



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI.J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAI 320 OF 2014 (UR. 242 OF 2014)**

**BETWEEN**

**THE COUNCIL, JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY.....APPLICANT**

**AND**

**JOSEPH MUTUURA MBEERA.....1<sup>ST</sup>  
RESPONDENT**

**NAFTALY RUGARA MUIGA.....2<sup>ND</sup>  
RESPONDENT**

**THE CABINET SECRETARY FOR EDUCATION, SCIENCE AND TECHNOLOGY.....3<sup>RD</sup>  
RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup>  
RESPONDENT**

*(An application for extension of time within which to file and serve notice of appeal from the judgment of the Industrial Court of Kenya at Nairobi (Nduma, J.) dated 19<sup>th</sup> September, 2014*

**In**

**IND. CORT PET.N NO. 33 OF 2013)**

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**RULING**

1. The applicant, *Jomo Kenyatta University of Agriculture and Technology (JKUAT)* seeks the following substantive orders in its motion dated 15<sup>th</sup> December 2014 and filed on 17<sup>th</sup> December, 2014:-

*“2. That, the honourable court extends the time required to file the Notice of Appeal dated the 7<sup>th</sup> day of October, 2014 against the judgment of the Honourable Justice Mathews N. Nduma dated the 19<sup>th</sup> day of September, 2014 in Industrial Court civil Petition No. 33 of*

2013;

3. *THAT, the Notice of Appeal dated the 7<sup>th</sup> day of October, 2014 and filed on the same day be deemed as properly filed and the same to be served within 7 days from the order of the court.”*

**Rules 4, 42, and 43(1)** of the **Court of Appeal Rules, 2010** (the rules) and **Article 159(2) (d)** of the **Constitution** are invoked as the basis for the motion. JKUAT is represented before me, as it was in the Industrial Court, by learned counsel, Mr. B. G. Kariuki, instructed by M/s Oluoch-Olunya & Associates, Advocates.

2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents (**Mbeeria and Muiga**) describe themselves as “public-spirited adult citizens of Kenya” but they are also lecturers at JKUAT. They are represented

before me, as they were before the Industrial Court, by learned counsel Mr. F. Muigai Gachau instructed by M/s. Musyoka & Muigai Advocates. The **Cabinet Secretary for Education, Science and Technology (the CS)** and the **Attorney General (the AG)** who are named as the 3<sup>rd</sup> and 4<sup>th</sup> respondents, respectively, were represented before me by learned counsel Mr. Mohamed Adow, instructed by the Attorney General.

3. A short background to the application is pertinent. On 19<sup>th</sup> August 2013, Mbeeria and Muiga filed a constitutional petition before the Industrial Court faulting the CS for appointing the Council of JKUAT without adhering to constitutional and statutory principles of inclusiveness and openness in public appointments. They sought an order quashing the Gazette Notice which published the appointment on 25<sup>th</sup> January 2013, and an order of mandamus directing the CS to commence the recruitment process of Council members in accordance with the law. The AG was joined in the suit as the legal advisor to the National Government and also the state officer enjoined under **Article 156** of the Constitution to promote, protect and uphold the law. JKUAT was enjoined as an interested party because its management would be affected if the orders sought were granted.
4. The petition was not opposed by the CS or the AG. On the contrary, the AG filed submissions, on behalf of himself and the CS, supporting Mbeeria and Muiga in their contention that the appointment of the Council was not, as provided for in the Constitution, subjected to an “*inclusive, competitive, accountable and transparent process that involves public participation and best practices in management, equal and affordable opportunities for all, promotes public trust, is non-discriminatory, promotes equity, equality and social justice*”. JKUAT, however, opposed the petition asserting that it had complied with the law.
5. Upon considering the petition and the submissions of learned counsel representing the parties, the court, Nduma J., agreed with the petitioners and the AG that the appointment was faulty and declared that the Council was not properly constituted. It proceeded to quash the Gazette notice which published the appointment of members of the Council and issued an order of mandamus directing the CS, jointly with JKUAT, to commence the recruitment process of members of JKUAT Council in accordance with the law. The court clarified that the orders did not nullify any actions hitherto undertaken by the Council and that the orders would take effect within 30 days of the judgment delivered on 19<sup>th</sup> September 2014. The orders have since been extended until the hearing and determination of this application.
6. If JKUAT was aggrieved by those orders, it did not show it immediately. It would at least have filed a notice of appeal within 14 days in accordance with **rule 75** and served it within seven days after lodging it in accordance with **rule 77** of the Rules, but none was filed and/or served. A notice of appeal was, however, filed on 7<sup>th</sup> October 2014, which was 18 days after the judgment of the Industrial Court. It was not served on counsel on record for any of the other parties and there was no indication to any of the respondents that a letter bespeaking copies of the proceedings and judgment had been filed as required under the proviso to **rule 82(1)** of the rules.

7. Learned counsel for JKUAT Mr. Kariuki submitted before me that he was not aware of those provisions of the Court of Appeal Rules, 2010 and was only aware of the rules that apply in the High Court allowing 30 days for appeals. He was also not aware of the requirements of **rule 82(2)** requiring service of the letter bespeaking copies to be served upon the respondents if the period taken in providing copies of proceedings would be excluded in the computation of time. Mr. Kariuki further submitted that the omissions amounted to a mistake of counsel which should not be visited on the client. In any event, he concluded, the omission to comply was a technicality which should be frowned upon and ignored under the new Constitutional dispensation as spelt out in **Article 159(2) (d)**.
8. Perhaps the sworn version of those submissions would emphasize the tenor of it, thus:-

*“13. THAT, I mistakenly presumed that the period within which to lodge the Notice of Appeal was thirty (30) days from the date of the judgment. I filed a notice of appeal under that impression on the 7<sup>th</sup> day of October, 2014.*

*14. THAT, it has now come to my knowledge and/or attention that under the Court of Appeal Rules, the same should have been lodged within fourteen (14) days of the judgment, hence rendering the current notice filed four days out of time.*

*15. THAT, failure to lodge the notice of appeal on time was not occasioned by willful neglect or indolence by the applicant but as a result of honest mistake and/or oversight of the counsel part (sic).*

*16. THAT, the said mistake of counsel should not be visited upon the applicant who has every intention to appeal the trial’s(sic) court decision.*

*17. THAT, I believe that the applicant has a good appeal on the merits of its case. Hence it should not be locked out based on a technicality and in this new constitutional dispensation and in light of Article 159 2(d) where it underpins the administration of justice notwithstanding the procedural technicalities.”*

In Mr. Kariuki’s view, there would be no prejudice caused if an opportunity was given to JKUAT to urge its appeal which was meritorious, while on the other hand if the orders of the Industrial Court are not set aside, innocent university students would suffer as they will have no governing body for their institution.

9. In response to those submissions, Mr. Gachau referred to the replying affidavit sworn by Muiga and submitted that it would be pointless to extend the filing of the notice of appeal to 7<sup>th</sup> October 2014 as sought by JKUAT when the filing of the record of appeal itself was already out of time, and there was no application for extension of time to file it. That would be so since the applicant cannot take advantage of **rule 82 (1)** and the notice of appeal would stand withdrawn under **rule 83**. He also pointed out that he was the one who drew the attention of counsel for JKUAT to the invalid notice of appeal on 1<sup>st</sup> December 2014 but no immediate action was taken to rectify it until this motion was filed 17 days later. In his submission, that was consistent with the indolence exhibited by the applicant or a calculated move to delay the matter until the unlawful Council completes its term. As the judgment of the Industrial Court was of immense public interest since it seeks to implement good governance in line with the Constitution, he submitted, further delay would be prejudicial.
10. Mr. Gachau further submitted that the sole basis for the application was ignorance of counsel and not a genuine mistake which would be excusable. There was a difference, he pointed out, between misreading a provision of the law or rules and not reading it at all.

The former was excusable, but not the latter. He could not see how a firm of Advocates which has been in existence for more than 15 years with experienced lawyers could plead ignorance of the

law. He cited this Court's decision in **Baber Alibhai Mawji v. Sultan Hasham Lalji & Others [1995] eKLR**, in support of those submissions. Finally Mr. Gachau submitted that the intended appeal was not arguable because the concessions made by the AG on behalf of himself and the CS before the Industrial court are not reversible.

11. For his part, learned state counsel, Mr. Adow stated that the AG was now supporting the motion despite opposing the petition in the Industrial court. He attributed this strange turn of events to conflicting instructions.

12. I have carefully considered the motion, the affidavits on record and the submissions of all counsel. The guiding principles in considering applications under **rule 4** of the rules are not contentious although none of the parties made reference to them. I recently restated them in the case of **Habo Agencies Limited v. Wilfred Odhiambo Musingo**, Civil Appeal (Application) No. 124 of 2004 (ur). In that decision, I also examined the application of **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** and **Article 159(2)**

(d) of the Constitution. I will restate them again *in extenso* for full appreciation:-

*“I am aware that the discretion I have to exercise under **Rule 4** is unfettered and does not require establishment of “sufficient reasons”. Indeed I stated as much as a single judge and was upheld by the full court in **Fakir Mohamed v Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR)**, thus:-*

*“The exercise of this Court’s discretion under **Rule 4** has followed a 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 degree of prejudice to the respondent if the application is granted, the effect of the 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 Application No. Nai. 255 of 1997 (ur), **Mwangi vs Kenya Airways Ltd [2003] KLR 486**, **Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General**, Civil Application No. Nai. 8 of 2000 (ur) and **Murai vs Wainaina (NO. 4) [1982] KLR 38**”.*

*I am also aware that there is a duty imposed on the Court under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court. As explained in the case of **City Chemist (Nbi) & Anor. vs Oriental Commercial Bank Ltd Civil Application No. NAI 302 of 2008 (UR 199/2008)**:*

*“The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective.”*

*In the same case, however, the court cautioned thus:-*

*“That is not to say that the new thinking totally up-roots well established principles or precedent in the exercise of the discretion of the Court which is a Judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in*

***determining with some measure of certainty the validity of claims long before they are instituted in Court. It also guides the lower Courts and maintains stability in the law and its application.”***

Those Sections of the Appellate Jurisdiction Act came first in legislative time but have found legitimacy in **Article 159 of the Constitution 2010** which deals with judicial authority and the administration of justice without regard to technicalities of procedure. The Supreme court has had occasion to interpret Article 159 and did so in the case of **Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR** where it agreed with the dicta of Kiage, JA in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** stating:

***“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist***

***technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”***

The Supreme Court further emphasized:

***“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 principle 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 2013, [2013] e KLR”.***

13. With those principles in mind, I now advert to the application before me. The only ground relied on to seek extension of time is mistake of counsel, and the nature of the mistake is that the advocate for the applicant was ignorant of the relevant provisions of the law; that is to say, when to file a notice of appeal, when to serve it, and the necessity of serving a copy of the letter bespeaking proceedings and judgment for purposes of appeal. The consequence of such ignorance was inaction. On both counts in my view, the application stands on quick sand, since the explanation proffered for the delay would amount to no explanation. As the Privy Council stated in the case of **Ratnam v. Cumarasamy [1964] 3 All E R 933 :- 8** “**The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion . If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”**

14. There are, of course, mistakes of counsel that may be excusable, and the timeless dicta of Madan, J.A. (as he then was) in **Murai v. Wainaina (No.4) [1982] KLR 38**, quickly come to mind:-

***“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior***

*counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”*

15. In this case, however, the applicant’s advocates simply plead ignorance and consequential inaction which cannot avail them. This Court said so in **Rajesh Rughani – Vs- Fifty Investment Ltd. & Another** (2005) eKLR:-

**“If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.**

In the case of **Bains Construction Co. Ltd. -Vs- John Mzare Ogowe** 2011 eKLR this Court also observed:-

**“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences”.**

16. As for failure to look up the relevant provisions of the law, *this has been held not to be an error of judgment or a slip on the part of counsel which is excusable. As correctly stated by Mr. Gachau, there is a distinction between an error of judgment or error of misreading some difficult point of law on the part of counsel, and a simple non-reading of the rules. This Court, in the Mawji case (supra) stated:-*

**“Yet again, we point out that there is a difference between misunderstanding and not reading a rule.**

**We think that the learned judge was right when he said that ignorance cannot be equated to a genuine mistake or error on the part of a legal advisor. What happened here was not a mistaken view of law or procedure.”**

And so it is in the matter before me.

17. The rules of procedures are not ornamental since they serve the pivotal purpose in the administration of justice that was eloquently summarized by Kiage JA with the support of the Supreme Court in the **Obado case** above. I am not satisfied that there is any proper basis for me to exercise my discretion judiciously. The about-turn by the Attorney General is just that. In a manner of speaking, the Attorney general was speaking from both sides of his mouth, but equity has always frowned on a party who approbates and reprobates at the same time. I find no assistance from the submissions of Mr. Adow for the Attorney General.

As for the fear of possible prejudice if the application is not granted, I find none. The Industrial Court was careful to ring-fence the judgment in order to avoid the tumultuous consequences feared by the applicant and there has been no prejudice so far. There is, however, a higher virtue of public interest in ensuring that the laws of the land, and particularly the Constitution, are complied with. And that is the constant North.

### **Disposition.**

18. For the reasons stated above, the application for extension of time is rejected and the Notice of Appeal filed on 7<sup>th</sup> October 2014 is not deemed to have been properly filed. It is invalid. The motion is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

*Dated and delivered at Nairobi this 27<sup>th</sup> day of February, 2015.*

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**