



Ndung'u v Njuguna (Civil Appeal 134 of 2017) [2024] KEHC 8472 (KLR) (9 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 134 OF 2017**

JM NANG'EA, J

JULY 9, 2024

BETWEEN

JOHN NJOROGE NDUNG'U APPELLANT

AND

JANE NJOKI NJUGUNA RESPONDENT

RULING

1. For determination is the Appellant's Notice of Motion Application dated 6th December 2022 expressed to be brought by under Sections 79 G, 95,1B and 3A of the [Civil Procedure Act](#); Order 51 of the [Civil Procedure Rules](#) 2010 and all enabling provisions of the law. The Appellant seeks the following reliefs:
 1. That the orders of the court issued on 19th November 2019 directing the Applicant to file and serve the Record of Appeal within 45 days failing whereof the appeal will stand dismissed for want of prosecution be set aside and /or varied with the effect that the Record of Appeal dated 22nd February 2022 filed in court on 2nd March 2022 and which was duly served upon the Respondent on 31st March 2022 be deemed as properly filed in court and duly served.
 2. That the costs of this application be provided for.
2. The Application is supported by the grounds set out on the face thereof and the Supporting Affidavit of Wangalwa Oundo, the Appellant's advocate herein , sworn on 6th December 2022. The appellant avers inter alia that:
 1. Judgment was delivered on the 22nd August 2016 by Hon. Murgi (C.m) in favour of the Respondent.
 2. The Appellant was aggrieved by the judgment and appealed the judgment by filing a Memorandum of Appeal dated 22nd August 2017.
 3. The Appellant's advocate delayed in filing the Record of Appeal as a consequence of delay in receiving certified typed proceedings from the subordinate court.



4. The Applicant has an arguable appeal that raises triable issues with high chances of success and thus the need to allow for determination of the appeal on merits.
 5. The Record of Appeal was filed in court on 2nd March 2022 and duly served upon the Respondent's advocates on 31st March 2022.
 6. At the time of filing the Record of Appeal, the Appellant's advocate on record did not consider the fact that on 19th November 2019 the court issued orders to the effect that the the Record of Appeal shall be filed within 45 days failing which the appeal would stand dismissed for want of prosecution.
 7. It is in the interests of justice, therefore, that this Court grants leave to the Appellant to appeal out of time.
3. The application is opposed through the affidavit of the Respondent's advocate (S.M Muthomi) in which it is deposed inter alia that:
1. The application is not only bad in law but also fatally defective and an abuse of the court process.
 2. The appellant falsely claims to have received certified copies of proceedings from the lower court late yet the record shows that the proceedings were annexed to the appellant's earlier Notice of Motion dated 8/9/2019 for stay of execution.
 3. That the appellant's advocate has neither annexed documents to show that he applied for certified copies of the proceedings nor a certificate of delay obtained from the court.
 4. That the appellant was required to seek leave and /or apply for extension of time to file the Record of Appeal.
 5. That the appellant is guilty of inordinate and unexplained delay to file this application.
- And
6. That the judgment appealed from resulted in a monetary decree and the applicant has never deposited the decretal sum in court despite a court order to this effect.
 4. On 14th December 2022, the court directed that the application be disposed of by way of written submissions. Learned Counsel for the parties filed their submissions.
 5. The appellant submits that the court has discretion to extend time after considering the circumstances of each case before it, reference being made to the judicial determination in *Nicholas Kiptoo Arap Salat V. IEBC & 7 Others*, S C Application No. 16/2014. The case states the guiding principles in the exercise of such discretion which include consideration of whether or not there was unexplained delay to bring an application and any the question of prejudice that may be occasioned to a party.
 6. The Respondent's advocates retort that the appeal stood dismissed when the Appellant failed to file the Record of Appeal within the period directed by the court . It is therefore contended that the Record of Appeal herein should be struck out having been filed out of time without leave. . Counsel sought to rely on the following decisions : *County Executive of Kisumu vs County Government of Kisumu & 8 others* [2017]eKLR, *Peter Ng'ang'a Kimani vs Francis Njenga Kamau & Another* [2019] eKLR and *Peter Kiplang'at Tuwei vs Alfred Cheruiyot Sang* [2017] eKLR. In the same circumstances as obtain in this case, the court in these decisions deprecated filing of appeals outside the prescribed period without



leave and thereafter seeking to regularize the record. The courts in the said cases proceeded to strike out the impugned appeals.

7. I have read through the record. On 19th November 2019, when this matter came up before my sister Honourable Justice C.Meoli, she directed the appellant to file the Record of Appeal within 45 days from that date in default of which the appeal would stand dismissed by the end of the period. The Record of Appeal was not filed until the file was placed before my brother Honourable Justice J. Njagi on 12th September 2022 when he made an order that the appellant may make an application to regularize the appeal. This application was then filed on 9th December 2022, almost three months after the order was made.
8. It is trite that a Notice of Appeal or even an Appeal itself that is lodged out of time could be struck out in appropriate circumstances regardless of the length of the delay. The provisions of Sections 3A and 3B of the *Civil Procedure Act* on which the application is predicated introduce the overriding objective in civil litigation which mandates the court to consider factors like delay, the costs and prejudice likely to be occasioned to the parties before the court determines an application one way or the other.
9. As noted above, the appeal was irregularly filed out of time and with no satisfactory explanation for the delay given that the appellant had already obtained the proceedings of the lower court. Even when the appellant was indulged to file the Record of Appeal within 45 days despite the delay, the appeal was only filed around 3 months later. This is inordinate delay in the circumstances that this court is not inclined to countenance. Clearly, the appellant has not shown bonafides to entitle him to the exercise of the court's discretion in his favour. The record also shows that his belated application dated 8/7/2019 seeking stay of execution of judgement delivered in 2016 was dismissed on 19/11/2019 for his non-appearance in court.
10. Consequently, the appeal is struck out with costs to the respondent.

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J. M. NANG'EA

JUDGE

