



**Mugo v Teachers Service Commission (Cause E028 of 2021)  
[2023] KEELRC 1622 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1622 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
CAUSE E028 OF 2021  
ON MAKAU, J  
JULY 7, 2023**

**BETWEEN**

**PETER KINYUA MUGO ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**RULING**

1. This ruling relates to the Respondent's (Applicant) Notice of Motion dated 5<sup>th</sup> December, 2022 brought pursuant to Article 159 of the Constitution, Rule 5(2)(b) of the Court of Appeal Rules, 2022 and all other enabling provisions of the law, seeking the following Orders;
  - a) That this Honourable Court be pleased to extend time for filing Notice of Appeal against the whole judgement delivered on 31<sup>st</sup> October 2022 in the suit herein.
  - b) That pending the hearing and determination of the intended appeal, the court be pleased to order stay of execution of the judgment by Hon Marete J delivered on 31<sup>st</sup> October 2022.
  - c) That costs of the Application be provided for.
2. This application is based on the grounds that Applicant is aggrieved by the impugned judgement and wishes to appeal against the entire judgement to the Court of Appeal; that the said appeal raises substantial and weighty issues of law with high probability of success; that execution of the judgment is likely to cause irreparable harm and damage by injuring the reputation of the teaching service and set a bad precedent for examination center managers; that the reinstatement is against common law doctrine of mutuality of contracts and the principle of freedom of contracts; that the claimant may not be able to refund the sum of Kshs. 1,167,528 being the approximate decretal sum, in the event the appeal succeeds; that the delay in filing the appeal is attributed to the delay in receiving the typed judgment to enable the applicant peruse and make an informed decision on whether or not to appeal; that the Application has been made without any unreasonable delay; that the by dint of section 12 of



the TSC Act and Article 260 of the Constitution, the applicant is exempted from depositing security as it is capable of satisfying the decree of the court should the appeal fail; and that the applicant is vigilant to prosecute its appeal.

3. The application is also supported by the affidavit sworn on 5<sup>th</sup> December 2022 by Ms. Jane Irambu, respondent's Deputy Director in charge of Field Services. The affidavit basically reiterates the grounds set out in the Notice of Motion above.
4. The claimant has opposed the Application by his own Replying Affidavit sworn on 1<sup>st</sup> February 2023. In brief he states that the Notice of Motion presently before this Court lacks merits as there is no Notice of Appeal filed by the applicant from the date of the impugned judgment; that the application offends Rule 6, 75 and 77 of the Court of Appeal Rules which require that a Notice of Appeal is to be filed within 14 days from the date of the impugned decision; that the application has been filed after an unreasonable delay of 77 days and no reason for the delay has been offered; that the trial court read a typed judgment and therefore there is no merit in the allegation that the delay in lodging the appeal was caused by the delay in getting a the judgment typed; that the court lacks jurisdiction to entertain the application for stay as the same is res judicata as a similar application was dismissed by the trial court on 31<sup>st</sup> October 2022; that the applicant has not met the threshold for granting stay of execution pending appeal; that the applicant has not shown good will to partially settle the decree or offer security for due performance; that the appeal is in bad faith and is just calculated to deny him enjoyment of the fruit of his judgment; that the intended appeal is not arguable; that the applicant will suffer no prejudice if the application is dismissed; and that the application is an abuse of Court process and ought to be dismissed with costs.

### **Submissions**

5. It was submitted for the applicant that the substantial loss will be occasioned to it if the stay sought is withheld since the claimant has not demonstrated capacity to refund the decretal sum should the appeal succeed after execution. It was further contended that the application was made without unreasonable delay. Reliance was placed on National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another [2006] eKLR.
6. As regards security for the due performance of the decree, it was reiterated that the applicant is exempted from offering security by section 21 of the TSC Act and Article 260 of the Constitution. To fortify the foregoing, reliance was placed on the case of TSC v Benson Kuria Mwangi [2020] eKLR.
7. As to whether the application is res judicata, it was submitted that an oral application for stay immediately after a judgment is delivered does not bar a party from making a formal application for stay of execution. Therefore it was submitted that the application is not res judicata and has met the threshold for granting stay of execution to protect the substratum of the intended appeal.
8. Finally, it was submitted that the intended appeal is arguable and has high likelihood of success. Reliance was placed on the case of Kenya Medical Lab Technicians & Technologists Board v Prime Communications Ltd [2014] eKLR, where the court held that an arguable appeal is not necessarily one that must succeed.
9. The respondent never filed any submissions to the application but only relied on the Replying Affidavit to oppose application.



## Analysis and Determination.

10. Having considered the application, the response thereto and the submissions it is a fact that the Applicant did not lodge a Notice of Appeal within 14 days after delivery of the impugned judgment as required under rule 75 of the Court of Appeal Rules 2010. It is also a fact that the judgment has not been satisfied by the applicant. The issues for determination are:
  - (a) Whether the court should extend the time for filing the notice of appeal against the Judgment delivered on 31<sup>st</sup> October 2022 by Hon. Marete J.
  - (b) Whether the Notice of Appeal and the Memorandum of Appeal annexed to the application should be deemed as duly filed.
  - (c) Whether the impugned judgment and all consequential order should be stayed pending the intended appeal.

## Extension of time to file Notice of Appeal

11. Section 7 of the *Appellate Jurisdiction Act* donates jurisdiction to the High Court to extend time for lodging a notice of appeal, thus: -

“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 for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

12. The purposeful interpretation of the above provision is that the same jurisdiction is also donated to this Court and the Environment and Land Court since their decisions, just like the High Court, are appealable to the Court of Appeal.
13. In *Trimborn Agricultural engineering Limited v David Njoroge Kabaiko and another* [2000] eKLR, Shah JA held that:

“The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of *Peter Njoroge Mairo v Francis Gicharu Kariri & another*, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of *Edward Allan Robinson & 2 others v Philip Gikaria Muthami*, (Civil Application No. Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus: ‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an



appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal. (Emphasis added)”

14. As illustrated in the case above, the powers donated to the High Court under Section 7 of the *Appellate Jurisdiction Act* are clear and limited. This Court can only come to the aid of a litigant who is desirous of filing a Notice of Appeal for the first time after running out of the stipulated timelines.
15. Accordingly the court has jurisdiction in the instant application. The power to enlarge time is discretionary and must be exercised judiciously. The Applicant must therefore convince the Court that there was good reason for the failure to comply with the timelines.

The Principles that guide the Court in the exercise of the discretion to extend time were clearly set out in the Supreme Court decision of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2013] eKLR where the court held that:

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

... we derive the following as the underlying principles that a court should consider in exercising such discretion:

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 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 Respondent if the extension is granted;
  6. whether the application has been brought without undue delay; and
  7. whether in certain cases, like election petition, public interests should be a consideration for extending time.”
16. The Applicant explained that the failure to file a Notice of Appeal in time was caused by the delay in getting a typed copy of the Judgment from the court after a request vide the letter dated 7<sup>th</sup> November 2022. That a perusal of the judgment was necessary in order to make an informed decision whether or not to file an appeal. The letter was addressed to the Deputy Registrar of the Court at Nyeri as opposed to the Sub-registry at Meru where the suit was filed. The mix-up is excusable since the same judge presided over the two stations and the judgment was in fact delivered in Nyeri and the file dispatched to Meru Registry.



17. However as contended by the claimant, there is no proof that the said letter was ever received at the Court Registry at Nyeri. There is also no proof that the applicant made any effort to get a copy of the typed judgment before the time required for filing a Notice of Appeal lapsed. Consequently, I am not satisfied with the explanation given by the Applicant for the failure to file the notice of Appeal within the statutory timelines.
18. I have also considered the time taken to make the application herein being 77 days from the date of the impugned judgment. Although the application was ready by 5<sup>th</sup> December 2022, the same was not filed until 16<sup>th</sup> January 2023, 32 days later. Again no reason was given for the delay. Therefore, I find and hold that a delay to make the application for 77 days after the impugned judgment without any plausible explanation has rendered the said delay unreasonable.
19. The applicant alleges that granting the application will not prejudice the claimant. However, the court notes that the respondent did not comply with the judgment by reinstating the claimant to his job. Obviously his livelihood has been compromised and most likely languishing in financial embarrassment. Granting the application will prejudice the claimant further.
20. In light of the finding that I am not satisfied with the explanation for delay, the application for extension of time must fail. Accordingly, consideration of the issue of stay pending appeal is not necessary. Consequently, the application dated 5<sup>th</sup> December, 2022 is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties 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**

