



**Mulima & 2 others (Suing as Representatives of Ex-East African
airways Staff Welfare Association) v Attorney General & 8 others (Civil
Application 1 of 2018) [2019] KESC 74 (KLR) (29 April 2019) (Ruling)**

Alfred Asidaga Mulima & 2 others v Attorney General & 8 others [2019] eKLR

Neutral citation: [2019] KESC 74 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 1 OF 2018

DK MARAGA, CJ & P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

APRIL 29, 2019

BETWEEN

ALFRED ASIDAGA MULIMA 1ST APPLICANT
CHARLES MARARO NJOROGE 2ND APPLICANT
PETER KHIO KITUKU 3RD APPLICANT
**SUING AS REPRESENTATIVES OF EX-EAST AFRICAN AIRWAYS STAFF
WELFARE ASSOCIATION**

AND

THE ATTORNEY GENERAL 1ST RESPONDENT
BARCLAYS BANK INTERNATIONAL LIMITED 2ND RESPONDENT
BARCLAYS BANK TRUST COMPANY LIMITED 3RD RESPONDENT
BARCLAYS TRUST CHANNEL ISLAND LIMITED 4TH RESPONDENT
BARCLAYS TRUST INTERNATIONAL LIMITED 5TH RESPONDENT
BARCLAYS BANK KENYA LIMITED 6TH RESPONDENT
MINISTRY OF FINANCE 7TH RESPONDENT
MINISTRY OF TRANSPORT 8TH RESPONDENT
THE REGISTRAR GENERAL 9TH RESPONDENT

*(Being an application for extension of time to file and serve the record of appeal out of time
against the judgement and orders of the Court of Appeal (Githinji, Karanja, and Musinga JJA)
dated and delivered in Nairobi on the 24th February, 2017 in Civil Appeal No. 179 of 2015)*



Supreme Court extends time to file and serve record of appeal out of time

Reported by Chelimo Eunice

Civil Practice and Procedure – appeal - appeal to the Supreme Court - extension of time - application for extension of time within which to file and serve record of appeal - whether Supreme Court would extend time to file and serve the record of appeal out of time where the Court of Appeal had failed to supply the applicants with copies of the proceedings and judgment in time.

Brief facts

The applicants sought leave to appeal out of time and an order directing the Registrar of the Supreme Court to deem the petition and record of appeal as filed with leave. They argued that having timeously lodged their notice of appeal and applied for copies of proceeding, the Court of Appeal's delay in availing them a copy of the proceedings ought not be visited on them and further that unlike other superior courts of record, there were no provisions for issuance of certificate of delay from the Court of Appeal.

The respondents opposed the application arguing that leave to appeal out of time was never granted as of right; that it was an equitable remedy that was only available to a deserving party and that the applicants were guilty of laches.

Issues

Whether the Supreme Court would extend time to file and serve the record of appeal out of time where the Court of Appeal had failed to supply the applicants with copies of the proceedings and judgment in time.

Held

1. It was the Court of Appeal which failed to supply the applicants with copies of the proceedings and judgment in time. The record showed that the judgment of the Court of Appeal was delivered on February 24, 2017. The applicants filed a notice of appeal and applied for a copy of the proceedings and judgment on March 6, 2017. The proceedings were supplied to them on December 20, 2018 and they filed their record of appeal out of time on January 22, 2018.

Application allowed.

Orders

- i. *Applicants ordered to file a fresh record of appeal within 14 days of the date of the ruling.*
- ii. *The costs of the application were to abide the outcome of the intended appeal.*

Citations

Statutes

1. Constitution of Kenya, 2010
2. Supreme Court Act

Advocates

None mentioned

RULING

- 1 Before the Court is an application dated January 22, 2018 premised upon Section 24 of [Supreme Court Act](#), Rules 35, 43 i and 23 of the Supreme Court Rules, 2012 seeking leave to appeal out of time and an order directing the Registrar of this Court to deem the petition and record of appeal as filed with leave. An amended application was filed on 24th May 2018 albeit without leave of the Court.



- 2 The applicants are chairman, secretary and treasurer of the Ex-East African Airways Staff Welfare Association the Association registered on 12th June, 2012 . They filed a representative petition in the High Court for the benefit of the members of the association and for all former Kenyan employees of the defunct East African Airways Corporation the corporation . Their claim was that when the corporation ceased operations on 13th January 1977 and they were declared redundant on 15th February 1977, as employees of the corporation engaged on diverse dates, they became entitled to their provident fund, redundancy payments, unpaid leave and other cessation of service benefits. The corporation, however, failed to pay them thus violating their Constitutional rights under Articles 20 1 , 27, 28, 29 f, 35, 40, 41, 43, 47, 48 and 57 of the Constitution of Kenya, 2010.
- 3 Save for the petitioners’ right to information which the High Court directed the 1st Respondent to provide them within 90 days and publish the names of those who were paid by the official receiver, as well those yet to be paid and the total amount being held by National Bank of Kenya for the petitioners, the High Court dismissed the petition on the grounds that the matter was not only statutorily barred but also unenforceable under the 2010 Constitution as the said Constitution has no retrospective application. To date, the 9th Respondent is yet to comply with the orders.
- 4 Aggrieved by that decision, the applicants appealed to the Court of Appeal. In its judgment delivered on the 24th of February 2017, the Court of Appeal dismissed the applicants’ Appeal No. 179 of 2015 in its entirety adding that the matter was res judicata as the East African Mediation Agreement Act had addressed the issue of the petitioners’ provident fund. The Court of Appeal also found that the applicants were guilty of laches which caused the respondents serious prejudice.
- 5 Being dissatisfied with the Court of Appeal judgement and intent on preferring a further appeal to this Court under Article 163 4 a of the Constitution, the applicants lodged a Notice of Appeal to this Court on the 6th of March 2017 together with a request for a certified copy of the proceedings and the judgement but received them only on 20th December 2017 by which time the period allowed for appeal had expired hence this application.
- 6 It is the applicants case that having timeously lodged their notice of appeal and applied for copies of proceeding, the Court of Appeal’s delay in availing them a copy of the proceedings should not be visited on them. They cited the cases of Law Society of Kenya Vs Centre for Human Rights and Democracy & Others, [2014] eKLR; Aviation & Allied Workers Union Kenya Vs Kenya Airways Limited & 3 Others [2015] eKLR; and Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 Others [2014] eKLR in support of their application.
- 7 It is their further submission that unlike other superior courts of record, there are no provisions for issuance of certificate of delay from the Court of Appeal and that the respondents will not suffer any prejudice if this application is allowed.
- 8 In response, through the replying affidavit sworn on 20th March 2018 by Paul Ndungi, the Secretary and Senior Legal Counsel with the 6th Respondent, the 2nd to 6th Respondents argued that leave to appeal out time is never granted as of right. It is an equitable remedy that is only available to a deserving party. Having failed to comply with the High Court direction to publish the names of the former employees of the corporation who had been paid and those not yet paid, the applicants are not parties deserving the exercise of this Court’s discretion in their favour.
- 9 The respondents further argued that the applicants are guilty of laches. To allow proceedings after a delay of 36 years during which the respondents have destroyed or lost their documents will deny them the right to a fair hearing and thus cause them great prejudice. Moreover, they concluded, the applicants



have not satisfied the conditions set out in the Nicholas Salat case for allowing such an application. They therefore urged us to dismiss the said application with costs.

10. Having perused the application and its annexures and considered the rival submissions of the parties, we find that it is the Court of Appeal which failed to supply the applicants with copies of the proceedings and judgment in time. The record shows that the judgment of the Court of Appeal that the applicants wish to appeal against was delivered on 24th February 2017. The applicants filed a Notice of Appeal and applied for a copy of the proceedings and judgment on 6th March 2017. The proceedings were supplied to them on 20th December 2018 and they filed their record of appeal out of time on 22nd January 2018.
11. In the circumstances, we allow this application. The applicants shall file a fresh record of appeal within fourteen 14 days of the date hereof. The costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2019.

D.K. MARAGA M.K IBRAHIM

**CHIEF JUSTICE & PRESIDENT JUSTICE OF THE SUPREME SUPREME COURT OF KENYA
COURT**

S. WANJALA. N. NJOKI

**JUSTICE OF THE SUPREME JUSTICE OF THE SUPREME
COURT COURT**

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

Supreme Court Of Kenya

