IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA IN CHAMBERS)

CIVIL APPLICATION NO. NAI. 131 OF 2015 (UR 105/2015)

BETWEEN

PROF. PAUL MUSILI WAMBUA ……..….....……..…….APPLICANT

AND

ATTORNEY GENERAL ……....……..……..…… 1ST RESPONDENT

ASSOCIATION OF HUMAN RESOURCE

PRACTITIONERS OF KENYA ……..……...…….... 2ND RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE…...….....3RD RESPONDENT

(An application for extension of time, leave to file Notice of Appeal out of time and maintenance of status quo pending the lodging, hearing and determination of an intended appeal from the Judgment of the High Court (Odunga, J.) dated 23rd January, 2015

in

PETITION NO. 542 OF 2013)

****

RULING

[1] On the 23rd January 2015, the High Court, Odunga J., dismissed a petition that was filed by Prof Paul Musili Wambua (hereinafter referred to as the applicant). The said petition was filed after the Association of Human Resource Practitioners of Kenya (2nd respondent) complained against the applicant for allegedly holding two positions in public office, as Chairman of the Betting Control and Licensing Board and as the Associate Dean of the School of law, Parklands Campus, University of Nairobi. Perhaps in response to those complaints, or to forestall any precipitate action by the respondents, who were insisting the applicant was in breach of the provisions of the Constitution and the Betting Lotteries and Gaming Act, the applicant filed a constitutional petition in the High Court.

[2] The applicant was seeking on his own behalf and other lectures in public universities for declaratory orders that lecturers in public universities are not State Officers, and as such were not precluded from participating in gainful employment as envisaged under **Article 77** of the constitution. Secondly a

declaration that Section 3 (1) (b) of the Betting Lotteries and Gaming Act was discriminatory of the applicant and was contrary to the provisions of Articles 24 and 27 of the Constitution. Lastly, the applicant also sought for an order of injunction to restrain the 2nd respondent from maligning him based on their erroneous interpretation of the constitution. It would appear the Commission on Administration of Justice also joined in the suit as an interested party and they are now the 3rd respondents and the Attorney General is the 1st respondent.

[3] After considering the matter, the judgment was read on 23rd January 2015, by Ogola J., on behalf of Odunga J. The record that is before me shows that when the judgment was delivered, it was only a Mr. Kamau who was present for the respondents. There is no indication on the record before me whether the applicant was notified of the date of delivery.2

[4] The applicant has now filed a Notice of Motion which is an omnibus one as it is predicated under Rules 4 and 5 (2) (b) of the Court of Appeal Rules, seeking for extension of time within which to file a Notice of Appeal out of time, and other orders of stay of execution which can only be heard by a full Bench. I will only deal with the prayer for extension of time, although the prayers under 5(2) (b) are supposed to be by a separate application which is made before a full Bench, I will ignore them for now (I will not dismiss them) as I am mindful of the overriding objective, as stipulated in **Sections 3A** and **3B** of the Appellate Jurisdiction Act and **Article 159 (2) (d)** of the Constitution, what is of paramount consideration is what is in furtherance of achieving a just timely and less costly determination of dispute as well as ensuring effective use of judicial resources. Dismissing those prayers as misplaced as they are will not be in furtherance of substantive justice.

[5] The applicant contends that he was not served with a notice notifying him or his advocates of the delivery of judgment when it was read on 23rd January 2015. As such, he was not aware of the judgment until he came across a newspaper article on the 8th February 2015 that serialized the said judgment. The following day, the applicant obtained a copy of the said judgment and he immediately caused a Notice of Appeal to be filed on the 9th February 2015, but it was already outside the period of time allowed under the Rules.3

[6] The application is supported by the affidavit of the applicant sworn on the 14th May 2015. The matters deposed therein reiterate the grounds in support of the application, and the fact that the applicants also applied for certified copies of proceedings on the 19th February 2013 in preparation of lodging the record of appeal. Mr. Waweru Gatonye teaming up with Mr. Gitonga learned counsel for the applicant argued this application. It was submitted that the facts were undisputed that when the judgment was read, it was only the representative of the Attorney General who was in court and the applicant was not informed. The applicant filed a notice of appeal after 17 days, instead of 14 days and there is a credible explanation for that delay. Granting the leave would not prejudice the respondents as the delay of 17 days was not inordinate.

