



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC APPLICATION NO.219 OF 2013 'B'

BENSON MUGO KINYUA..... APPLICANT

VERSUS

PETER MURIUKI KINYUA.....RESPONDENT

RULING

1. The applicant, Benson Mugo Kinyua, brought the notice of motion dated 4th July, 2013 praying that he be granted leave to file an appeal out of time.

The application is brought under Section 79G of the Civil Procedure Act and order 50 Rule 6 of the Civil Procedure Rules and is supported by the affidavit of the applicant.

2. The application is premised on the grounds that the judgment sought to be appealed from was delivered in the absence of the parties; that the applicant learnt about the judgment a few months later; that upon learning about the judgment the applicant instructed a new firm of advocates to represent him in his intended appeal against the judgment. After successfully prosecuting an application for change of advocates, his new advocate applied and obtained copies of typed proceedings and judgment for the purpose of the intended appeal. The applicant contends that he stands to suffer irreparable loss and damage if the intended appeal is not heard and determined on merit as it has high probability of success.

3. The application is opposed on the grounds that it is grossly incompetent and bad in law; that it is insufficiently supported and that it is a sham and an abuse of the court's process.

4. It is also contended that the application is misconceived, incompetent, mischievous and devoid of any merit; that the applicant was not diligent in following up the matter in the lower court. Respondent laments that there has been inordinate delay in bringing the appeal yet no sufficient reason has been given for it. It is also deposed that the application has been brought in bad faith and that the appeal has no overwhelming chances of success.

5. Counsel for the applicant reiterated the applicant's contention that the judgment sought to be appealed from was delivered in the absence of the parties and/or their advocates; that the applicant learnt about the judgment in October, 2012; and that as the applicant's previous advocate failed to inform the applicant about the judgment, the applicant instructed his firm to act for him in the intended appeal; that he immediately made an application for change of advocates which was allowed on 26th March, 2013. On 5th April, 2013 he wrote to the Deputy Registrar requesting for copies of proceedings and judgment which he received on 4th May, 2013. He urged the court not to visit the mistake of the applicant's previous advocate on the advocate and reiterated that the appeal has been made without delay

and that it has high probability of success.

6. Conceding that the court has discretion to extend time, counsel for the respondent submitted that the discretion should be exercised on just and fair terms. The case in the lower court was filed in 2002 and 11 years later it is still in court; that there has been undue and unexplained delay. Further that the applicant seeks an equitable remedy but his hands are not clean and the applicant has neither annexed a draft memorandum of appeal nor a certificate of delay.

7. Counsel also submitted that the application is incompetent and bad in law as the affidavit in support thereof has not being commissioned by a competent person.

8. In a rejoinder counsel for applicant maintained that the application is proper and urged the court not to visit the mistake on the part of the advocate on the applicant. He also argued that even if the affidavit is struck out the grounds still support the application and that, contrary to the respondent's contention the application has been made without undue delay. Regarding the 45 days delay, he explained that he was waiting for instructions from the applicant and that upon getting instructions he moved to court immediately and diligently.

9. I have carefully considered the reasons advanced in favour of the application, the grounds of oppositions thereto and the submissions by the advocates for the respective parties.

10. The sole issues for determination are:-

1. Whether the application is fatally defective for want of form?
2. Whether the respondent has made up a case for granting of the order sought.

11. As the first issue is capable of preliminarily disposing of the application, I will determine it first.

12. This issue flows from the respondent's contention that the application is incompetent and bad in law because the supporting affidavit was not commissioned by a competent person. This argument stems from the uncontroverted fact that the advocate who commissioned the affidavit, Mr. Cheche, did not have a practising since 2012. Based on the provisions of Section 34 of the Advocates' Act counsel submitted that the advocate was incapable of doing what he purported to do.

Section 34 aforementioned provides:-

“No unqualified person shall, either directly or indirectly take instructions or draw or prepare any document or instrument:-

(e) for which a fee is prescribed by order made by the chief justice under section 44; or

(f) relating to any other legal proceedings.”

13. As pointed out earlier, counsel for the applicant does not agree that the defect in the advocates standing is capable of affecting the applicant's supporting affidavit. Terming the objection technical he submitted that under Order 2 Rule 14 no technical objection may be raised in a pleading for want of form.

14. The question which arises is whether the defect in the applicant's supporting affidavit is a technical one so as to bring the objection by the respondent's counsel under Order 2 Rule 14 aforementioned.

15. To answer this question, I must begin by pointing out that Section 34 of the Advocates' Act does not prescribe the fate of documents drawn by an unqualified advocate. However, as doing the forbidden acts raises policy issues, the courts have, in interpreting that section held:-

“...it is criminal under Section 34 of the Advocates Act for an Advocate to practice

without a practicing certificate. The Section is not a procedural technicality. It is a substantive statutory provision. The court is enjoined not only to protect the Constitution but all laws enacted by Parliament. It has the duty to protect the Advocates Act and its provisions. To ignore the clear provisions of Section 34 of the Advocates Act is to perpetuate an illegality. Article 159(2) (d) does not condone such an act.”

16. See John Langat v Kipkemoi Terer & 2 Others, Kisumu HC. Civil Appeal No. 21 of 2013 (Unreported).

17. To give effect to the law and address the mischief meant to be cured by Section 34 of the Advocates' Act courts have in numerous authorities, including the Court of Appeal decision cited above, struck out pleadings drawn by unqualified advocates. To do otherwise will be an affront on my responsibility and sworn fidelity to the law. In this regard I am constrained to agree with the counsel for the respondent that the affidavit in support of the application is bad in law and as such ought not to form part of the record of the court and I hereby strike it off the record of the court.

18. It is argued that even without the supporting affidavit the application is proper as the grounds still supports the application.

19. Although counsel has not stated the legal basis of his argument I suppose that the argument is premised on Order 51 Rule 4 which provides:-

“Every notice of motion shall state in general terms the grounds of the applications, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

20. From the foregoing, it is clear that not all applications need to be supported by an affidavit. However, in the instant application the applicant chose to support his application with an affidavit. Without the affidavit the application will lack the crucial evidence that is required to establish the facts on which the application is grounded.

21. Having taken liberty to peruse the application I note that the facts on which the application is grounded require evidence to prove or substantiate. That evidence is not contained in the grounds but would ordinarily be contained in the supporting affidavit. This being the case I can do no better than agree with counsel for the respondent that the application is incompetent and bad in law.

22. Turning to the second issue, It is common ground that this court has power to grant the order sought. In granting the order sought the court exercises discretion. Regarding this exercise of discretion the Court of Appeal in Leo Sila Mutiso v. Rose Helen Wangari - Civil Application No. NAI 251 of 1997 (unreported) observed:-

“Whilst the discretion under rule 4 of the Rules is unfettered, it must, like all discretion, be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy.”

23. The guiding principles in exercise of the court's discretion were set down by the Court of Appeal in the same case as follows:-

“It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly,(possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

24. Addressing himself to a similar application (an application for extension of time within which to file an appeal) J.W Onyango Otieno JA. observed:-

“the applicant needed in law to explain the period of delay....He also needed to satisfy me that prima facie, the intended appeal is arguable, but without going into the full merits of the appeal, and that the respondents would not suffer prejudice by my extending time within which to file notice of appeal and record of appeal.”

See Dickson Ndegwa Mbugua v. City Council of Nairobi & 3 others Civil Application No.112 of 2009 (2010) eKLR.

25. Applying the above tests to the instant case, in view of the various steps that the applicant's new advocate needed to take before he could lawfully act for the applicant, the need for him to obtain typed proceedings and move the court to regularize the intended appeal.

26. As regards the explanation given for the delay, it is noteworthy that the applicant blames his previous advocate for failing to inform him about the delivery of the judgment which he maintains was delivered in the absence of his advocate and the parties to the suit. The applicant has also averred that he got to know of the judgment in or about October 2012. Curiously though, the applicant has not annexed any evidence of the said allegations.

27. In my view, if the applicant wanted this court to believe those allegations he ought to have annexed a copy of the proceedings at the lower court for this court to consider. He should also have obtained an affidavit or statement from his previous advocate detailing the circumstances under which the judgment was delivered and how and when the applicant (their client) got to know of it. Without such evidence and given the fact that the applicant has not disclosed how he got to know of the judgment, the only reasonable conclusion that this court can make is that the applicant has something to hide on what truly necessitated the application for change of advocate and the filing of this application.

28. As concerns the delay following the instruction of the applicant's new advocate, that is something that came much later in the day, at the tail end. The cumulative effect of the applicant's failure to prove the allegation that the judgment was delivered in his or his advocate's absence or how he learnt about the delivery of the lower court's judgment makes this court hesitant to find that there was a good reason for the delay.

29. On whether or not the applicant has an arguable appeal, it is unfortunate that the applicant has not annexed a draft memorandum of appeal for this court to consider. Without such a draft there is no way this court can determine the arguability or otherwise of the intended appeal.

30. The applicant has also failed to demonstrate that granting of the order sought will not occasion any prejudice on the respondent who has waited for the impugned judgment for over 11 years.

31. The upshot of the foregoing is that the applicant has failed to discharge the legal burden placed upon him in order to obtain the orders sought. Consequently, I find the application to be without merit and dismiss it with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 14th day of February, 2014.

H.A OMONDI

JUDGE

