



**Judicial Service Commission v Mwangi & another (Civil Application  
223 of 2015) [2016] KECA 782 (KLR) (12 February 2016) (Ruling)**

*Judicial Service Commission v Gilbert Njuguna Mwangi & Attorney General [2016] eKLR*

Neutral citation: [2016] KECA 782 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 223 OF 2015  
F. AZANGALALA, JA  
FEBRUARY 12, 2016**

**BETWEEN**

**JUDICIAL SERVICE COMMISSION ..... APPLICANT**

**AND**

**GILBERT NJUGUNA MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to file a Notice of Appeal from  
the Judgment and Decree of the Industrial Court of Kenya at Nairobi  
(Nderi, J.) dated 28th January, 2014 in H.C. Petition No. 17 of 2013)*

**RULING**

1. The Notice of Motion before me is brought by Judicial Service Commission (hereinafter “JSC”). The motion is stated to have been brought under Rule 4 of the Court’s Rules, Sections 3, 3A, 3B and 7 of the [Appellant Jurisdiction Act](#), and all the enabling provisions of the Law. As far as I am concerned, the primary provision of law relevant to this matter is Rule 4 of this [Court’s Rules](#) which provides that:  
  
“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”.
2. Section 3 gives the court jurisdiction to hear appeals from the High Court, delineates the powers the court has when hearing appeals and states the law to be applied when hearing such appeals. It has nothing to do with extension of time which is specifically provided for in Rule 4. Section 3A and 3B



were introduced into the [Appellate Jurisdiction Act](#) in 2009, to crystallize the overriding objective of the Act and how the same may be achieved when considering appeals. The objective is to facilitate the just, expeditious, proportionate and affordable resolution of appeals to this Court. It is obviously relevant when considering appeals and applications under the Act and the rules made thereunder including rule 4. Section (7) donates to the High Court the power to extend time and to certify that a case is fit for appeal even when the time appointed for doing so has expired. The section is of no relevance to this application.

3. By its motion dated 18<sup>th</sup> August, 2015, JSC prays that time should be extended to enable it lodge a notice of appeal outside the period stipulated in Rule 75(2) of the [Court's Rules](#).
4. In Nairobi High Court Petition No. 267 of 2009, the petitioner was Gilbert Njuguna Mwangi, the 1<sup>st</sup> respondent herein while the Attorney General was originally the only respondent in that petition as then the Attorney General was obligated to represent the JSC which entity was the Petitioner's employer. After the promulgation of the Constitution 2010, JSC became an independent constitutional commission with authority to sue and be sued. JSC, therefore, was joined in the Petition as the 2<sup>nd</sup> respondent. Their roles have been interchanged in this motion with JSC appearing as the applicant and the Attorney General as the 2<sup>nd</sup> respondent.
5. Nduma Nderi, J., heard the petition and, by his judgment dated and delivered on 28<sup>th</sup> January, 2014, the learned Judge found for the 1<sup>st</sup> respondent and against JSC. JSC was dissatisfied with the Judgment but did not file a notice of appeal or record of appeal as required under Rule 75 (2) and 82(1) of the [Court's Rules](#). The Attorney General, JSC's then advocates, took no action for nearly six months when JSC instructed its present advocates M/s Issa & Company on 16<sup>th</sup> June, 2014. The firm of Issa & Company Advocates contend that their efforts to obtain JSC's file from the Attorney General did not bear fruit at all. They only got copies of the pleadings in February 2015 from the Deputy Registrar of the Industrial Court when they attended that court for taxation of the 1<sup>st</sup> respondent's bill of costs. The advocates claim that JSC, in the same month of February, 2015, instructed them to lodge an appeal against the judgment but by which time the time for doing so, had long expired.
6. Pursuant to those instructions, the advocates filed a Notice of Appeal and applied for a copy of proceedings and a certified copy of the Judgment on 6<sup>th</sup> February, 2015. As at the time of lodging this application, the said documents were yet to be availed.
7. On 24<sup>th</sup> June, 2015, the advocates lodged, before the Industrial Court, an application by way of a Notice of Motion seeking leave to appeal out of time and for stay of execution of the said judgment.
8. The advocates claim that the Notice of Motion was not heard by the Industrial Court because the Industrial Court Judge on 1<sup>st</sup> July, 2015, advised them to seek extension of time before this Court upon which they withdrew the Notice of Motion and on 19<sup>th</sup> August, 2015 lodged this Notice of Motion before me.
9. The above contentions were contained in the grounds in the body of the Notice of Motion and the affidavit in support of the Notice of Motion sworn by Winfrida Mokaya, the Registrar of JSC. Annexed to the affidavit are copies of the 1<sup>st</sup> respondent's petition and its amended version filed before the court below, the judgment of the same court, and copies of correspondence exchanged between JSC and the Attorney General and between the JSC's current advocates, the Attorney General and the court below.
10. By way of explanation, Mr. Issa, submitted that JSC only became aware of the Judgment of the court below two months after the delivery of the same, that is, on 26<sup>th</sup> March, 2014 by which time the time for filing a Notice of Appeal had expired. It was also contended by learned counsel that to enable it



determine whether to appeal, it had to study the said pleadings, proceedings, and judgment of the court below, hence, the correspondence between it and the Attorney General. As the Attorney General was incommunicado, JSC instructed their present advocates who, on their part, could not act on its instructions before studying the same documents culminating in the abortive application made before the court below and eventually, the present application.

11. In those premises, it was learned counsel's view that the delay involved in filing the Notice of Appeal is not inordinate and has been explained.
12. The Notice of Motion was opposed by the 1<sup>st</sup> respondent by way of a replying affidavit sworn by the 1<sup>st</sup> respondent's Advocate, Gicheru Ng'ang'a, in which it was deponed, inter alia, that the delay between the date of judgment (28/1/2014) and the lodgment of the Notice of Appeal was 13 months and the delay between the lodgment of the Notice of Appeal and the filing of this motion was six (6) months which delays, according to the deponent, was absurd given that JSC was represented by no other than the Attorney General, the largest law firm in the country. It was further deponed that the explanation proffered by JSC demonstrates its self-induced feeling of entitlement. According to the 1<sup>st</sup> respondent, the correspondence exhibited by JSC's Registrar showed unbelievable inaction on the part of both JSC and their advocates. It was also deponed that besides the two advocates who represented JSC, the Registrar herself is an advocate of considerable experience and it was inconceivable that a simple document such as a Notice of Appeal could not be lodged in time.
13. It was also deponed on behalf of the 1<sup>st</sup> respondent that the intended appeal had no chance of success and that to allow the extension sought, would prejudice the 1<sup>st</sup> respondent as the court below ordered his reinstatement and he only has 4 years before retirement.
14. Dr. Kuria, learned Senior Counsel who represented the 1<sup>st</sup> respondent at the hearing of this motion, in his submissions before me was concerned that JSC, by its conduct seemed to expect special indulgence which this Court should not condone or encourage. In learned Senior counsel's view, JSC had not satisfactorily explained the delay involved of nearly 19 months.
15. Learned Senior Counsel conceded that the intended appeal is arguable but, in his view, arguability of the proposed appeal is not the only consideration and non-consideration thereof was not fatal. It was learned Senior Counsel's further view that the case in the court below raised a challenge to the independence of the Judiciary which the court upheld and which this Court should also uphold by rejecting JSC's application. Learned Senior Counsel reiterated that the correspondence exhibited by JSC disclosed negligence on the part of both JSC and its advocates and JSC should not benefit from the exercise of discretion in its favour.
16. With regard to the likely prejudice, the 1<sup>st</sup> applicant would suffer if the application is allowed, learned Senior Counsel submitted that given the age of the 1<sup>st</sup> respondent, the period he had stayed out of employment and his retirement in 4 year's time, he would be gravely prejudiced by further delay in concluding this matter which militates against granting JSC's application.
17. Both learned counsel cited various authorities in support of their clients' respective stand points and fervently urged their client's respective cases for which I am, indeed, grateful. However, no two cases can ever be the same.
18. The application is brought pursuant to rule 4 of this *Court's Rules*. The law as to the principles which guide the court when considering such an application are now well settled and there are myriad authorities on the same. I will cite three of them which come to my mind separated from each other by nearly ten (10) years.



19. In *Wasike v Swala*, [1984] KLR 591, this Court (Kneller, Hancox and Nyarangi, JJ.A.) held, inter alia, as follows:

1. ....
2. As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, such an applicant must now show, in descending scale of importance, the following:
  - a. that there is merit in his appeal,
  - b. that the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and
  - c. that the delay has not been inordinate”.

(underlining mine)

20. Thirteen years down the line, Gicheru, Lakha and Bosire, JJ.A. rendered themselves as follows in *Leo Sila Mutisov Rose Helen Wangari Mwangi* [Civil Application No. Nai. 251 of 1997]:

“Whilst the discretion under rule 4 of the *Rules* is unfettered, it must like all discretions, be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiment or sympathy. 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; the reason for the delay; (possibly), the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to respondent if the application is granted”.

21. As the two cases illustrate, the number of factors which the court should consider while seized of an application under rule 4 of our *Rules* is not and cannot be exhaustive. The factors will continue to expand with time to cater for different circumstances as the following case illustrates. That is the case of *Fakir Mohammed v Joseph Mugambi and 2 Others*, [2005] eKLR [Civil Application Nairobi 332 of 2004], where we said: -

“The exercise of this Court’s discretion under rule 4 has followed 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, (possibly), the chances of the appeal succeeding 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 v Mwangi*, Civil Application Nairobi 255 of 1997 (UR), *Mwangi v Kenya Airways Limited* [2003] KLR 486, *Major Joseph Mwereri Ingweta v Murika M’Ethare and Attorney General* – Civil Application Nairobi 8 of 2000 (UR) and *Murai v Wainaina* - Number 4 [1982] KLR 38”.

22. The above are the guiding principles I need to consider in this application bearing in mind of course that no two cases can be the same. That is why this Court has said time without number that the list of matters to be considered cannot be exhausted and each case must be considered on its own circumstances.

23. In this case, the judgment intended to be challenged was passed on 28<sup>th</sup> January, 2014. A notice of appeal should, therefore, have been filed latest by 11<sup>th</sup> February, 2014. It was not. The delay to be



- explained is, therefore, the period between 11<sup>th</sup> February, 2014 being the last day when the notice should have been filed and 19<sup>th</sup> August, 2015 when this application was filed.
24. JSC says its then advocate, the Attorney General, did not communicate the results of the said judgment at all and that it remained unaware of the judgment until 26<sup>th</sup> March, 2014 when it was served with the decree in the case. That event triggered the correspondence already referred to above culminating in JSC changing its representation from the Attorney General to the firm of Issa and Company Advocates, its present advocates on 16<sup>th</sup> June, 2014.
  25. M/s Issa and Company Advocates requested the Attorney General to release to them their client's file without success. On 18<sup>th</sup> June, 2014, they applied for copies of pleadings, proceedings and judgment from the Industrial Court again without success until sometime in February, 2015 when during taxation of the 1<sup>st</sup> respondent's bill of costs, they obtained copies of the pleadings. M/s Issa and Company Advocates were then instructed to appeal against the said judgment and on 11<sup>th</sup> February, 2015, lodged a Notice of Appeal. On 6<sup>th</sup> February, 2015 they applied for copies of proceedings and certified copy of the judgment. The advocates claim that despite several visits to the Industrial Court registry, they were not furnished with copies of the said documents up to the time they lodged this application on 19<sup>th</sup> August, 2015.
  26. In the interim, on 24<sup>th</sup> June, 2015, JSC lodged an application before the Industrial Court seeking leave to appeal out of time and for stay of execution which application was withdrawn as already stated on 13<sup>th</sup> July, 2015.
  27. Learned counsel for the 1<sup>st</sup> respondent submitted that the above explanation for delay to seek extension of time to file a Notice of Appeal is absurd. He was of that view because at all material times, JSC was ably represented by counsel and that the stated difficulties in obtaining pleadings and judgment were inconceivable given that the erstwhile Advocates for JSC are the largest firm of advocates in the country. That argument is quite attractive especially considering that JSC holds a special relationship with the Industrial Court and the Office of the Attorney General. In view of that special relationship, it is not easy to appreciate how obtaining pleadings, proceedings and judgment could present any challenge for it or their advocates. Having said that, learned Senior Counsel for the 1<sup>st</sup> respondent did not allege that the factual position given for the delay was false. It was never suggested that the letters bespeaking proceedings and judgment were not in fact written or that the documents were obtained as alleged. Neither was it alleged that the Attorney General communicated with JSC. It was further not denied that JSC and its current counsel made the efforts deponed to in the affidavit in support of this notice of motion to have the matter progress further. True, the Attorney General is the largest firm of advocates in the country. However, size of a firm is not synonymous with efficiency. Sometimes the very opposite happens and the larger the firm the less the efficiency. Further, the Attorney General's office is manned by staff of varying levels of competence. I also do not lose sight of the fact that in the normal conduct of the affairs of human beings, strict timelines may not be met depending on prevailing circumstances.
  28. I am not, therefore, prepared to find that the explanation for the delay given by the Registrar of JSC in her affidavit in support of the motion is farfetched. The affidavit does not, however, cover the entire period of delay. The periods between 26<sup>th</sup> March, 2014 when JSC became aware of the judgment and 4<sup>th</sup> April, 2014 when it wrote to the Attorney General for copies of pleadings is not explained and so is the period between 13<sup>th</sup> July, 2015 when JSC withdrew its application before the Industrial Court and 19<sup>th</sup> August, 2015 when this application was lodged. So, the length of time JSC completely failed to explain may appear long given the professional status of JSC but that is not the only consideration I should take account of. In the event, the case of *Margaret Muthoni Muchiga v Esther Kamori Gichobi* [Nyeri Civil Application 117 of 2009] (UR) on which the 1<sup>st</sup> respondent placed reliance is



clearly distinguishable from the facts herein. There, a finding was made that a delay of 16 months was inordinate and was not explained. The other cases relied upon by the 1<sup>st</sup> respondent, *Fredrick Mutonyi Gitonga v Isaiah Mutonyi Wambugu & Another*, [2015] eKLR (UR) and *Aviation Cargo Support Limited v St. Mark Freight*, [2014] eKLR which involved delay of 7 months and 6 months respectively are also distinguishable for the same reason as the delays were found inordinate and unexplained.

29. It is common ground that the intended appeal is arguable. The 1<sup>st</sup> respondent, through his counsel, indeed, contended at the hearing of this motion that the manner in which this application is determined would show whether the Judiciary, known for delivering justice to others, can do justice to its own. I have on my own perused the pleadings and the judgment of the Industrial Court and cannot say that the draft memorandum of appeal annexed to this application is frivolous. At least three issues will put the matter beyond dispute namely; (i) whether Article 77 (9) of the *Retired Constitution* was misinterpreted by the Industrial Court; (ii) whether the doctrine of precedent was ignored and (iii) whether the said court had basis to order re-engagement of the 1<sup>st</sup> respondent especially when the re-engagement was at a specified level.
30. On the issue of prejudice likely to be visited upon the 1<sup>st</sup> respondent if this motion is allowed, Gacheru Ng'ang'a, one of the advocates in the firm of Kamau Kuria & Company Advocates for the 1<sup>st</sup> respondent deponed, at paragraph 18 of the replying affidavit, that re-opening the matter for further litigation will prejudice the 1<sup>st</sup> respondent who only has 4 years to retire. Mr. Gacheru Ng'ang'a did not state that he had been informed of that prejudice by the 1<sup>st</sup> respondent himself. He deposed that that was what he verily believed. The prejudice envisaged is that of the 1<sup>st</sup> respondent and it would have been prudent if the deposition regarding prejudice would have been made by him or on his information. The issue of prejudice has, therefore, not satisfactorily been addressed. On my part, I hold that having waited all this long, the 1<sup>st</sup> respondent can wait a little longer as the law is finally settled which I believe will not be far from now given our transformed Judiciary.
31. In the end, and for the foregoing reasons, I am inclined to exercise my unfettered discretion in favour of JSC. I allow this application. JSC is granted seven (7) days from the date hereof to file and serve a notice of appeal. It should also lodge a record of appeal within thirty (30) days of to-day and serve the same within seven (7) days of lodgment. JSC, shall pay the costs of this application to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2016.**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

