IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, J.A (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 247 OF 2010

BETWEEN

CHARLES ALEXANDER KIAI …….........…………APPLICANT /APPELLANT

AND

FRASIAH WANGUI GICHERU …………...……………….1ST RESPONDENT

LAND REGISTRAR NYERI ………………………………2ND RESPONDENT

THE CHAIRMAN L.D.T. OTHAYA ……………......………..3RD RESPONDENT

CHAIRMAN, PROVINCIAL APPEALS COMMITTEE

CENTRAL PROVINCE ……....………………………………4TH RESPONDENT

THE CHIEF MAGISTRATE NYERI ……........………………..5TH RESPONDENT

(An application for leave to file an application under Rule 102 of the Court of Appeal Rules for an order of reinstatement in an appeal from the Ruling of the High Court of Kenya at Nyeri (Sergon, J.) dated 26th February, 2010

in

H.C.C.JR. APP No 13 of 2010

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RULING

1. The Notice of Motion dated 9th February, 2015 seeks one substantive order:-

> ***"THAT the Honorable Court be pleased to grant the applicant leave to file an application for reinstatement of Nyeri Civil Appeal No 247 out of time".***

It is brought under **Rule 4** and **102 (3)** of the **Court of Appeal Rules** (the Rules).

2. A short background to the application is necessary. The applicant, (hereinafter referred to as **"Kiai")** claims lawful ownership of land parcel Number **Othaya/Itemeini/1045** measuring about 0.72 Hectares or 1.78 Acres. It is common ground that this parcel was originally registered in Kiai's name, but in his own pleading, he sold it to the late husband of the Ist Respondent (hereinafter, "**Frasia"**) in the year 2003. According to Kiai, Frasia's husband did not fulfill the terms of their contract and so Kiai rescinded the sale. The purported rescission precipitated a dispute which was referred to the Othaya Land Disputes Tribunal (the tribunal) for arbitration. The tribunal decided in favour of Frasia in 2006; the award was filed in court, and was made a judgment of the court on 23rd February 2007.
3. No appeal was filed to challenge the judgment, and so, Frasia went ahead and obtained the consent of the local Land Control Board, the Executive officer of the court was authorized to execute the transfer forms,in May 2007, and the Title Deed was issued to her on 13 November 2007. She took possession of the land. It was not until one year later in November 2008, that Kiai went back to the Chief Magistrate in Nyeri and applied for review of the judgment entered pursuant to the award made two years earlier. He told the court that he had appealed the decision of the tribunal to the Nyeri Provincial Appeals committee and sought maintanance of the *status quo* until the appeal was heard. The Chief Magistrate struck out the review application on 7th May 2009 on the ground that it was in abuse of court process to pursue a review as well as an Appeal simultaneously.
4. Undaunted by that rejection, Kiai went to the High court, not on appeal against the Chief Magistrate's order, but on a Judicial Review application seeking an order of *certiorari* to quash the award of the tribunal made on 2nd November 2006, the judgment of the chief magistrate's court adopting it on 23rdth February 2007 and the ruling of the chief Magistrate rejecting his review application on7th May 2009. He also sought the cancellation of the Title deed issued to Frasia. That is why he enjoined the 2nd to 5th Respondents in the Judicial Review application.The only ground pleaded was that the tribunal had no jurisdiction to deal with the matter *ab initio* and therefore all subsequent proceedings and orders were nullities. That application fell before Sergon J. who, after hearing the parties, struck out the application on the grounds that the order for *certiorari* was sought out of time contrary to the provisions of the ***Law Reform Act*** and that the prayer for cancellation of a Title Deed did not lie under **Order LIII** of the **Civil Procedure Rules.** That was on 26th February 2010.
5. Aggrieved by that Ruling, Kiai came before this court, over six months later, and filed **Civil Appeal No.247 of 2010** on 10th September 2010. The appeal was due for hearing on 12th June 2013 and the parties were served with hearing notices. When the matter was called out for hearing, there was no one to prosecute the appeal and so this court dismissed it under **Rule 102(1)** of the Rules. Nothing happened for the next two months or so until 5th August 2013 when Kiai filed an application to review and set aside the order of dismissal and to reinstate the appeal for hearing. After hearing the parties, this court, on 20th January 2015 dismissed the application on the basis that it was not filed within the mandatory timeline of 30 days under **Rule 102(3)** of the Rules and that there was no reasonable explanation for the delay in filing the application.
6. Kiai was still not done. Three weeks later, he filed the application now before me. In all his false starts before various courts, Kiai was represented by learned counsel. The appeal before this court was filed through the firm of **M/S Gori Ombongi & Co, Advocates**. They were also the Advocates who filed the application for setting aside the dismissal order and reinstatement of the appeal on 5th August 2013. Soon after, however, they appear to have fallen out with Kiai whom they accused of *"failure to attend briefing and preparation and also failed to provide sufficient instructions and materials in support and preparation of the case"*. They applied to withdraw from acting for him on 5th February 2014 and in a considered Ruling, a single Judge of this court allowed them to withdraw. Kiai was left to argue the application for setting aside in person, until he appointed other Advocates, **M/s Muchiri wa Gathoni & Co,** to file the application now before me on 11th February 2015. On her part, Frasia was represented before me by learned counsel **Mr. E.W Nderitu** while learned State Counsel **Mr. F.O. Makori**, represented the 2nd to 5th Respondents.
7. Adverting now to the application before me, it cites ***Rule 102(3)*** of the Rules as one of the legal bases for seeking the order for reinstatement of the dismissed appeal. It is indeed the same

provision of the Rules Kiai used in the earlier motion filed on 5th August 2013. As a single judge, I cannot obviously deal with an application made under Rule 102 and to that extent, the motion would be incompetent. It was argued by Mr Nderitu and Mr. Makori, learned counsel for the respondents, that the application is *res judicata* and I will examine that argument later in this ruling.

8. That leaves **Rule 4** which is also cited in support of the application. As a single judge, acting on behalf of the full court, I have unfettered discretion to:

> "…***extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended".***

9. I am also aware of the principles distilled by this court as a guide to the exercise of that discretion. I take them from **Fakir Mohamed v Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR),** where the full court on a reference, upheld the single judge stating thus:-

> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M'Ethare & Attorney General, Civil Application No. Nai. 8 of 2000 (ur) and Murai vs Wainaina (NO. 4) [1982] KLR 38".***

10. Learned counsel Mr. Machirah who appeared for Kiai, submitted that this was a straight forward application for extension of time after the earlier application was rejected by the full court for being out of time. The reasons given for the delay as appear in the supporting Affidavit of Kiai are basically that his erstwhile Advocates failed to attend court and failed to inform him about the dismissal of his appeal until 20th June 2013. The same advocates also misled him that the application for reinstatement of the appeal had been filed only to withdraw from acting in the matter and for the court to declare that the application was filed out of time. Counsel submitted that the wrongful actions and omissions of Kiai's former advocates should not be visited on him. Kiai wants an opportunity to file another application for reinstatement of the appeal, although it should have been filed on or before 11th July 2013 in accordance with the rules. Mr. Machirah cited the case of ***Peter Gatahi Kamaitha v Secretary Public Service Commission&2 others [2014] eKLR*** where this court allowed a similar application after the lapse of nine months from the delivery of a Ruling dismissing an appeal for non-appearance. He also invoked ***Article 159*** of the ***Constitution*** and ***Section 3A*** and ***3B*** of the ***Appellate Jurisdiction Act.***

11. As stated earlier, the main opposition to the application is the submission that it was bad in law as it was *res judicata*. Mr Nderitu submitted that the motion relies on the same grounds advanced by Kiai to urge his earlier application and these were considered by the full court. Another application on the same grounds would therefore be *res judicata*. That view was shared by Mr. Makori who added that the courts discretion to reinstate an appeal was only exercisable within the 30 days provided under ***Rule 102(3).*** Beyond that there was no discretion since the Rule was couched in mandatory tone. Counsel also maintained that the full court considered and rejected the former application on merits and therefore a second application would be *res judicata*. He concluded that the blame heaped on the previous counsel was misguided since the party in litigation also had an obligation to ensure that the rules were complied with and inaction would not avail them. For support of this proposition he cited my decision in ***Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR.***

12. In response to the submissions made by Mr Nderitu and Mr Makori, Mr Machirah submitted that the doctrine of *res judicata* was not applicable in this instance as the thrust of the present application was extension of time while the previous application addressed the reinstatement of the appeal. He also submitted that the reasons in support of the previous and the present application were factual and that they would not change. Counsel also submitted that the present application was made pursuant to ***Rule 4*** and that there was no fetter on the court's discretion to make the appropriate orders. It was also counsel's submission that this court's Ruling of 20th January, 2015 had no bearing on the present application, and that the **Habo case (supra)** was distinguishable. Mr Machirah further submitted that there had been a delay of 19 days prior to the filing of the present application, and that the same had been explained. Finally, it was his submission that after dismissal of the applicant's appeal, the requisite application had been filed within 20 days and that no prejudice would be occasioned to the Respondents as they will have an opportunity to argue their grounds in opposition to the application.
13. I have anxiously considered the application, the affidavits on record, the annexures thereto, the submissions of counsel and the law.

    I think it is imperative that I examine closely the decision of the full court in the earlier motion for reinstatement of the appeal before I decide the propriety of extending time to file a fresh one as sought herein by the applicant. The earlier motion was predicated on **" Rule 71(4) and Rule 102(1) (3)"**. Rule 71(4) is, of course, irrelevant as it relates to criminal appeals. It is **Rule 102(1)** which provides for dismissal and application for reinstatement and **102 (3)** which limits the time for the application. The motion was not ***"struck out"*** for being filed out of time. If it had been, the applicant would probably have a firm ground for stating that it was never heard. But the applicant took the risk of prosecuting the motion before the full court despite the filing defect and the court went ahead to consider it on merits.

14. The court considered the reasons given for the motion, thus:-

> ***"The application is supported by the affidavits sworn by the applicant and his former advocate, Messers Ombongi O. Douglas. Mr. Ombongi deposed that he had misplaced his office diary hence his office assistant was unable to diarize the hearing date of the appeal; his mistake as counsel ought not to be visited upon the applicant. He further deposed that the respondents would not suffer any prejudice if the appeal was restored to be heard on merit. The applicant on the other hand deposed that he would suffer irreparable damage if the appeal was not restored because the 1st respondent would take over his parcel of land."***

15. It considered the respondents' submission that the application was incurably defective and also considered the parameters for the exercise of its discretion thus:-

> ***"However, where the court has to exercise its discretion, there must be some reasonalbe basis of fact of law to warrant the orders being made. In other words, judicial discretion cannot be exercised whimsically or capriciously."***

16. The court then formed its opinion on the basis of the facts and the law stating:-

> ***"Therefore, an application for restoration of an appeal dismissed under Rule 102 (1) for non-attendance ought to be filed within 30 days of the dismissal. In this case the appeal was dismissed on 12th June, 2013 hence the application for restoration ought to have been filed on or before 12th July, 2013. From the record, the current application was filed on 5th August, 2013. What is the consequence of the said application being filed out of time? We are of the considered view that Rule 102 (3) connotes that this Court can only exercise its discretionary power in an application for restoration of an appeal if the same is filed within the requisite time frame. We take note that the applicant neither***

> ***offered any reasonable explanation for the delay in filing the current application nor did he make an application for extension of time within which to file the said application.”***

The final order was that “..***we dismiss the applicants application with costs.”***

17. The million dollar question then arises: what is the import of granting the application now before me? In my view, it would mean that the applicant is at liberty to file the same notice of motion under **Rule 102(1).** The same reasons will be advanced, as correctly observed by Mr. Machirah, and the court will express the same or different views. With respect, that would be a recipe for absurdity and I would not countenance it. The application under ***Rule 4*** ought to have been filed soon after the time for seeking reinstatement of the dismissed appeal expired on 12th July, 2013 or at any time before the motion under ***Rule 102(1)*** was heard. In the **Habo case** (supra), the applicant applied for extension of time before the motion for reinstatement was heard. Filing it beyond such time would amount to unreasonable and unexplained delay. It would also be fatal to the exercise of the court’s discretion. I agree with both learned counsel for the respondents that the principles of *res judicata* may correctly be applied to the circumstances of this case to prevent abuse of court process.
18. Mr. Machirah urged me to apply the emphatic principles expressed in **Article 159** of our **Constitution** and **Section 3A and 3B** of the **Appellate Jurisdiction Act,** in favour of the applicant. I had occasion to consider those provisions in the **Habo case (supra)** where I stated as follows:

> ***“I am also aware that there is a duty imposed on the Court under Sections 3A and 3B of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court. As explained in the case of*** ***<u>City Chemist (Nbi) & Ano. vs Oriental Commercial Bank Ltd</u>*** ***Civil Application No. NAI 302 of 2008 (UR 199/2008):***
>
> ***“The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective.”***

In the same case, however, the court cautioned thus:-

> ***“That is not to say that the new thinking totally up-roots well established principles or precedent in the exercise of the discretion of the Court which is a Judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and un-ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in Court. It also guides the lower Courts and maintains stability in the law and its application.”***

Those Sections of the Appellate Jurisdiction Act came first in legislative time but have found legitimacy in Article 159 of the Constitution 2010 which deals with judicial authority and the administration of justice without regard to technicalities of procedure. The Supreme court has had occasion to interpret Article 159 and did so in the case of Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR where it agreed with the dicta of Kiage, JA in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** stating:

> ***“… I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an***

efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…"

The Supreme Court further emphasized:

"Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR".

19. **I have said enough to show that I am not inclined to exercise my discretion in favour of the applicant in the circumstances of this case. The applicant may well have recourse against his erstwhile advocates whom he appears to blame for his woes, but that would be before a different forum. The litigation in this matter came to an end through the scrupulous observance of the rules governing it, and the applicant should be told so.**

The application before me is lacking in merit and I order that it be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 17th day of June, 2015.

P. WAKI

……………………………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR