



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 188 OF 2016 (UR 148/2016)

BETWEEN

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY 1ST
APPLICANT**

PROF MABEL IMBUGA 2ND APPLICANT

AND

1. HUDSON OKELLO ONGANGA

2. CHARLES MAINA GITHINJI

3. ROSE KIPLAGAT JEPCHIRCHIR

***(ALL SUING FOR AND BEHALF OF THEMSELVES AND ON BEHALF OF 50 OTHERS.....1ST*
RESPONDENT**

**TECHNICAL UNIVERSITY OF MOMBASA 2ND
RESPONDENT**

PROFESSOR JOSPHAT KAZUNGU MWATELA..... 3RD RESPONDENT

**ENGINEERS REGISTRATION BOARD 4TH
RESPONDENT**

**COMMISSION FOR UNIVERSITY EDUCATION 5TH
RESPONDENT**

***(An application for extension of time to file and serve a Notice of Appeal from the Judgment and Order of
the High Court at Mombasa (Emukule, J.) dated 12th April, 2016 in Constitutional Petition No. 68 of
2014)***

RULING

The applicants Jomo Kenyatta University of Agriculture and Technology and Professor Mabel Imbuga pray by their application dated 3rd August 2016 that this honourable court be pleased to extend time within which they may file and serve a notice of appeal. The Court is moved under **Rule 4** of the Court of Appeal Rules and the grounds on which the prayer is sought appear on the face of the motion as follows;

“(a) THAT on the 5th day of May 2016 the 1st respondents served the 1st applicant with an order issued by the High Court in Constitutional Petition No. 68 of 2014 between Hudson Okello Oganga and Two others Vs. Technical University of Mombasa and 3 Others (the petition).

(b) THAT the said order was not served upon the 2nd applicant.

(c) THAT upon perusal of the court file pursuant to the 1st applicant’s instructions the applicants’ advocates noted that when the matter was last in court on the 19th day of November 2015 for hearing the presiding judge the Honourable Justice Edward M. Muriithi directed that the judgment in respect of the subject petition would be rendered on notice.

(d) THAT subsequently the presiding judge was transferred to the High Court in Machakos.

(e) THAT the judgment was delivered by the honourable Justice Anyara Emukule on the 12th day of April 2016.

(f) THAT the applicants were not aware of the date on which the judgment was delivered for the reason they were not served with the notice of the date of delivery of the same.

(g) THAT consequently the applicants did not file their Notice of Appeal within the period prescribed by law.

(h) THAT the respondents shall not suffer any prejudice if the orders sought in the application are granted.

(i) THAT the applicant stands to suffer grave prejudice if the orders sought in this application are not granted.”

The motion is supported by the affidavit of Vivian Waithaka Nyambura, the 1st applicant’s Chief Legal Officer sworn on the same date. That affidavit, together with the submissions made by learned counsel Mr. Lawi, who held brief for Mr. Mukele for the applicant, was to the effect that judgment in Mombasa High Court Constitutional Petition No. 68 of 2014 was on 12th April 2016 was reserved for delivery on notice by Muriithi, J who heard the matter. The learned Judge was subsequently transferred out of Mombasa station before judgment had been rendered. On 5th May 2016 the 1st applicant was served with an order emanating from the said proceedings and it is this that alerted the applicants that judgment had been rendered. They instructed the firm of Mukele Moni & Co. Advocates to take the matter up with a view to an appeal. The advocates were unable to access the court file so as to peruse it and take necessary action for the given reason that they were not on record for the applicants at the High Court. Even after requesting in writing on 13th July 2016, it was not until 22nd July 2016 that they were allowed to peruse the court file. They had in the meantime expressed to the 1st applicant vide their letter of 18th July 2016 their frustration at the difficulties they were encountering with perusing the court file. Upon perusal of the file they found that judgment had in fact been read on 12th April 2016 by Emukule, J on behalf of Muriithi, J but they were never notified of the impending delivery hence their non-attendance. The deponent swears and urges that the respondents would not suffer any prejudice were this application to be allowed as the 2nd respondent has already filed a notice of appeal signifying that the appeal process against the impugned judgment has already commenced any way.

In opposition to the application Hudson Okello Onganga swore an affidavit on his own and on behalf of the other co-respondents referred to as the 1st respondent. The gist of that affidavit and the submissions of

the respondents' learned counsel Mr. Chamwada, is that counsel for the applicants is not properly on record as he did not seek or obtain the consent of the applicants previous counsel at the High Court or the leave of that court to come on record, the application is in bad faith and a delaying tactic meant to defeat the ends of justice. It is contended that "*all the parties were called and were aware of the judgment*" and an order from the same was in any event served on the applicants' counsel on 5th May 2016 so they ought to have moved the court sooner. It would also be prejudicial to allow the application as it would mean that the 1st respondent would have to wait much longer for the conclusion of the matter which involves their degree certificates. I was urged to reject the application as being belated by more than a month after the applicants were aware of the judgment. The change of advocates was dismissed as a ruse to cover up for the delay.

I have carefully considered the application, the papers filed in opposition thereto and the rival submissions made before me by learned counsel. In an application such as this, what is urged of me is the exercise of discretion. The discretion is a wide and unfettered one to the end that I should be free to ensure that the ends of justice are met on a case to case basis. The discretion though wide and free is not a wild or unruly one exercisable on a whim.

Rather, it is a judicial one, to be exercised judiciously on the basis of well-known principles. This has to be so to ensure a sense of certainty, method and equality which are the life-blood of a rational judicial process. The matters a judge considers on an application for extension of time have been pronounced on by Judges of this Court singly and *en banc* on numerous occasions. They down boil to, essentially, though not exhaustively, the following;

- (a) The length of the delay
- (b) The explanation for the delay
- (c) Possibly, the likelihood of the of the intended appeal succeeding
- (d) The degree of prejudice that may be suffered should the application be granted.

See for instance ***MWANGI vs. KENYA AIRWAYS LTD.*** [2003] KLR 486. Having borne those principles in mind as indicative of the matters I should consider, I am not sure that I can say with a settled and clear conscience that the applicants are up to dilatory mischief in the bringing of the present application. True, there has been a delay since at least late April 2016 by which the notice of appeal should have been filed. There seems to be largely unchallenged evidence, however, that no notice of judgment was issued to the applicants' advocates. Even though the 1st respondent contends that calls were made about the delivery of that judgment, the contention sounds rather hollow for want of particulars; who called (whatever that means)? When did he/she call? Who was called? It is as likely as not, from a full consideration of the question, that the applicant was never notified.

I also find to be plausible the explanation given that attempts to peruse the court file so as to know what happened and what was decided by Muriithi , J were thwarted by the hurdle of counsel's not being on record. I do not for a moment believe that court officers and administrators should place a cloak of secrecy and barriers to accessibility to any persons who wish to access court records. Those records are essentially public and accessible to all upon payment of a small fee. We endeavour to render open and accessible justice so that the habit, alas all too prevalent, that advocates, their clerks and, members of the public and sometimes parties in person are denied access is a throwback to a past best forgotten and an anachronism unsuited to our modern democracy. Before ideal is matched by reality, however, I do accept, with a sigh, that counsel for the applicant may indeed have been kept away from a file they legitimately sought to peruse so as to take timely action. The delay, itself not exactly inordinate given the explanation, is excusable.

On the question of whether allowing this application will occasion prejudice to the 1st respondent, the contention is that the appeal process will mean they have to wait longer for the matter to be finally laid to

rest. Whereas I sympathize with the 1st respondents' need to have the matter speedily concluded, in this case by shutting the door to an appeal, I am fully cognizant that the appellate process is an integral part of the justice project. It exists out of a sound acceptance of the fallibility of human beings, even judges, hence the need for a higher tier of courts, comprising an enlarging number of judges, to review and reconsider decisions already made. It serves a salutary purpose - inconvenient and time consuming as it may sometimes be.

In the present case the appeal process is said, without controvert, to have already been set in motion by the filing of an appeal by the 2nd respondent. That being the case, the delay basis for the claim of prejudice falls by the wayside. In any event, the fears of delay can be addressed by setting of strict timeliness.

The upshot is that I find merit in the application before me. I grant it. The applicant shall file and serve a notice of appeal within *seven (7)* days of the date hereof to be followed by a filing of a record of appeal within *forty-five (45)* days of that initial filing.

The costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 14th day of October, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR