IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 102 OF 2019

BETWEEN

PATRICK WANYONYI KHAEMBA...APPLICANT

AND

THE TEACHERS SERVICE COMMISSION......................1ST RESPONDENT

THE BOARD OF MANAGEMENT,

KAPLETINGI MIXED DAY SECONDARY SCHOOL....2ND RESPONDENT

FRANCIS TANUI..3RD RESPONDENT

(An application for extension of time for giving notice of appeal and for leave to appeal out of

time from the decision of the Employment and Labour Relations Court at Kisumu

(Nduma Nderi, J.) dated 20th September, 2018 in **ELRC PETITION NO. 30 OF 2017**)

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RULING

What is before me is an application by way of motion on notice dated 26th August, 2019. It was filed pursuant to **Articles 159 & 259 (1) of the Constitution, Sections 3 (2), 3A and 3B of the Appellate Jurisdiction Act** and R**ules 1 (2)(4), 42, 43 (1) & 77 of the Court of Appeal Rules.** The applicant seeks first, extension of time within which to lodge and serve a Notice, Memorandum and record of Appeal on the respondents. Secondly, that should the application be allowed then the notice, memorandum and the record thereof filed be deemed as duly filed and served upon the respondents within time.

The grounds in support of the application are that; the applicant was aggrieved by the ruling of the trial court dated 20th September, 2018; there was delay in delivering of judgment by the court in **Kisumu ELRC Petition No. 23**; there was also delay by 1st respondent in delivering a decision on his request for review its decision to dismiss from service in **TSC/DISC/NO.0929/09/2015**; being aged and out of employment meant lack of funds which further aggravated his ability to pursue the appeal timeously; that the application was made in good faith; that he would be prejudiced as to his right to access justice would be undermined should the prayers sought not be granted; that the respondents should not be allowed to benefit from procedural tricks to drive him out of the seat of justice; that the delay was not deliberate but is excusable; that the intended appeal was arguable with overwhelming chances of success; and extension of time will not cause any undue hardship or prejudice to the respondents. Finally, he stated that the above were extenuating circumstances that warranted this Court's exercise of discretion in his favour.

The background to the application is that the applicant who is a teacher by profession sued the respondents in **Kisumu ELRC Petition No. 23 of 2015** challenging his interdiction. The petition was dismissed on 16th July, 2019. During pendency of delivery of the judgment in the said petition, the 1st respondent instituted disciplinary proceedings in **TSC/DISC/NO.0929/09/2015** against the applicant and subsequently terminated his employment. Aggrieved, the applicant filed an application for review dated 30th November, 2016 with the 1st respondent. The application was unsuccessful and the applicant's termination was upheld. The applicant then moved and filed **Kisumu ELRC Petition No. 30 of 2017** that is the subject of the present application in which he challenged the dismissal.

The respondents countered the petition by filing an application in which they sought to strike it out on grounds that it was *sub judice* and premature. Subsequently the respondents' application was allowed and the petition was struck out with costs for duplicity and being an abuse of the court process.

Dissatisfied with the above decision, the applicant intends to appeal to this Court. However the time for filing the notice, memorandum and record of appeal is long gone, hence the instant application. The application is supported by the applicant's affidavit in which he has rehashed, reiterated and expounded on the grounds in support of the application already set out hereinabove

In a Replying Affidavit sworn by one, **Mary Rotich**, the Director in charge of Field Services of the 1st respondent, she deposes that; the applicant was employed by the 1st respondent in 1992 and posted to Canon Kituri Secondary School in Taita Taveta District where he was interdicted in 1996 and suspended for three months for having carnal knowledge with a student; he was again interdicted in 2001 for an attempt to defile a student while teaching at Chakol Secondary School, while still on suspension he in 2002 was re-interdicted for presenting documents unofficially obtained from the Provincial Director's office to the 1st respondentFollowing this re-interdiction, the applicant filed a Judicial Review application being **Bungoma Misc. Application No. 99 of 2002** which he successfully challenged the re-interdiction and the court quashed the re-interdiction. The 1st respondent unsuccessfully appealed the above decision. It was then that the 1st respondent on the advice of the Attorney General unconditionally reinstated the applicant and posted him to Rhamu Girls Secondary School and paid him salary and allowances for all the six years he had been out of service. In 2012 he was again interdicted for desertion of duty and suspended for two months. The applicant then filed **Kisumu Constitutional Petition No. 231 of 2013** challenging his interdiction and subsequent suspension. The court upon hearing the petition quashed the interdiction and suspension and the applicant was reinstated in his employment and posted to Kapletingi Secondary School. While at this school he was interdicted for hosting three female students in his personal residence contrary to the regulations governing the teaching service. The applicant then filed **Kisumu ELRC Petition No. 23 of 2015** which compelled the 1st respondent to dismiss him from employment for immoral behavior. The applicant again rushed to court and filed **Kisumu ELRC Petition No. 30 of 2015** which was struck out for duplicity and abuse of the court process as already stated.

It was further deposed that; the application having been filed one year after the ruling is an afterthought and an abuse of the court process. That the applicant was guilty of inordinate and inexcusable delay, bad faith, indolence and lack of respect for court process. That no proper, reasonable or justifiable reason had been offered for the delay and that the outcome in **Kisumu ELRC Petition No. 23 of 2015** and purported review had no bearing on the merits of **Kisumu ELRC Petition No. 30 of 2015;** that the applicant failed to disclose material facts to the effect that **Kisumu ELRC Petition No. 23 of 2015** had been dismissed. That the 1st respondent was reasonably apprehensive that should the intended appeal succeed it will be forced to trace the school girls who had testified in the proceedings four years ago in order to organize its defence before the trial court. That memories may have faded and that members of Board of Management who heard the applicant's case had since retired and documents may have disappeared hence it would be in the interest of the public that litigation should come to an end so as to uphold and preserve the integrity of the judicial process. That the court is bound by the Constitution on expeditious administration of justice and therefore it is in interest of good order for the court to allow public bodies to perform their administrative duties and also taste the fruits of their judgment. Finally, it was deposed that this Court should exercise its discretion in a manner that upholds the procedural requirements of the court which are mandatory in nature taking into account that the applicant had been time and again welcomed to the seat of justice until the moment he started to abuse the court process.

At the hearing of the application, the applicant was present in person while **Mr. Anyuor,** learned counsel appeared for the respondents. They all had filed written submissions which they highlighted.

The applicant submitted that he wanted to be given time to be heard on the merits of his dismissal from employment. That the ruling was delivered on 20th September, 2018 and his failure to file the appeal in time was occasioned by the delay in the delivery of the judgment in **Kisumu ELRC Petition No. 23 of 2015.** He further submitted that there was also ongoing internal review process with the 1st respondent which took time before the decision was made. The applicant further submitted that he lacked funds to pursue the appeal and that this Court had unfettered discretion to grant the application. He submitted further that **Kisumu ELRC Petition No. 23 of 2015** dealt with his interdiction while **Kisumu ELRC Petition No. 30 of 2015** touched on his dismissal and that while he was at liberty to file a fresh suit arising out of his dismissal, the same would be successfully defeated by a plea of limitation.

Opposing the application, Mr. Anyuor submitted that no notice of appeal was filed within the requisite time despite the cost being a mere Kshs. 75/-. The appellant was a teacher by profession who had filed several suits before and therefore financial constraints was not a justifiable reason for the delay. In any event he had the option to invoke pauper brief provisions in the Court of Appeal Rules but had failed to do so. Counsel submitted further that the applicant was guilty of inordinate and inexcusable delay. The delay of 365 days was so inordinate that this Court should not countenance it. That the applicant was abusing the court process by filing a multiplicity of suits. Finally, counsel submitted that the respondent will suffer prejudice as the witnesses who testified four years ago were girls who had since left school, their memories may have faded and it will be difficult to trace them in any event.

I have considered the application, the submissions by the parties and the law. The issue for my determination is whether the application is deserving. To do so, I am mainly being called upon by the applicant to exercise my unfettered discretion under Rule 4 of this Court's rules in his favour. Rule 4 of the Court of Appeal Rules provides inter alia:

> "**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 doing 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**."

As stated above, an applicant may apply for extension of time either before or after taking the action in respect of which extension of time is sought. The applicant has already lodged a notice, memorandum and record of appeal but all out of time.

The discretion of a single Judge under Rule 4 is wide and unfettered but it must be exercised judiciously upon reason and not subjectively, impulsively, on whim or emotion. For the court to exercise this discretion, the applicant must establish the foundation upon which the

discretion should be exercised in his favour. This Court in the case of **Leo Sila Mutiso v Rose Wangari Mwangi, Civil Application No. Nai.255 of 1997 (unreported)** took the view 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 delay; secondly, the reason for 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."**

Similarly, in **Mwangi v Kenya Airways Ltd, [2003] KLR 48**, the court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4, went on to hold that:

> **"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."**

The principles for extension of time were further considered by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others** **[2014] eKLR (page 31) as follows:**

> **"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion: extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court; a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis; where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court; whether there will be any prejudice suffered by the respondents, if extension is granted; whether the application has been brought without undue delay*; and whether in certain cases, like election petitions, public interest should be a consideration for extending time."***

In the instant application, it is common ground that the length of delay was about 365 days. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable. In the case of **Nicholas Kiptoo Arap Korir Salat (supra), the Court stated that:**

> **"At Common Law, equity developed in the courts of Chancery Division to check the excess of common law. If one showed that he had a bona fide cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling reasons, the courts of the Chancery Division could intervene and indulge such a person if established that he was not at fault. It is on this equitable under-pinning that courts in Common Law jurisdictions in exercise of their discretion now grant orders extending time. Presently, extension of time has now been given statutory backing with various legislations providing courts with the power to extend time. Extension of time being a creature of equity, one can only enjoy it if he acts equitably:** *he who seeks equity must do equity*. ***Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it."***

It is not in dispute that the delay of over 365 days was inordinate and it is trite law that when delay is established, it is inexcusable unless reasonably explained. Equally, no plausible explanation was given for the delay save for the pending delayed judgment and determination of his review application. These are no good reasons to explain the delay. The pending judgment in another suit and the review proceedings before the 1st respondent did not disable nor deter the applicant from lodging an appeal. The applicant clearly slept on his rights and it is an accepted principle of law that a party who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim denied as an abuse of the court process. In **James Kanyiita Nderitu v Attorney General & another [2019] eKLR** this Court ovbserved:-

> **"We have considered the appellant's submission and the learned judge's finding that there was inordinate delay in the filing of the petition. In this context, the learned judge invoked the principle of laches. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time. (See *Republic of Phillipines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379)".***

Additionally, in the case of **Trishcon Construction Company Limited v Mohamed Salim Shamshudin & another [2019] eKLR,** this Court while dealing with more or less similar facts as in the instant application stated:-

> **"In this matter, the appellant has not demonstrated to our satisfaction that delay in delivery of the ruling by 14 months on the part of the learned judge occasioned a miscarriage of justice or that there was an erroneous recollection of facts by the judge. The appellant has also not demonstrated that any finding of fact made by the judge was erroneous due to delay in delivery of the ruling. Bare allegations that the 14-month delay is tantamount to an injustice does not suffice. The appellant should go further and prove on balance of probability the alleged injustice or misapprehension of facts occasioned by the delay. Guided by the comparative judicial** ***decisions cited as well as failure by the appellant to demonstrate that the delay occasioned misapprehension or erroneous findings of fact, we find delay of 14 months as a ground of appeal in this matter has no merit."***

I am therefore satisfied that the delay of 365 days is inordinate and inexcusable. I do not buy the reasons advanced by the applicant for the delay.

The applicant also intimated that the delay was also as a result of financial constraints. In the case of **Joseph Maina Njoroge & 2 others v Paul Chege Muhahi [2007] eKLR** this Court when presented with a similar case held that:

> **"Rule 112 of this Courts Rules is very clear. It provides precisely for a situation such as the applicants alleged they found themselves in. It provides for relief from fees and security in civil appeals and allows any person seeking to appeal in a civil matter to this Court from the decision of superior court who lacks means to pay the required fees or to deposit the security for costs to apply to the court to lodge the same appeal without payment of such fees and security. That explains why Omolo JA stated categorically in the case of** Francis Mwai Karani vs. Robert Mwai Karani **(Civil Application No. NAI. 246 of 2006) that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of Rule 112 of this Courts Rules. I do not accept the applicants' explanation for delay of one year eleven months in filing the appeal on this matter. I reject it."**

Therefore the applicant's impecuniosity cannot be reason enough for me to exercise my discretion in his favour. In any event the applicant should have invoked rule 115(1) of this Court's rules which allows a party who has demonstrated that he lacks the means to pay the required fees to lodge the appeal without payment of the requisite fees.

With regard to possible prejudice, the respondents referred to memory lapse and difficulties in procuring witnesses for trial as some of the reasons why the application should not be allowed. These submissions are not idle, considering that the witnesses were school children at the time and now they are not. It will even be a challenge for the respondents to trace them. Some of whom might not even be willing to pursue the case anymore hence the respondents will be truly and surely prejudiced. On the question as to whether the intended appeal is arguable, I need not say much. No grounds that the applicant will raise in the intended appeal have been demonstrated in the application.

Having taken all of the above into consideration, I have come to the inescapable conclusion that the application must fail. Accordingly, the application is dismissed with costs to the respondents.

Dated and delivered at Kisumu this 28th day of November, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR