

eREPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga CJ &P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

CIVIL APPLICATION NO. 1 OF 2018

ALFRED ASIDAGA MULIMA

CHARLES MARARO NJOROGE

PETER KIIO KITUKU (Suing as representatives of Ex-East African Airways Staff Welfare Association).....APPLICANTS/PETITIONERS

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

BARCLAYS BANK INTERNATIONAL LTD.....2ND RESPONDENT

BARCLAYS BANK TRUST COMPANY LTD.....3RD RESPONDENT

BARCLAYS TRUST CHANNEL ISLAND LTD.....4TH RESPONDENT

BARCLAYS TRUST INTERNATIONAL LTD.....5TH RESPONDENT

BARCLAYS BANK KENYA LTD.....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).

R U L I N G

[1] Before the Court is an application dated 22nd January 2018 premised upon Section 24 of Supreme Court Act, Rules 3 (5), 4 (3) (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.

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D.K. MARAGA
CHIEF JUSTICE & PRESIDENT
SUPREME COURT OF KENYA

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M.K IBRAHIM
JUSTICE OF THE SUPREME
COURT

.....
S. WANJALA.
JUSTICE OF THE SUPREME
COURT

.....
N. NJOKI
JUSTICE OF THE SUPREME
COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA