



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GATEMBU J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 119 OF 2018 (UR.101A/2018)

BETWEEN

UNIVERSITY OF NAIROBI.....APPLICANT

AND

KEVIN MBWAYA & 62 OTHERS.....RESPONDENT

(An application for extension of time to file a notice of appeal on the Judgment and Order of the High Court of Kenya at Nairobi (Mwita J))

delivered on 29th September, 2017 in H.C Constitutional Petition No. 354 of 2015)

RULING

1. The respondents, on their own behalf and on behalf of 55 others petitioned the High Court through a petition dated 25th August 2015 seeking, among other reliefs, a declaration that they were valid students of the applicant, the University of Nairobi, having enrolled at Kenya Polytechnic University College which was a constituent college of the applicant; that their names should be included in the applicant's list for graduation; and that the Engineers Board of Kenya be compelled to admit or register them to the profession as graduate Engineers and their degree certificates be deemed to have been acquired properly, procedurally and in conformity with the law and with the requirements of the Engineering Board of Kenya.
2. In a judgement delivered under the 29th September 2017, the Constitutional and Human Rights Division of the High Court (Mwita, J) declared that the respondents were valid students of the University of Nairobi having been enrolled at Kenya Polytechnic University College which was a constituent college of University of Nairobi. The court also nullified the degree certificates issued to the respondents by the Technical University of Kenya which was the second respondent in the petition. The Technical University of Kenya was ordered to forward the names of the respondents to the applicant for inclusion on the list of graduands for the next graduation to be held by the applicant. The Technical University of Kenya and the applicant were ordered to meet the costs of the petition.
3. The applicant intends to appeal that judgement. On 9th May 2018, just over seven months after the delivery of the judgement, the applicant lodged this application brought under Article 159(2)(d) of the Constitution and Rule 4 of this Court's Rules seeking extension of time "*within which to file the notice of appeal from the Judgment of the High Court...*" The application is supported by an affidavit sworn by the senior legal officer of the applicant, Fredrick Collins Omondi.
4. During the hearing of the application, learned counsel Mr. Mapesa holding brief for Ms. K. Kilonzo for the applicant relied on the grounds appearing on the face of the application and the supporting affidavit. He urged that this is a proper case for the Court to exercise its discretion under Rule 4 in favour of the applicant; that in the absence of a replying affidavit from the respondents, the application should be treated as unopposed; the delay in filing the notice of appeal and the present application was occasioned by several indefinite shutdowns of the university caused by its students unrest as well as the nationwide university lecturers' strikes; that during the unrests and strikes the applicant prioritized the re-opening of the university including negotiation for return to work formula which resulted in the delay in giving the advocates instructions to appeal the decision of the High Court.
5. Mr. Mutanda, learned counsel holding brief for Mr. G. Mureithi for the Commission for University Education, the 4th respondent did not oppose the application.
6. Opposing the application, learned counsel M. Khasiani holding brief for the Mr. Lusweti for the respondents submitted that the applicant

has not given a reasonable explanation for the delay in filing the notice of appeal; that it is not demonstrated how the shutdown of the University impaired its ability to instruct its advocates on the appeal; and that there is no indication that advocates for the applicant filing appeals. Counsel concluded by pointing out that the decree from the judgment of the lower court was not attached which in his view rendered the application to be defective.

7. An application under Rule 4 of the Rules of the Court involves the exercise of judicial discretion. Waki J.A stated the applicable principles in Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4 ... 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, (possibly) the chances of the respondent 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 factors: See Mutiso vs Mwangi Civil Appl. NAI.

255 of 1997, Mwangi vs Kenya Airways

Ltd [2003] KLR 486, Major Joseph Mwereri

Igweta vs Murika M’E t h a r e & Att or ne y General Civil Appl. NAI. 8/2000 and Murai v Wainaina (No 4) [1982] KLR 38.”

8. As already indicated, Judgment of the lower court was delivered on 29th September, 2017 but the applicant did not lodge notice of appeal within time prescribed. The present application was filed on 9th May, 2018, approximately 7 months after the delivery of the judgment by the lower court. The applicant attributes that delay to indefinite shutdowns at the University and to strikes that are said to have demanded focus and prevented the issuing of instructions to the advocates in a timely manner. Although the supporting affidavit is scanty in details, counsel for the applicant stated that the period in question was between October 2017 and March 2018 when operations at the University are said to have regained some normalcy and counsel were then instructed to lodge the appeal.

9. I do not think the applicant has done a good job of explaining itself. Details are lacking. There is no explanation why after normalcy was said to have returned to the University in March 2018 it took another month or so for the present application to be lodged. As Musinga J.A stated in Donald O. Raballa v Judicial Service Commission & another [2015] eKLR

“Statutory timeliness are set for good reasons and in instances where the Court is permitted to exercise its discretion to extend the time for such compliance, the law requires that the reasons for failure to meet the timelines be sufficiently set out.”

10. Given that the unexplained delay is approximately one month and considering that the matter appears to raise matters of public importance involving public institutions, I reluctantly exercise the court’s discretion in favour of the applicant and allow prayer 2 of the application dated 8th May 2018. The applicant shall file and serve its notice of appeal with 7 days of the date of delivery of this Ruling. It shall thereafter file and serve its memorandum of appeal and record of appeal within 30 days from the date of filing of the notice of appeal. The applicant shall bear the costs of this application.

Orders accordingly

Dated and delivered at Nairobi this 20th day of December, 2018.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR