



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civ Appli 289 of 2006

REPUBLICAPPLICANT

Ex parte

1. CONTROLLER AND AUDITOR GENERAL

2. PUBLIC SERVICE COMMISSION

AND

FLORA NJOKI NJERURESPONDENT

(An application for extension of time to file and serve both Notice of appeal and record of appeal from the ruling and order of the High Court of Kenya

irobi (Mr. Justice J.L.A. Osiemo) dated 12th September, 2006

in

H.C. MISC. NO. 693 OF 2005)

RULING

This is an application by the Republic (hereinafter “*the applicant*”) by Notice of Motion dated 15th November 2006 and lodged on 17th November 2006. The respondent is Flora Njoki Njeru (hereinafter “*the respondent*”). The following relief is sought by the applicant:-

- 1. The Honourable Court of Appeal do grant the Applicant extension of time to file and serve Notice of Appeal and Record of Appeal from the Ruling and Order of The Hon. Mr. Justice J. L.A. Osiemo dated 17th December 2004 (this date was later amended by consent to the correct date being 12th September 2006) in H.C.C.C. No. 693 of 2000 (this year being later amended by consent to the correct year being 2005).***
- 2. That the costs of this application be provided for.”***

The grounds for the application were:-

“(a) That the applicant was not notified and neither could he have known and did in fact not know of the date of the ruling and could not therefore file a Notice of Appeal or request for certified copies of the proceedings, judgment and decree in time.

(b) Leave of the Court is needed for the filing of the notice and record of appeal out of time.

(c) That it is in the interests of Justice that time be extended to enable the applicant to be heard on the appeal.

(d) That the Applicant has an arguable Appeal which raises vital issues of law as demonstrated in the draft Memorandum of Appeal.”

A document headed “*Memorandum of Appeal*”, omitting by mistake, the word “*Draft*” was exhibited to the supporting affidavit of Litigation State Counsel Mwangi Njoroge setting out the following intended grounds of appeal:-

“1. That the Learned Superior Judge erred in law and in fact in issuing an order that does not fall within the purview of Judicial Review after hearing the Judicial Review Application to wit, an order that the ex parte applicant be reinstated to her employment and resume her normal duties with immediate effect.

2. That the learned superior judge erred in law and in fact in issuing an order that was not capable of implementation by the respondents.

3. That the learned superior judge erred in law and in fact in not specifying which of the respondents were to implement the order of reinstatement thus issuing an ambiguous order.

4. That the learned superior court judge erred in law and in fact in not finding that the respondent did not owe the ex parte applicant any statutory duty that could give rise to orders of judicial review.

5. The Learned Superior (sic) erred in law and in fact in considering the merits and demerits of the allegations reveled (sic? revealed?) against the Respondent during, (sic) the disciplinary proceedings.

6. The learned Superior Judge erred in law and in fact in failing to restrict his inquiry only to the propriety of the disciplinary procedure that the Respondent was subject to.

7. That the Learned superior court Judge erred in fact in Law (sic) finding that a decision to dismiss the ex parte applicant for gross misconduct subject matter of the Judicial Review proceedings was (sic) can be the subject of an order certiorari.

8. That the Learned Superior court erred in fact and in law in finding that the letters communicating the Public Service Commission’s dismissal of the ex parte applicant’s appeals were written without authority.

9. That the learned Superior court judge erred in issuing and (sic) order that had the effect of substituting his decision for the decisions of the respondents.”

In the case of *Leo Sila Mutiso v. Rose Helen Wangari Mwangi* – Civil Application No NAI 251 of 1997 (unreported) delivered on 5th November 1999 in a Ruling of the Court (Gicheru, Lakha, and Bosire JJs) this Court reiterated that:

“Whilst the discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy.”

“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 the 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.”

The length of the delay sought to be excused in the current application is from the date on which the Notice of Appeal should have been lodged in accordance with **rule 74 (2)** of the Court of Appeal Rules (hereinafter “*the Rules*”) to the date when the current application was filed. The judgment was, according to the date given over the signature of the Judge, J.L.A. Osiemo J. in the record, delivered on **12 September 2006** so that the Notice of Appeal should have been lodged within 14 days, that is on or before **26th September 2006** in accordance with **rule 74 (2)** of the Rules and then served within seven days of the lodging of the Notice in accordance with **rule 76 (1)** of the Rules.