[7] This application was opposed; Mr. Kaumba learned counsel for the Attorney General did not file a replying affidavit but he raised some points of law in his arguments and relied on the list of authorities filed by the applicant especially the case of; **Rael Munyaka & 6 Others v Waitaluk Land Disputes Tribunal & 3 others {2007} eKLR** in which Onyago Otieno JA was considering a similar application as this one for extension of time. He stated that every delay must be explained by a party at fault. Timelines are set for purposes of achieving timely dispensation of justice, predictability and uniformity or equality of arms meant for all the parties. Counsel also cast aspersions on the part of the applicants for abandoning the petition as they failed to attend court during the hearing after they filed written submissions. They were also faulted for filing the instant application late that was on 19th May 2015, despite the fact that the Notice of Appeal was filed on the 9th February 2015. The delay of over 3 months between the filing of the Notice of Appeal and the instant application was not explained.

[8] I have considered the rival submissions by both counsel, it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the

Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted. (See **MUTISO V MWANGI) [1999] 2 EA 231**. In other words Rule 4 of the Court of Appeal Rules donates unfettered discretion and as long as the discretion is exercised judiciously, a single Judge would be entitled to consider any other relevant material.

[9] The delayin this case was attributed to failure by the Court to issue and serve a notice of the date when it scheduled the delivery of the judgment upon counsel for the applicant. The record shows when judgment was read, only Mr. Kamau was present for the respondents. There was no appearance for the applicant, and there is no indication from the record that is before me that the applicant was notified of the date. Moreover the averments by the applicant that neither he nor his advocate was served with the notice for the delivery of judgment, have been controverted by the respondents. The fact that the applicant was absent when the judgment was read; he learnt about the judgment when it was serialized in the newspapers on the 8th February 2015; are not disputed by the respondent. When the applicant learnt about the judgment he caused the notice of appeal to be filed immediately on the 9th February 2015. These facts have not been disputed. The applicant was late in filing the notice of appeal for 17 days and that delay in my considered view is explained. The respondent did not file any papers raising the issue of the delay in regard to the filing of the present application. Raising a factual point that requires a corresponding response based on facts from the bar did not help the case for the respondent.

[10] The applicant has not attached a draft copy of the intended grounds of appeal, to enable me gauge the merits of the same. This is a further problem I have encountered with this application. However a perusal of the judgment that the applicant wishes to appeal against, there were serious points of law touching on the interpretation of the provisions of the constitution and also the Betting Lotteries and Gaming Act, Chapter 131 of the laws of Kenya that were determined in that judgment. The intention of the applicant to seek a second opinion in the Court of Appeal on the interpretation of pure points of law cannot be termed as frivolous. This is obviously with the usual rider that not all appeals that raise arguable points of law are likely to be successful.

[11] On the issue of prejudice to be suffered by the respondents if this application is allowed, as noted above, the delay here was not inordinate; the respondents have perhaps been inconvenienced when they were drugged in Court to defend the instant application, that inconvenience can nonetheless be compensated with costs being awarded to the 1st respondent.

[12] In conclusion I find merit in the prayer no 2 of the Notice of Motion dated 15th May 2015. The applicant is given fourteen (14) days from the date of this ruling within which to file the Notice of Appeal and 30 days after filling the Notice to file the record of appeal. The applicant shall pay the costs of this application to the 1st respondent in any event.

Dated and delivered at Nairobi this 31st day of July 2015.

M.K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR