave to file the notice and record of appeal out of time. Furthermore, the applicant had also failed to demonstrate that his intended appeal was arguable and at the very least, he had failed to show what he seeks to challenge in the ruling of **Abuodha J**. As a result of these findings, the Judge thought it unnecessary to delve into the prayer to relieve the applicant the burden of paying court fees and security for costs.

It is this ruling that is the subject of the reference to the full court. In the applicant's motion filed on **8th December 2017** and supported by his affidavit sworn on **30th November 2017**, the applicant deposed that the Judge failed to consider crucial evidence on record which would have resulted in a different outcome; that the notice of appeal was filed on **15th February 2017** and was therefore filed within time; that the delay by the registrar in lodging the notice of appeal was beyond his control; that there are material errors on the face of the record sufficient to interfere with the decision of the Judge; that Article 159(2)(d) of the Constitution enjoins the court to administer substantive justice without undue regard to technicalities and finally, that the application was brought in good faith and without undue delay.

The application was opposed by the replying affidavit filed on behalf of TSC by **Stella Chemutai Rutto** sworn on **26th November, 2018**. It was deposed that the applicant was guilty of *laches* and had yet to file and serve the record containing the memorandum of appeal. We were urged to dismiss the application with costs.

We have considered the motion and the supporting affidavit, the respondent's replying affidavit filed and the applicant's brief submissions when he appeared before us on **17th April, 2019**. Although there are two applications on record, on **29th January, 2019**, when the applicant appeared before **Gatembu, JA**, an order was made to the effect that:

“The applicant seeks a review of a decision of a single judge, the Hon. Mr. Justice G.B.M. Kariuki, JA that was delivered on 24th November, 2017. The applicant's present application would therefore appear to be a reference to the court under Rule 55 of the Court of Appeal rules. In the circumstances, the application is adjourned for hearing before the full court on a date to be fixed in the registry on basis of priority. Today's costs in the application.”

Rule 55 of this Court's rules provide as follows:

“55 (1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge:

(a) In any criminal matter, wishes to have his application determined by the Court; or

(b) (b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he may apply therefore informally to the judge at the time when the decision is given or by writing to the registrar within seven days thereafter.

(2) At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced.”

In the Notice of Motion dated **30th November, 2017**, the applicant sought to review the ruling of **G.B.M. Kariuki, JA** given on **24th November, 2017**. The specific prayer sought in the motion was:

“That the Honourable court be pleased to review and/or set aside its ruling and orders issued on 24th November, 2017 and in its place there be an order allowing the application dated 12th May, 2017”

In the supporting affidavit (in support of the motion of **30th November, 2018**), the applicant deposed that there was an error on the face of the record; that the Notice of Appeal was filed on **15th February, 2017** and was lodged on **2nd March, 2017**; that the Notice of Appeal was filed 5 days after the delivery of judgment by the ELRC; that the Registrar delayed in lodging the Notice of Appeal, a matter beyond the applicant's scope; that the respondent was served with the Notice of Appeal on **7th March, 2017**; and, that the impugned ruling runs contrary to the provisions of Article 159 (2)(a) of the Constitution of Kenya, 2010.

The applicant was dissatisfied with the decision of the ELRC rendered on **10th February, 2017** in Nairobi Cause No. 1783 of 2014. The Notice of Appeal dated **13th February, 2017** was filed on **2nd March, 2017**. This was clearly outside the fourteen (14) days stipulated by Rule 75 of this Court's Rules. The Notice was late by six (6) days. The learned judge considered the delay and stated:

“There is no explanation why the notice of appeal was not filed timeously. But the period of the delay of six days was not inordinate and could be excused upon a reasonable explanation being proffered. Delays that are not inordinate also require to be explained. If this were not so, the object and purpose of the rules would be defeated.

Under rule 82 of the Rules of this Court, an intending appellant is required to institute appeal by lodging in the appropriate court registry within 60 days of the date when the notice of appeal was lodged the memorandum of appeal, record of appeal prescribed fees and security for costs. From the date when the notice of appeal should have been filed (on or before 24th February, 2017) to the date when this application was filed on 24th May, 2017, three months had elapsed and from the date when the Notice of Appeal was filed on 2nd March, 2017 to the date when the application was made on 24th May, 2017, two months and three weeks had elapsed. The proceedings in E & LR Court Cause No. 1783 of 2014 were ready for collection on 3rd April, 2017. As the period of 60 days from the last date on which the Notice of Appeal should have been filed elapsed on

24th April, 2017, and as the period of 60 days from the date on which the notice of appeal was lodged elapsed on 2nd May, 2017, an explanation why the record of appeal was not prepared and lodged on or before 24th April, 2017 or, on or before 2nd May, 2017 was necessary. By the time the applicant filed his application on 24th May, 2017 for extension of time to appeal, 90 days from 24th November, 2017 had elapsed and 82 days from 2nd May, 2017 had elapsed.

Although the applicant avers that he retained messrs Masika & Koross Advocates to act for him in the appeal, they did not ensure that a letter bespeaking the proceedings was copied to the advocates for the respondent notifying them of the applicant's intended appeal. The effect of this default is that the applicant cannot take advantage of the proviso to Rule 82 (1) of this Court's Rules which facilitates exclusion of time certified by the Registrar of the High Court as having been required for the preparation and delivery of the proceedings to the applicant. However, in this case, no exclusion of time was necessary because the proceedings were ready for collection on 3rd April, 2017 long before the period of 60 days for appealing run out. The appeal should have been filed within 60 days from 24th February, 2017 when the notice of appeal should have been filed or 60 days from 2nd March, 2017 if extension of time was sought and obtained. A court of law will not shut out a litigant who acts with a sense of dispatch and is able to show that he was diligent in pursuing the filing of the appeal especially where the delay was unavoidable."

The learned judge considered the motion and in our view, rightly came to the conclusion that the letter of 13th February, 2017 from the applicant's counsel namely, **Masika & Koross** bespeaking the proceedings having not been copied to the respondent, the proviso in Rule 82 (1) which facilitates exclusion of time certified by the Registrar of the High Court for the preparation of the proceedings could not avail him. In effect, the applicant had to file and serve a record of appeal within 60 days of the filing of the Notice of Appeal. The application seeking an order to file the appeal out of time was filed on 24th May, 2017. This was long after the period to file the Notice of appeal and the record of appeal had lapsed, inspite of having receipt of proceedings on 3rd April, 2017. Again, the learned judge found that there was no averment by the applicant as to whether he had an arguable appeal.

We are in agreement with the learned judge's summation of the provisions of the rules. Perhaps, the applicant realizing that he failed to comply with the rules, opted to rely on Article 159 of the Constitution. In **Law Society of Kenya vs. Centre for Human rights & Democracy & 12 Others, Petition No. 14 of 2013**, the Supreme Court of Kenya stated:

"Indeed, this Court has had occasion to remind litigants that Article 159

(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principles that

"justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 203, [2013] eKLR)"

It is in view of the above that we find no merit in this reference. It is hereby dismissed. We make no order as to costs as although the respondent's counsel was served with a hearing notice on 4th April, 2019, she did not attend court on 17th April, 2019.

It is so ordered.

Dated at and Delivered at Nairobi this 11th day of October, 2019.

M. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR