



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GATEMBU, J.A. IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI 6 OF 2015 (UR 6 OF 2015)**

**BETWEEN**

**THE CLERK OF THE NATIONAL ASSEMBLY ..... 1<sup>ST</sup> APPLICANT**

**HON. KENNETH O. MARENDE**

**(RTD) SPEAKER OF THE NATIONAL ASSEMBLY & 207 OTHERS..... 2<sup>ND</sup> APPLICANT**

**AND**

**REV. DR. TIMOTHY NJOYA & 17 OTHERS ..... 1<sup>ST</sup> TO 18<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 19<sup>TH</sup> RESPONDENT**

**THE MINISTER FOR FINANCE ..... 20<sup>TH</sup> RESPONDENT**

**HEAD OF PUBLIC SERVICE & SECRETARY**

**TO THE CABINET HON. FRANCIS MUTHAURA ..... 21<sup>ST</sup> RESPONDENT**

**AND**

**COMMISSION ON THE IMPLEMENTATION OF THE CONSTITUTION (CIC)..... 1<sup>ST</sup>  
INTERESTED PARTY**

**KENYA REVENUE AUTHORITY..... 2<sup>ND</sup> INTERESTED PARTY**

*(Being an Application for leave to appeal out of time to the Court of Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, Warsame, J. as he then was) dated 17<sup>th</sup> January, 2013*

*in*

***HIGH COURT CONSTITUTIONAL PETITION NO. 137 OF 2011)***

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**RULING**

1. The applicants seek extension of time to file a notice of appeal and that the notice of appeal dated 30<sup>th</sup> January, 2013 be deemed to have been duly filed. They also seek extension of time for the filing of the intended appeal. They intend to appeal the Judgment of the High Court given by M. Warsame, JA dated 17<sup>th</sup> January 2013 and delivered on the same date by W. K. Korir, J declaring, among other things, that members of Parliament are under an obligation under Articles 201, 210 and 230 of the Constitution of Kenya, 2010, to pay tax.
2. During the hearing of the application, learned counsel Mr. Anthony T. Njoroge appearing with Mr. Sheriffsam Mwendwa for the applicants referred me to the grounds supporting the application appearing on the face of the application and to the supporting affidavit sworn on 10<sup>th</sup> December, 2014 by Justin Bundi, the Clerk of the National Assembly. The applicants say that immediately upon delivery of the Judgment by the High Court, the Public Service Commission (the Commission) on behalf of the applicants instructed their advocates on record at the time, namely the firm of Ochieng Onyango Kibet & Ohaga Advocates, to appeal the decision; that on 5<sup>th</sup> April 2013 the said advocates wrote to the Commission forwarding

*“a duly filed and served notice of appeal dated 30<sup>th</sup> January, 2014”* (the exhibited notice of appeal is dated 30<sup>th</sup> January, 2013); that the applicants believed that a notice of appeal had been duly filed and served; that despite representation by the said firm that they were proceeding with the intended appeal, they failed to carry out the instructions to appeal; that on 11<sup>th</sup> September, 2014 the Commission resolved to terminate the mandate of firm of Ochieng Onyango Kibet & Ohaga Advocates and to appoint Mr. Anthony Njoroge Advocate to act in their place; that Anthony Njoroge Advocate sought and was granted leave by the High Court on 7<sup>th</sup> October 2014 to come on record in place of the firm of Ochieng Onyango Kibet & Ohaga Advocates; that the applicants then presented to this Court an application that combined prayers for extension of time and stay of execution and was subsequently informed by the Registrar of this Court to file separate applications occasioning further delay in filing of the present application; that in those circumstances the applicants should not be punished for the mistakes of their advocates.

3. Citing the decisions of this Court in **Dennis Mogambi Mong'are vs. AG and others [2014] eKLR** and **Center For Rights Education Awareness and another vs. John Harun Mwau [2012] eKLR** counsel submitted the intended appeal is arguable as the High Court failed to consider the transitional provisions of the Constitution of Kenya, 2010 that saved the benefits and remuneration of members of the 10<sup>th</sup> Parliament; that the 10<sup>th</sup> Parliament also had its powers to amend the National Assembly Remuneration Act and the court was wrong to declare amendments to that Act unconstitutional; that the intended appeal raises fundamental issues regarding the interpretation of the transitional provisions of the Constitution of Kenya, 2010 and its application to the rights and freedoms of citizens; that issues of immense public importance and interest that merit resolution by this Court and that as a result the applicants have been deprived of their severance allowance pegged at 30% of their salary; that the Judgment the applicants intend to appeal against may lead to huge financial losses for the applicants; and that steps have been initiated to enforce the judgment of the High Court.
4. To further support the applicants' case, Mr. Njoroge referred to numerous decisions on the principles applicable when considering applications for extension of time including the Supreme Court decision in **John Ochanda vs. Telkom Kenya Ltd [2014] eKLR**; decisions of this Court in **Mwangi vs. Kenya Airways Ltd [2003] KLR 486** and **Origo and another vs. Mung'ala [2005] 1 KLR169** among other cases.
5. Opposing the application learned counsel for the respondent Mr. Anthony T. Aluoch stated that to the extent that the applicants are seeking the exercise of the court's discretion in their favour, their conduct is relevant; that the present application which was filed on 13<sup>th</sup> January, 2015 was not served on his firm until after the hearing notice was served by the Court; and that counsel for the applicants ambushed him with a copious bundle of authorities during the hearing of the application. Deprecating the conduct of counsel for the applicants, Mr. Aluoch submitted that the

applicants do not deserve favourable consideration in the exercise of the Court's discretion.

6. According to Mr. Aluoch the general principle that mistakes of counsel are excusable and parties should not be penalized for such mistakes does not apply in this case; that Mr. Anthony Njoroge who formally obtained leave of the court to be on record for the applicants on 7<sup>th</sup> October, 2014 was involved in the conduct of the proceedings from the onset; that the applicant should not be complaining that they were let down by advocates when the advocate currently on record was present when the Judgment was delivered; that in any event mistakes should be excusable for a person who does not understand the rules which is not the case here as the applicants were represented throughout the proceedings.
7. Citing the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No Nai 255 of 1997** Mr. Aluoch submitted that from the date the Judgment was delivered on

17<sup>th</sup> January, 2013 to the time the present application was filed on 13<sup>th</sup> January, 2015 is a period of two years; that there is no evidence that the notice of appeal dated 30<sup>th</sup> January, 2013 exhibited to the affidavit of Justin Bundi was filed; that

the delay of two years in presenting this application is inordinate and is not explained. In that regard counsel referred to the decision by my brother Mwera JA in **Joyce**

**Akinyi Ochieng vs. Antony Chinedu Ifedigbo in Civil Application No. Nai 122 of 2013** where the Court refused to extend time saying that a delay of over two years was not satisfactorily explained.

8. Regarding the argument that the intended appeal is meritorious and that it involves a matter of great public importance, Mr. Aluoch submitted that the Court needs to balance the interest of the applicants as members of parliament and the interest of the general public and urged that the interest of the general public dictate that the present application should be refused.
9. I have considered the application, the supporting affidavit and exhibits and the arguments by learned counsel. Although the applicants have invoked Article 164(3) and 210 of the Constitution of Kenya as well as rules 4 of the rules of this Court, the substance of the application is that I am asked to extend time within which the notice of appeal and the record of appeal should be filed and served. I am required to exercise my discretion in that regard. The matters for consideration in the exercise of that discretion include the length for delay involved, the reasons for the delay, whether the applicant has an arguable appeal and the degree of prejudice to the other party if time is extended. As stated by this Court in often cited case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** (supra):

***“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.”***

10. Applying those principles, the first matter which I should consider is the length of delay involved and the reasons for delay. In that regard the applicants have demonstrated through the affidavit of Justin Bundi to which I have referred that upon delivery of the Judgment on 17<sup>th</sup> January, 2013 they promptly sought “a comprehensive legal opinion” on the implications of the Judgment and also on “the chances of success” should the applicants prefer an appeal. The applicants did that through their letter to their previous advocates dated 18<sup>th</sup> January 2013. That was notably a day after the delivery of the Judgment. On 25<sup>th</sup> January 2013, the applicants instructed their advocates “to immediately appeal against the Judgment...to the Court of Appeal...”

11. It would appear that the applicants' instructions were heeded by their advocates as there is exhibited to the affidavit a copy of a notice of appeal dated 30<sup>th</sup> January 2013 drawn by the firm of Ochieng Onyango Kibet & Ohaga Advocates. As correctly pointed out by Mr. Alouch however that notice does not bear a court stamp and it is not evident that it was filed.

12. It is not clear what transpired between the applicants and the Commission on the one hand and their said advocates on the other between January 2013 and September 2014 that prevented those advocates from taking steps to file the appeal. What is clear from the correspondence exhibited to the supporting affidavit is that up until January 2014 (see letter dated 17<sup>th</sup> January 2014) the Commission followed up the matter with the said advocates complaining that it was not being kept informed regarding the status of the appeal and requiring the said advocates to 'regularly update and advise on the progress' of the appeal.

13. It is deposed that the applicants asked the Commission to intervene and that the Commission deliberated upon the matter and resolved to terminate the services of the firm of Ochieng Onyango Kibet & Ohaga Advocates; that the Commission did resolve on 11<sup>th</sup> September 2014 to terminate the services of that firm; that Mr. Anthony Njoroge Advocate was instructed to take over the conduct of the matter and that leave was obtained on 7<sup>th</sup> October 2014 for Mr. Anthony Njoroge Advocate to "come on record."

14. Up until there, I am satisfied that the inaction in either filing or pursuing the appeal is satisfactorily explained even though the decision to change advocates was not taken until 11<sup>th</sup> September, 2014. The High Court having granted Mr. Anthony Njoroge Advocate leave to come on record on 7<sup>th</sup> October 2014, is the lapse of time between 7<sup>th</sup> October 2014 and the time the present application was filed on 13<sup>th</sup> January 2015 satisfactorily explained? That lapse of time is explained in paragraphs 11 to 14 of the supporting affidavit as follows:

*"11. That Mr. Anthony Njoroge, Advocate thereafter filed an application before the High Court to come on record for the Applicants and the Application was allowed by the High Court on 7<sup>th</sup> October, 2014. I Annex hereto marked "JB.4" a copy of the order extracted on 13<sup>th</sup> November, 2014 allowing the new*

*Applicants' Advocates to come on record.*

*12. That initially the Applicants made an Application to the Court of Appeal for extension of time and stay of execution in a combined Application.*

*13. That subsequently we were informed by the Registrar that the Application for leave and the application for stay of execution ought to be filed separately and this occasioned further delay in the filing of the present Application.*

*14. That the Applicants are desirous of appealing against the orders arising out of the judgment delivered on 17<sup>th</sup> January, 2014, by Justice Warsame and they should not be punished for the mistakes of their advocates."*

15. That explanation raises more questions than it answers.

When did the applicants make the 'combined application' in which they say they had combined the request for extension of time and the request for stay of execution? Why was that application not exhibited to the affidavit? When were the applicants "subsequently...informed by the Registrar..." to file separate application? How long did the applicants require to file the present application after being informed by the Registrar to file separate applications?

16. In my view, even if I was to give the applicants the benefit of discounting the period of 2014

Christmas vacation the further delay of over two months between 7<sup>th</sup> October 2014 and 13<sup>th</sup> January 2015 when the present application was filed is not satisfactorily explained.

17. In view of the conclusion I have reached that there is delay of over two months that is not satisfactorily explained, I need not delve into the question of the chances of the appeal succeeding even though I do not consider that the intended appeal is frivolous.

18. As regards the question of prejudice, I echo the words of Mwera JA in **Joyce Akinyi Ochieng vs. Antony Chinedu Ifedigbo** (supra) that “*litigation must come to an end and the applicant should not be seen to unnecessarily extend it...*”

19. For those reasons, the application is dismissed with costs to the 1<sup>st</sup> to 18<sup>th</sup> respondents, who attended the hearing of the application.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2015.**

**S. GATEMBU KAIRU**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**