Baloo v Mwanzilo & 2 others (Miscellaneous Civil Application E008 of 2022) [2022] KEHC 10704 (KLR) (25 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10704 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

MISCELLANEOUS CIVIL APPLICATION E008 OF 2022

JM MATIVO, J

MAY 25, 2022

BETWEEN

SAMIR GULAM ABBAS BALOO ..... APPLICANT

AND

BENJAMIN MUTUKU MWANZILO ..... 1ST RESPONDENT

TORNADO ENTERPRISES CARRIERS LIMITED ..... 2ND RESPONDENT

KIPKOECH RUTO ..... 3RD RESPONDENT

RULING

1. Vide a Notice of Motion dated April 14, 2022, the applicant prays that for leave to appeal out of time against the ruling made on December 8, 2021. He also prays for the leave sought to operate as stay of proceedings and for costs to be provided for. (The prayer for stay does not state which proceedings are to be stayed, nor does it specify whether its stay pending filing of the appeal or hearing of the intended appeal. Its framed as if before me is a judicial review proceeding which is not the case. The requirement for pleadings to be lucid is important).

2. The application is premised on the grounds that even though interlocutory judgment was entered against the applicant on December 12, 2018, the applicant only learnt about the judgment after a friend brought to his attention a newspaper advertisement. He states that his application to set aside the judgment was dismissed by the lower court on December 8, 2021, so he intends to appeal against the said ruling. He avers that it is in the interests of justice that the application be allowed.

3. The application is opposed vide a replying affidavit dated May 9, 2022 sworn by a one Benjamin Mutuku Mwanzilo. The salient features of the affidavit are that the applicant is not candid when he says that he learnt of the suit through a newspaper yet a Notice to Show Cause was served upon him severally including via whatsapp as detailed in paragraphs 3 and 4 of the affidavit; that the applicant has

not explained why he never appealed within time; and, that the impugned ruling carefully evaluated the draft defence and concluded that it had no merits.

4. At the hearing, the applicant's counsel essentially rehashed the grounds in the application and the supporting affidavit, so, it will add no value to replicate them here. The application proceeded *ex parte*. However, later after the ruling date had been reserved, the respondent's counsel logged in and said he had connectivity challenges. I told him the matter had proceeded his absence notwithstanding and I will consider his reply because I could not re-open the proceedings *ex parte*.

5. For starters, the right to appeal is not automatic. This position has been recognized by our superior courts in many decisions. The Supreme Court in *Nyutu Aqrovet Limited v Airtel Networks Kenya Limited: Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* stated that a right of appeal is not automatic but is a creation of statute and the jurisdiction to grant leave to appeal is only excised where the right of appeal exists. Thus, an applicant for leave must show that the intended appeal raises a bona fide and arguable case. I have read the impugned ruling. The learned magistrate subtly addressed this test, and indeed the applicable law in cases of this nature. She evaluated the draft defence and she was satisfied that it had no merits. In the same vein, I have read the ruling and the draft appeal. It's my view that the intended appeal against the learned Magistrates ruling does not disclose an arguable appeal.

6. The other hurdle the applicant must surmount is the delay in moving the lower court and also the delay in approaching this court. As the papers filed show, he only approached the lower court on July 21, 2021 to set aside a judgment entered on December 12, 2018, after a delay of two years and seven months. As if the applicant had not learnt a lesson from the consequences of the said delay, again the instant application was filed on April 21, 2022 seeking leave to appeal against a ruling delivered on December 8, 2021, after another delay of over 4 months. This delay has not been satisfactorily accounted for.

7. The Supreme Court *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated: -

    i. 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;

    ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

    iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;

    iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

    v. Whether there will be any prejudice suffered by the respondents if the extension is granted;

    vi. Whether the application has been brought without undue delay; and

    vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

8. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent, a position well stated in the following paragraph extracted from M/S *Portreitz Maternity v James Karanga Kabia*:-

> " That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."

9. Decided cases are in agreement that delay, even for one day must be satisfactorily accounted to the satisfaction of the court. This position was appreciated in *Mbogo Gatuiku v A G* in which the court that 'even a delay of a day or two calls for an explanation.' I am not satisfied that the applicant has accounted for the delay in approaching this court.

10. The grant or refusal to grant the orders sought entails exercise of judicial discretion. Whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of `discretion' by Lord Mansfield in *R v Wilkesn* is that `discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, `but legal and regular.' The King's Bench in Rookey's Case stated as follows: -

> " Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the*constitution* entrusted with."

11. Broadly speaking, the exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. A review of the tests and authorities discussed above and the facts of this case leave me with no doubt that this is not a proper case for the court to grant the leave sought. Having declined to grant leave, it follows that there is no basis upon which the prayer for stay can be considered. Consequently, I dismiss the applicant's application dated April 14, 2022. I make no orders as to costs.

Orders accordingly

Signed, dated and delivered virtually at Voi this 25 th day of May 2022.

John M Mativo

Judge