



**Republic v Public Service Commission & another; Kirinyaga  
County Public Service Board (Exparte Applicant) (Judicial Review  
E003 of 2023) [2025] KEELRC 70 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 70 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**JUDICIAL REVIEW E003 OF 2023**  
**ON MAKAU, J**  
**JANUARY 23, 2025**  
**IN THE MATTER OF AN APPLICATION FOR**  
**ORDER OF CERTIORARI AND PROHIBITION**  
**AND**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT**  
**IN THE MATTER OF THE PUBLIC SERVICE COMMISSIONS ACT**  
**AND**  
**COUNTY GOVERNMENTS ACT**  
**AND**  
**IN THE MATTER OF THE DECISION BY THE PUBLIC**  
**SERVICE COMMISSION DATED 14TH APRIL 2021**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KENYA UNION OF CLINICAL OFFICERS ..... 2<sup>ND</sup> RESPONDENT**

**AND**



## KIRINYAGA COUNTY PUBLIC SERVICE BOARD ..... EXPARTE APPLICANT

### RULING

1. This ruling relates to the Applicant's Notice of Motion dated 27<sup>th</sup> August 2024 brought under Articles 159, 259(1) of *the Constitution*, Section 7 of the *Appellate Jurisdiction Act*, section 1A, 1B, 3 and 3A and 63 of the *Civil Procedure Act*. It basically seeks the following orders:
  - a. That this Honourable Court be pleased to enlarge time for filing of the Notice of Appeal and the Appellant's Notice of Appeal dated 20<sup>th</sup> August, 2024 lodged on the 24<sup>th</sup> August 2024 be deemed as properly filed and served.
  - b. That in the alternative to prayer (2) above, the Honourable Court be pleased to enlarge time within which the ex-parte Applicant should file and serve a fresh notice of appeal out of time.
  - c. That the orders granted herein do apply mutatis mutandis to ELRC JR No. E001 of 2023.
  - d. That the costs of the application be provided for in the appeal.
2. The application is premised on the grounds set out on the body of the motion and the supporting affidavit sworn on the 27<sup>th</sup> August 2024 by Ruth Wanyonyi Advocate. In brief the applicant contends that judgement was entered in this matter on 9<sup>th</sup> August 2024 and it obtained leave to appeal against the decision; that on the 20<sup>th</sup> August 2024, efforts to upload a Notice of appeal failed due to problems with the CTS; that it only managed to file the Notice of Appeal on the 24<sup>th</sup> August 2024, which was outside the 14 days limitation period that ended on 23<sup>rd</sup> August 2024; that the delay was for reasons beyond its control and therefore urged the Court to allow the notice of appeal admitted out of time; and that the orders granted herein to apply mutatis mutandis to JR E001 of 2023 because the same problem of CTS was encountered while trying to lodge a Notice of Appeal.
3. The Respondent opposed this motion vide grounds of opposition dated 4<sup>th</sup> November 2024 whereby it prayed for the motion to be struck out with costs on grounds that: the application is an abuse of the court process as they are intended to subvert the orders of 9<sup>th</sup> August 2024 for leave to appeal and stay of execution; that the application of 7<sup>th</sup> November 2024 is aimed at arm twisting the Court and if granted it will embarrass the Court as it has already upheld the decision of the PSC; that the Court is functus officio and the applications are sub judice and res judicata and therefore the court lacks the jurisdiction to grant the sought orders; that the orders sought are contrary to section 88 of the PSC Act that requires county boards to comply with PSC decisions on appeal notwithstanding any pendency of an application for review; and that the applicant is a contemnor hence not deserving of the Court orders or audience.

### Submission

4. The Applicant raised the issues for determination: whether this Honourable Court should the ex-parte Applicant's Notice of Appeal filed out of time, whether the intended appeal is arguable and who should bear the costs of this Application. On the first issue, counsel submitted that the Applicant only got to file its notice of appeal on 24<sup>th</sup> August 2024 at 5am due to system downtime during the week. The filing happened outside the 14 days limitation due to reasons beyond control.
5. It was submitted that Article 159 of *the Constitution* implores the Court to administer justice without undue regard to procedural technicalities. It was further urged that a party should not be driven away



- from the seat of justice when there is sufficient cause for the failure to comply with procedures and timelines.
6. It was further submitted that under Rule 18 of this Court's Rules 2024, the Court is clothed with the discretion to extend time within which a party can file an appeal. For emphasis, reliance was placed on the case of Paul Musili Wambua v Attorney General & 2 others [2015] eKLR where the Court of Appeal discussed the matters to be considered in deciding whether or not to enlarge the time for filing an appeal.
  7. The court was urged to grant the leave sought because the system failure leading to a delay of five hours is a factor beyond a party's control.
  8. On the second issue, while relying on Cotton LJ in Wilson v Church (No.2) 12 Ch D (1879) 454 at p458, it was submitted that the right of appeal was constitutional, and there being an appeal which in the Court's mind is not frivolous, it is in the interest of justice that the court do allow the same to be determined on merit.
  9. It was submitted that the draft Memorandum of Appeal attached to the application that raises weighty grounds warranting the consideration of the Court of Appeal. Further that, the length and reason of the delay, and the chances of success tilt in the Applicant's favour.
  10. On the third issue, it was submitted that the costs of the application abide the outcome of the appeal.
  11. The Respondent on the other hand submitted that the application does not meet the criteria, threshold and requirements for leave to file appeal out of time established by the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] e KLR.
  12. It was further submitted that enlargement of time by the Court is an equitable remedy and an applicant must approach the Court with clean hands. It was argued that the applicant herein has been in breach of section 88 of the PSC Act for four years since the PSC gave its decision in the dispute herein in 2021, which was late adopted as judgement of the Court on 9<sup>th</sup> August 2024.
  13. It was further argued that a decision by the PSC cannot be suspended or deferred but must be implemented even when an application for review is pending. It was further submitted that the applicant is in contempt of court also in breach of section 88 of the PSC Act. For emphasis, reliance was placed on the case of Alice Njoki Mugo v KCB Bank Kenya Limited & Another [2020] eKLR.
  14. It was further submitted that the applicant has failed to discharge the burden of citing, sufficiently explaining and proving the basis for the failure to comply with the timelines of filing a Notice of Appeal.
  15. It was argued that Ruth Wanyonyi's Supporting Affidavit is an inadmissible hearsay because she has not been in conduct of the suit there is nothing to prove that she personally to upload the alleged documents to the CTS. Further, the extracts allegedly from the Judiciary CTS also n inadmissible electronic evidence under section 106 B pf the Evidence Act due to lack of certificate of electronic evidence. for emphasis, reliance was placed on County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR where the Court of Appeal underscored the mandatory requirement of a certificate under section 106B of the Evidence Act.
  16. It was further submitted that the applicant has not explained delay in filing the Notice of Appeal from 9<sup>th</sup> August 2024 when the judgment was entered. In the respondent's opinion, the alleged filing of the notice of Appeal was just an afterthought.



17. It further submitted that the members of the respondent will suffer prejudice if the orders sought are granted because have been out employment and will continue to be without employment indefinitely as the applicant has not implemented the decision of the PSC as required by the law.
18. Finally, it was submitted that the intended appeal is absolutely not arguable as the applicant has not addressed the core question in the draft Memorandum of Appeal. Consequently, the court was urged to strike out the application with costs.

### **Determination**

19. I have considered the Application, response and, the rival submissions. The only issue falling for determination is whether the application meets the legal threshold for enlargement of time for filing a Notice of Appeal.
20. The jurisdiction of this court to enlarge the time for giving notice of appeal is donated by Section 7 of the *Appellate jurisdiction Act* which provides as follows:

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal notwithstanding that the time of giving such notice or making such appeal may have already expired”.

21. The foregoing provision applies to this court because under the 2010 Constitution, decisions of this court, like those of High court are appealable to the Court of Appeal under the same Act and the Rules thereunder. The jurisdiction of the trial court to extent the time required for lodging notice of appeal under section 7 aforesaid was confirmed by the Court of Appeal in Kenya Airports Authority & another vs Timothy Nduvi Mutungi [2014] eKLR where Githinji JA expressed himself as follows:

“The application of 10<sup>th</sup> December 2012, was properly made in the High Court as the High Court has power to extent time for giving notice of intention to appeal...”

22. It follows that submission by the applicant that the Court’s jurisdiction to extend time for filing of appeals is donated by Rule 18 of the ELRC Procedure Rules is incorrect. The said rule deals with appeal to the Court and not those going to the Court of Appeal.
23. Turning to the merits of the application, I am guided by the decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the Supreme Court laid down the following principles for the exercise of discretion to extend the time for filing an appeal, thus:

“ ...

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;



5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
24. More than a decade before the above decision, the Court of Appeal in *Pan African Paper Mills (EA) Ltd v Olaka* [2001] KLR stated as follows:
- “1. In an application for leave to file and serve a Notice and Record of Appeal out of time, the Court is being asked to exercise its unfettered discretion which is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it’s not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
  2. The decision whether or not to extend the time for appealing is essentially discretionary. In general, the matters which the Court takes into account in deciding whether to grant an extension of time are:
    - a) The length of the delay;
    - b) The reason for the delay;
    - c) The chances of the appeal succeeding if the application is granted; and
    - d) The degree of prejudice to the respondent if the application is granted.”
25. There is no doubt that the delay in filing the Notice of Appeal was only one day. The 14 days’ time lapsed on 23<sup>rd</sup> August 2024 and the applicant paid for the Notice of Appeal on 24<sup>th</sup> August 2024 at 4.42PM. The explanation for the delay was that the judiciary CTS was down from 20<sup>th</sup> August 2024. The respondent contended that there is no authentic evidence to support the applicant’s explanation.
26. I have considered the rival contention and the court record. It is clear that the applicant had all the time from 9<sup>th</sup> to 23<sup>rd</sup> August 2024 to lodge its Notice of Appeal. The notice of appeal on record is dated 20<sup>th</sup> August 2024, meaning that the applicant waited until the last moment to exercise the right of appeal.
27. Secondly, the allegation that the Judiciary CTS was down is not supported by evidence from the judiciary ICT department. There is no denial that the home page or Dashboard of the e-filing provides an email and telephone numbers to users to contact the ICT officer of judiciary in case one faces challenges uploading documents. The applicant has not provided any evidence to show that it contacted the judiciary ICT officers between 20<sup>th</sup> and 23<sup>rd</sup> August 2024 about the alleged problem in uploading the Notice of Appeal.
28. The applicant has filed annexure RW1 a screenshot or printout of the Dashboard indicating that the page was not working and prompting the user to reload. The said evidence is electronic but without any certificate of electronic evidence to authenticate the same as required by section 106B of the *Evidence Act*. Secondly, it is not clear about the time and date when the screenshot was taken. Finally, it does not indicate whether the user made any other attempt to access the CTS thereafter. In summary the



annexure RW1 is neither sufficient nor authentic evidence to discharge the burden of proof that the applicant was prevented from filing the Notice of Appeal on time because of continuous problem with the judiciary CTS.

29. As regards the issue of prejudice, there is no doubt that the respondent has been agitating for its members to return to work and any further delay in finalizing the matter will prejudice them. The applicant will not suffer any prejudice because the failure to commence its appeal on time can only be blamed on its own negligence.
30. Both sides submitted on issue whether or not the appeal is arguable, but I believe that matter should be better determined by the appellate court.
31. Having considered the matters canvassed before this court, and for observations made herein above, I am not satisfied that the delay in filing Notice of Appeal within the prescribed time is excusable. The applicant has not laid before the court any plausible explanation to justify the delay in filing the Notice of Appeal. Consequently, I decline to exercise my discretion to enlarge the time for filing Notice of Appeal and proceed to dismiss the application dated 27<sup>th</sup> August 2024 with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 23RD DAY OF JANUARY, 2025.**

**ONESMUS N MAKAU**

**JUDGE**

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

