



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL (APPLICATION) NO. 133 OF 2011**

**THE HON. ATTORNEY GENERAL ..... APPLICANT/APELLANT**

**AND**

**THE LAW SOCIETY OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**CENTRAL ORGANIZATION OF TRADE UNIONS ..... 2<sup>ND</sup> RESPONDENT**

**(Being an application for Reinstatement of Civil Appeal (Application) No. 133 of 2011 being an application for extension of time to serve records of appeal in an appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang, J.) dated 4<sup>th</sup> March, 2009 in Nairobi H.C. Petition No. 185 of 2008)**

**BETWEEN**

**LAW SOCIETY OF KENYA ..... PETITIONER**

**VERSUS**

**HON. ATTORNEY GENERAL ..... RESPONDENT**

**CENTRAL ORGANIZATION OF TRADE UNIONS (K) ..... INTERESTED PARTY**

**RULING**

1. On 5<sup>th</sup> July, 2011 the applicant filed an application under **rules 4 and 42** of the **Court of Appeal Rules** seeking extension of time for filing of an appeal against the High Court judgment (Ojwang, J. as he then was) in High Court Petition No. 185 of 2005.

The applicant further prayed that the appeal which had been belatedly filed be deemed to have been filed in time.

2. The applicant stated that the delay in filing the record of appeal was caused by failure to receive the proceedings in time.

3. The application was opposed by the 1<sup>st</sup> respondent. When the application came up for hearing on 24<sup>th</sup> October, 2011, only **Mr. Ngatia**, learned counsel for the 1<sup>st</sup> respondent, was in attendance. The Court was satisfied that the applicant had been duly served with a hearing notice and at Mr. Ngatia's

request, the application was dismissed with costs.

4. On 23<sup>rd</sup> November, 2011, thirty (30) days from the date the dismissal order was made, the applicant filed another application seeking the following order:

**“The Civil Appeal (Application) No. 133 of 2011 dismissed herein be restored for hearing on grounds that the failure by the applicant to attend hearing was hardship caused by a road accident along Kitengela-Mlolongo-Nairobi road.”**

5. The second application is the subject matter of this ruling. The application was supported by an affidavit sworn by **Anthony Oteng’o Ombwayo**, who was then a Senior Principal Litigation Counsel in the Attorney General’s office.

6. Mr. Ombwayo was residing at Kitengela and stated that on 24<sup>th</sup> October, 2011 he left his house at 5.30 a.m. driving to Nairobi to prosecute the application filed on 5<sup>th</sup> July, 2011, which I shall hereinafter refer to as **“the first application”**. On the way his car developed mechanical problems and he called a taxi operator who picked him up for purposes of dropping him at his office.

7. At about 6.20 a.m. they joined Mombasa road but there was heavy traffic jam caused by a road accident at Mlolongo area which took about an hour to clear.

8. Mr. Ombwayo further stated that they reached City Cabanas area at about 7.45 a.m. and found heavy traffic jam due to construction of a by-pass bridge. They encountered further traffic jam around Bellevue – Nyayo Stadium area. When he sensed that he would not make it to his office in good time, Mr. Ombwayo called some undisclosed colleagues in the office but none answered their telephones as they were in a meeting.

9. He got to his office at 9.30 a.m. and picked up the relevant files but before he left to court telephoned Mr. Ngatia on his mobile number, who informed him that the application had been dismissed for want of prosecution.

10. He attributed his failure to attend court to his vehicle breakdown, the said accident and the unusual traffic jam as stated hereinabove.

11. Counsel further stated that in his view, the intended appeal has very high chances of success. He added that the intended appeal is of serious public interest in view of the fact that the High Court had found that certain sections of the **Work Injury Benefits Act, No. 13 of 2007** were inconsistent with certain sections of the repealed Constitution of Kenya. As a result, the said Act had been rendered ineffective after nullification of some of its sections. The sections that were found to be unconstitutional were applicable to compensation of persons injured at places of work, Mr. Ombwayo stated.

12. In response to the application by the Attorney General, the Law Society of Kenya, the 1<sup>st</sup> respondent herein, filed a replying affidavit sworn by **Mr. Ngatia**, the 1<sup>st</sup> respondent’s learned counsel.

13. Mr. Ngatia stated that on 24<sup>th</sup> October, 2011 Mr. Ombwayo telephoned him at about 9.45 a.m. and enquired about the application which was coming up for hearing that day. Mr. Ngatia told him that it had been dismissed for non-attendance on the part of the applicant’s counsel. Further, Mr. Ombwayo did not tell him about any traffic hindrances that may have prevented him or any other counsel from attending court.

14. More important, Mr. Ngatia added, Mr. Ombwayo did not make any effort to reach him on his mobile number between 6.00 a.m. and 9.00 a.m. when the application was listed for hearing, if at all he had experienced any difficulties that prevented him from making it to court in good time.

15. Lastly, Mr. Ngatia stated, the laxity which had been manifested by the applicant since delivery of

the judgment by the High Court, culminating with the present application, militate against issuance of any orders in favour of the applicant.

16. In his brief submissions during the hearing of this application, **Mr. Oenga Kiage**, learned counsel for the applicant, told the Court that the circumstances that prevented Mr. Ombwayo from attending court on 24<sup>th</sup> October, 2011 were unavoidable. In his view, there will be no adverse consequences to be suffered by the respondents if the order sought by the applicant is granted.

17. Mr. Ngatia also made brief submissions. He pointed out two main reasons which, in his view, disentitle the applicant from grant of the order sought. The first one is that the 30 days' delay between the date of dismissal of the first application and filing of the second application had not been explained at all. Secondly, the explanation offered by Mr. Ombwayo for his failure to attend court on the material day is insufficient as to warrant exercise of this Court's discretion in favour of the applicant. He cited two authorities in support of his submissions:

(a) **Pepco Construction Company Limited vs. Carter & Sons Ltd, Civil Application No. NAI. 97 of 2000.**

(b) **Alfred Romani t/a Romani Architect & 3 Others vs. Association of Members Episcopal Conference in Eastern Africa (AMECEA) Civil Application No. NAI. 375 of 2002.**

18. **Mrs. Guserwa**, learned counsel for the 2<sup>nd</sup> respondent, did not oppose the application. In her view, although the delay in filing the second application had not been explained, the same was not inordinate as to be sufficient to deny the applicant an opportunity to pursue his appeal. She added that it was in the interest of justice that the application be allowed in view of the fact that the **Work Injury Benefits Act** touches many people.

19. I have anxiously considered this application in light of the affidavit and submissions by all the counsel.

20. The applicant did not cite the provisions of the law under which the application was brought but that is not fatal to the application. It is however evident that the application is brought under **rule 56 (3)** of the **Court of Appeal Rules** which states as follows:

**“Where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.”**

21. The applicant did not ask this Court to re-hear the first application which was dismissed, the Court was only asked to restore the dismissed application for hearing. Before the Court can grant the order sought, it has to be satisfied that the applicant was prevented by sufficient cause from appearing when the first application came up for hearing. The application must also be made within thirty days of the decision of the Court, see **rule 56 (4)** of this Court's Rules.

22. In considering an application under **rule 56 (3)**, a single judge of this Court exercises his discretion which is specifically circumscribed but the same must be exercised judiciously. As stated above, the prime consideration in such an application is whether there was **sufficient cause** that prevented the applicant from attending court when the earlier application was called on for hearing.

23. The two decisions of this Court that were cited by Mr. Ngatia in his submissions were rulings on reference to full Court following orders made by single judges in applications brought under **rule 4** of this Court's Rules for extension of time to file appeals. In such an application the Court's discretion is much wider than in an application made under **rule 56 (3)**.

24. In **ALFRED ROMANI T/A ROMANI ARCHITECT & 3 OTHERS vs. ASSOCIATION OF**

**MEMBERS EPISCOPAL CONFERENCE IN EASTERN AFRICA** (supra), the Court cited its earlier decision in the case of **LEO SILA MUTISO vs. ROSE HELLEN WANGARI MWANGI**, Civil Application No. NAI. 255 of 1997, where it stated as follows:

**“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 the 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.”**

It is thus evident that the requirements for extension of time for appealing are higher than in an application to restore for hearing an application that had been dismissed for non-attendance.

25. This Court must now consider whether the reasons advanced by Mr. Ombwayo for his failure to attend Court on 24<sup>th</sup> October, 2011 are sufficient.

26. Although counsel deponed that he suffered a vehicle breakdown and subsequently encountered heavy traffic jam along Mombasa road which was caused, *inter alia*, by an accident near Mlolongo and construction of a by-pass bridge near City Cabanas, counsel did not state why he did not deem it necessary to call Mr. Ngatia on his mobile telephone number, which was well known to him. After Mr. Ombwayo made effort to telephone his colleagues in the office without success, he ought to have telephoned Mr. Ngatia or sent him a text message to notify him of the difficulties he was facing, if at all. No explanation was proffered for Mr. Ombwayo’s belated call to Mr. Ngatia, whether the call was at 9.30 a.m. as alleged by Mr. Ombwayo or at 9.45 a.m. as stated by Mr. Ngatia. Mr. Ombwayo was aware that the application was listed for hearing at 9.00 a.m. and if he wanted to get Mr. Ngatia’s indulgence he ought to have called him much earlier.

27. Further, there are many advocates in the Attorney General’s Chambers and I believe that if Mr. Ombwayo had acted with due diligence he would have been able to reach one of them on their mobile phones or sent a text message even if some were in a meeting that material morning. He could even have contacted any other advocate outside the Attorney General’s office to hold his brief for purposes of notifying the Court and Mr. Ngatia of his difficulties. That was not done. In my view, the reasons advanced for Mr. Ombwayo’s failure to attend court are not satisfactory and cannot amount to sufficient cause.

28. **“Sufficient cause”** or **“good cause”** in law means:

**“.....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”**. See **BLACK’S LAW DICTIONARY, 9<sup>th</sup> Edition**, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.

29. It is not necessary for me to consider whether the delay in making the second application has been explained because under **rule 56 (4)** of the **Court of Appeal Rules** the application ought to have been made within thirty days from 24<sup>th</sup> October, 2011 and since the same was filed on 23<sup>rd</sup> November, 2011 it was made within the stipulated period of time.

30. All in all, I find this application lacking in merit and dismiss the same with costs to the respondents.

**Dated and Delivered at Nairobi this 15<sup>th</sup> day of March, 2013.**

**D.K. MUSINGA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**