



IN THE COURT OF APPEAL

AT NAKURU

CORAM: GITHINJI, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI 65 OF 2004 (NAK. 3/04)

BETWEEN

EGERTON UNIVERSITY APPLICANT

AND

REPUBLIC RESPONDENT

EX-PARTE

JOHN K. RUGA

(An application for extension of time to lodge an appeal, file & serve record of appeal from a ruling of the High Court of Kenya at Nakuru (Ondeyo J) dated 4th October, 2002

in

H.C.MISC.C. NO. 90 OF 2002

RULING

The applicant Egerton University seeks an order under **rule 4** of the Court of Appeal Rules that time within which to lodge the appeal as well as time within which to file and serve the Record of Appeal extended.

By a letter dated 4.2.2002, the Respondent John K. Ruga – a lecturer at Egerton University was informed by the University that the Disciplinary Committee had on 23.1.2002 found the Respondent guilty for re-sitting an examination for a student and that the Committee had decided that Respondent’s service be terminated with effect from 23.1.2002.

The Respondent then filed **High Court Misc. Application No. 90 of 2002** in which he sought an order of certiorari to bring to the High Court and quash the disciplinary proceedings of 23.1.2002 and decision dated 4.2.2002 terminating this services. The Court acceded to the application and on 4th October, 2002 granted the order of certiorari quashing the disciplinary proceedings and the decision terminating the Respondent’s employment.

The applicant filed a Notice of Appeal on 9.10.2002. The applicant filed an application seeking stay of execution of the orders of 4.10.2002 pending appeal. On 9.12.2002 the superior court allowed the application and stayed the execution of the decision pending the hearing and determination of the appeal. The respondent was ordered to deposit Shs. 50,000 in Court as security for the costs of the appeal. The Shs. 50,000 was deposited in Court on 28.1.2003. Thereafter the respondent filed **Civil Application No. Nai. 112 of 2003** seeking an order that the Notice of Appeal dated and lodged on 9.10.2002 be struck out on the ground that the Notice of Appeal was served out of time. That application was lodged at the registry on 29.4.2003. That application was allowed by the Court of Appeal on 1.10.2003 and the Notice of Appeal was struck out. Mr. Otieno Ogola the advocate for the applicant deposes in the supporting affidavit that they had obtained a Certificate of Delay from the Deputy Registrar on 17.10.2003 and that they had in fact lodged the appeal on 30.9.2003 a day before the Court of Appeal struck out the Notice of Appeal. That Certificate of Delay is annexed to the application. By the Certificate of Delay the Deputy Registrar certifies that the time for the preparation and delivery of the certified copies of the proceedings and ruling was from 7.10.2002 to 9th September, 2003 – 337 days. The present application was filed on 9.3.2003 about 5 months from the date the Notice of

Appeal was struck out by the Court of Appeal.

The application is opposed. The Respondent has filed a Replying affidavit in which he accuses the applicant of inordinate delay both in the filing of the appeal and in bringing this application. He particularly states that it is by filing of another suit **HCCC No. 38 of 2003 on 8.2.2004** in which he claims salary arrears from February 2002 to-date which has awoken the applicant from slumber.

The applicant is seeking the exercise of the Court's discretion in his favour. The discretion of the Court to extend time like any other discretion of the Court is exercised judicially. The matters which Court take into account in deciding whether or not to grant an extension of time are stated in the case of **James Herberts Odhiambo v Far East Chinese Mecial Centre & Anor** - Civil Application No. NAI. 43 of 2002 (unreported) relied on by the counsel for the applicant. They are also stated in numerous decisions of this Court – see for instance **Wasike v Swale** [1984] KLR 591.

The applicant's counsel states that the intended appeal has overwhelming chances of success and has addressed the Court on the matters that the appeal will deal with. This includes the alleged error by the Court in granting the order of certiorari when the respondent had not complied with **Order 53 rule 7(1) Civil Procedure Rules** by filing a copy of the order or proceedings that he sought to be quashed. Having heard the respective counsel and perused the Ruling of the Court given on 4.2.2002 I am satisfied that the intended appeal is not frivolous.

Regarding the issue of delay it is true that the Notice of Appeal was struck out by the Court of Appeal on 1.10.2003 for late service. The delay which is relevant in this case is from the time the Notice of appeal was filed up to the time the present application was filed.

The delay from the time the Notice of appeal was filed up to the 9.9.2003 has been adequately explained. The Certificate of delay exonerates the application for the delay. That is the time the Court certifies as required by the court in the preparing of the proceedings and judgment. The applicant could not have taken any action between 9.9.2003 and 1.10.2003 as the application for striking out the Notice of Appeal was pending. It is however apparent that there is a delay of 5 months from the time the Notice of Appeal was struck out and the time the present application was filed. Despite the fact that the Court quashed the disciplinary proceedings and the decision termination the Respondent's employment the dispute between the parties did not end. The Court had to stay the execution of its decision because of the prevailing disputes. Even after the Notice of Appeal was struck out the dispute between the parties was not settled. The Respondent had to resort to civil proceedings and file a civil suit **HCCC No. 38 of 2004** which is still pending for hearing.

The applicant has already filed an appeal which has not been struck out although there is a delay of 5 months before filing the present application. It seems from the circumstances of the case that even if the application had been brought earlier, the respondent could not have benefited. This is so because even after the Ruling of Appeal was struck out the dispute was not resolved and the Respondent had to file civil proceedings. Despite that delay the Court was still discretion to allow the application if the interest of justice so requires. It is my view that considering all the circumstances of the dispute the nature of the dispute and the previous proceedings it is in the interest of justice that the dispute between the parties should be conclusively and finally settled by allowing the applicant to file a competent appeal.

The Respondent has not benefited by the striking out of the Notice of Appeal as he has not been reinstated or paid any salary. He has filed civil proceedings which are still pending. I do not think that a further delay to be occasioned by allowing this application will cause serious prejudice to the Respondent.

For the above reasons I allow the application with costs to Respondent. I give leave to applicant to lodge and service a fresh Notice of Appeal within 7 days. I also give leave to the applicant to lodge and serve the Record of Appeal within 30 days from date hereof.

Dated and delivered at NAKURU this 24th day of September, 2004.

E.M. GITHINJI

JUDGE OF APPEAL