The Notice of Appeal has not yet been lodged since it cannot be lodged unless and until an extension of time for the lodging of it is granted. The current application was filed on **17th November 2006** which is **52 days** after the notice of appeal should have been lodged.

The reason for the delay given by the applicant is simply that the applicant was never informed that the ruling of the learned judge was going to be delivered on 12th September 2006 and was not informed that it had been so delivered until **25th October 2006** when a letter dated 6th October 2006 from the respondent’s Advocates ***Albert Kamunde & Co*** addressed to the Attorney General, Sheria House, Nairobi was stamped as having been received. That letter stated:-

“Please find enclosed a draft copy of the Order granted on 12th September, 2006 for your approval.

Kindly but also urgently let us have the Order with or without amendments for our further action.”

The respondent Flora Njoki Njeru, in her replying affidavit sworn on 9th February 2007 deponed, inter alia, in paragraphs 1 to 8 as follows:-

“3. THAT on the 22nd April 2005 vide Civil Application no. 693 of 2005 I applied for an order of Certiorari against the Public Service Commission with regard to being unfairly dismissed from its employment.

4. THAT aforementioned application was heard by the Honorable justice Osiemo who was set to deliver the ruling on the 4th July 2005. However the said ruling could not be delivered on that day but the parties herein were advised that the same was not ready but that a notice would be issued to the parties as to when the ruling would be delivered.

5. THAT I am advised by my advocate on record, Albert Kamunde, which advice I verily believe to be correct that the said notice was given to the parties herein vide a notice dated 6th September 2006. The said notice was addressed to both my lawyers and the Honourable Attorney General. Now shown to me and annexed hereto is a copy of the said Notice marked as “FNN-1”

6. THAT I sincerely believe that the Attorney General’s office had sufficient notice of the date and time when the ruling was to be delivered.

7. THAT the averment by the state counsel made in paragraph 9 that the Attorney General’s Office had not received the notice of ruling from the registrar’s office is untrue as the same was forwarded to them.

8. THAT I believe that the Notice of Motion Application brought to this court is meant to delay the ends of justice and to further deny my enjoyment of the fruits of justice. There is absolutely no justifiable reason as to why the Attorney General’s office could not bring this application earlier than

they did.”

The Notice exhibited as **FNN 1** referred to in Paragraph 5 *supra* was in these words:-

“TAKE NOTICE that the Judgment/Ruling in the above suit MISC Civil 693 /05 will be delivered on the 12th day of September 2006 at 9 0’clock in the Morning noon in Chambers/Court No 14

Please note that you are required to attend above Chambers/Court on the aforesaid date and time.

Dated at Nairobi this 6th day of September 2006.

for Deputy Registrar”

Above the words “*f Deputy Registrar*” there was a signature. It was stamped as received by Albert Kamunde & Co Advocates on 7/9/06 but it did not bear any stamp showing that it had been received by the applicant.

There was thus no written evidence as to when the notice of the revised date for delivery of the judgment was delivered by the superior court to the applicant herein.

The affidavit dated **15th November 2006** in support of the current application was sworn by Litigation State Counsel Mwangi Njoroge and stated as follows:-

“1. That I am a Litigation State Counsel employed in the Office of the Attorney General Nairobi Office and that I have been handling the conduct of the judicial review proceedings in the superior court that is H.C. MISC.APPL. 693 of 2005 the ruling whereof the applicant herein desires to appeal against and that I am therefore competent to swear this affidavit.

2. That the ex parte applicant filed her notice of motion for judicial review on 30/5/05 seeking by that motion orders of certiorari to quash the decision of the Public Service Commission disallowing her second appeal against dismissal for gross misconduct.

3. That in the same application the ex parte applicant also sought orders reinstating her former employment duties with the Public Service Commission notwithstanding that she was formerly working with the Office of the Controller and Auditor General.....

4. That upon instructions by the respondents the Hon. the Attorney General filed a replying affidavit on their behalf on the 28th September 2005.....

5. That the case came up for hearing on the 26/4/2006 and 13/6/2006. On 13/6/2006 the court directed that parties do attend the ruling on 4th July 2006 at 2.30 pm.

6. That during the attendance on the 4th July 2006 the court indicated that the ruling was not ready and that notice would issue to the parties.

7. That I proceeded on my annual leave on the 18/8/2006 and did not resume duty till 22/9/2006. Before I left for my annual leave no notice of ruling date had been served upon the Office of the Attorney General.

8. That after resuming duty on the 22/9/2006 I continued handling my work files and in the process I was handed file record in respect of this file with a letter from the firm of Albert Kamunde & Co Advocates intimating that the court had finally given a ruling on the matter in our absence on the 12th September 2006. (Annexed hereto is a copy of the said letter marked “MNIII”)

9. That still I did not get any notice of ruling after resuming from leave and when I received the

letter alluded to in the paragraph 8 hereinabove that was when I first came to know that the court had issued a ruling in the matter.

10. That the respondents are dissatisfied with the ruling and order of the court and they desire to be heard on appeal, and I have advised them that an appeal would have merits but I am aware that the appeal cannot be filed without the leave of the court as sought herein. (Annexed and marked "MNIV" is the draft memorandum of appeal).

11. That I asked the court clerk to trace the court file and obtain copies of the ruling to enable me to peruse it and if necessary prepare an appeal he obtained one on the 15th November 2006. (Annexed hereto is a copy of the said letter marked "MNV").

12. That I honestly believe that the delay in filing this application is not inordinate as has been explained hereinabove.

13. That I make this affidavit in support of the applicant's Notice of Motion dated 15th November 2006 for extension of time to file and serve both Notice of Appeal and Record of Appeal.

14. That the facts deponed to hereinabove are true to the best of my knowledge save wherein otherwise stated with grounds of belief and sources of information supplied."

No explanation was offered by the respondent as to why the letter dated **6th October 2006** (Exhibit MNIII) forwarding the draft Order was not received by the Attorney General's Chambers until **25th October 2006**. This was the date when the applicant was first informed of the delivery of the Ruling intended to be appealed against.

The length of delay in lodging and serving the Notice of Appeal as initially calculated as above was a total of 52 days. I consider that the period from the delivery of the ruling on **12th September 2006** until **25th October 2006** when the notification that the ruling had been delivered was received by the applicant should, in my view, be deducted in the final calculation of the length of delay. This results in the 52 days being reduced by 43 days to the final figure for the length of delay to **9 days**.

In paragraph 11 of the supporting affidavit of State Counsel Mwangi Njoroge deponed that his court clerk was unable to obtain copies of the ruling until **15th November 2006**. While it is understandable Counsel wanted to see the Ruling before making a decision whether or not to appeal it has not been made clear why it took so long (about three weeks) to get this document.

The chance of the appeal succeeding is a matter which **possibly** can be taken into account in the exercise of my discretion. The less I say about this aspect the better as, if the appeal proceeds, it will be the issue before the full court. All I need say is that in the exercise of my discretion I have borne in mind that the intended appeal does not appear, *prima facie*, to be frivolous.

The degree of prejudice, if any, likely to be suffered by the respondent is another factor which I am conscious I should take account of in the exercise of my unfettered discretion in applications of this nature. In the current application before me it has not been suggested by the respondent that she will suffer prejudice if the application is granted.

I have carefully considered all the above factors and have come to the conclusion that my unfettered discretion, which must be exercised judicially and not arbitrarily or capriciously, should be exercised in this case in favour of granting the extension of time sought.

I therefore hereby order that the time for lodging a **Notice of Appeal** from the decision of Osiemo J. delivered on **12th September 2006** be extended to expire **seven days** from the date of delivery of this ruling.

I further order that the **Notice of Appeal** shall be served in accordance with **rule 76 (1)** of the Court of Appeal Rules within **seven days** of the lodging of the Notice of Appeal.

I further order that the **Record of Appeal** shall be lodged within **seven days** from the date on which the Notice of Appeal is lodged and that the **Record of Appeal** shall be served on the respondent's advocates within **fourteen days** of the lodging of the **Record of Appeal**.

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

Dated and delivered at Nairobi this 20th day of April, 2007.

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR