Muchira v Kang'ethe & another (Miscellaneous Civil Application 171 of 2023) [2023] KEHC 22305 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22305 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS CIVIL APPLICATION 171 OF 2023

HM NYAGA, J

SEPTEMBER 20, 2023

BETWEEN

FRANCIS MUCHIRA ..... APPLICANT

AND

JOHNSON GUCHU KANG'ETHE ..... 1ST RESPONDENT

JOSEPH GUCHU KANG'ETHE ..... 2ND RESPONDENT

RULING

1. The Application for determination is a notice of motion dated 19th May 2023 which seeks the following orders;

    a. That this Application be and hereby certified as urgent and be heard ex parte in the first instance

    b. That this honorable court be pleased to grant the applicant leave to lodge an appeal out of time against the Ruling delivered on the 16th July 2019 by the Chief Magistrate Court in Nakuru CMCC No. 631 of 2010 .

    c. That upon grant of leave to appeal out of time, the memorandum of appeal annexed herein be deemed as duly filed upon payment of the requisite court fees.

    d. That the cost of this Application be in the cause.

2. The Application is propped by the grounds set out therein and is supported by the Affidavit of one Francis Muchira. In a nutshell the applicant states that Judgment was entered against the defendant in default of appearance. That in its Ruling delivered on 22nd May 2018 the Honourable Court had delivered a Ruling denying the respondents herein a stay of execution of the said Judgment when it

held that the respondents herein had been duly served with summons . That the respondents filed an Appeal Number 60 of 2018 before this court in which they had sought a stay of execution of the decree of the lower court. That the High Court dismissed that Application and it concurred with the lower court that the respondents had been aware of the suit against them as at 21st December 2011. That subsequently the lower court delivered a Ruling on the 16th of July 2019 where it reviewed its earlier Ruling delivered on 22nd May 2018 and set aside the ex parte Judgment.

3. It is this latter Ruling that the applicant has sought leave to appeal against. It is also stated that the respondents had made partial payments of the decretal sum in the lower court.

4. The respondents opposed the Application through a Replying Affidavits sworn by the first respondent on the 2nd June 2023. It is argued that the Application has no merit as the applicant has not met the threshold for grant of leave to appeal out of time.

5. Further, it is stated that there has been inordinate delay in presenting this Application. That the said suit namely CMCC No. 631 of 2010 has been proceeding in the lower court but for various reasons, it has been adjourned on several occasions.

6. Further, the respondent states that it is apparent that the applicant is unsure of the manner in which he intends to proceed since he has fixed the said suit for hearing and has never filed an appeal against the Ruling delivered on the 16th of July 2019.

7. Lastly it is averred that this Application is an afterthought and is aimed at removing the respondent from the Judgment seat. That is only fair that this Application be dismissed and the court orders the conclusion of the suit in the lower court.

8. The parties filed their submissions which I shall summarize.

9. The applicant cited the Supreme Court Supreme Court of Kenya case of *Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission and 7 others* (2015) eKLR which considered the salient features and principles to be considered in an Application for extension of time . It is further submitted that this court has jurisdiction to extend time and that the exercise of that jurisdiction is an issue of judicial discretion. Further, it is argued that the main contention by the applicant is that he had sustained a diligent request for justice and had relied on his previous advocates' communication on the matter. That a mistake by his previous advocates should not visit upon him and that this court should give him a chance to pursue the intended appeal.

10. Counsel also cited the case of a *Hudson Kidaha Kisigwa vs Romagego Kenya Limited* (2019) eKLR where the court noted that the failure but the applicant's advocate to inform him of the delivery of Judgment was a sufficient reason and that the mistake of the advocate could not bar the applicant from his constitutional right to appeal . Also cited was the case of *Philip Chemwolo and Another vs Augustine Kubede* (1982-1988) KLR 103 at page 104 where the court stated ;

> 'Blunders will continue to be made from time to time and it does not follow that because the mistake has been made that a party should suffer the penalty of not having his case heard on merit.'

11. Also cited was a case of *Martha Wangari Karua vs IEBC* Nyeri Civil Appeal No. 1 of 2017 which stated that ;

> 'The rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing however weak his or her case may be.'

12. Counsel also referred to the case of *Mbaki and others vs Macharia and Another* (2005)2 E.A. 206 where it was stated that ;

> 'The right to be heard is a valued right. It would offend all notions of Justice if the rights of a party or to be prejudiced or affected without the party being afforded an opportunity to be heard.'

13. Lastly Counsel cited the case of *Belinda Muras and 6 others vs Amos Wainaina* (1978) Where Madan J.A. stated as follows ;

> 'A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court may might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interests of justice so dictate.'

14. Counsel submits that the applicant only learned of the error by his previous advocates after making several efforts to find out the status of his case. That upon knowledge that an appeal had not been preferred he instructed the new advocates to do so. It has also been submitted that the steps taken by the applicant to find out the true position of the case revealed the concerted and diligent efforts made to access justice and that the applicant has not been indolent at any point.

15. For the respondents, counsel referred me to section 79G and section 95 of the *Civil Procedure Act* which provide for the filing of appeals . It is submitted that a party is aggrieved by the decision of a subordinate court has a Right to Appeal to the High Court within 30 days . That's the courts have over time set out the guiding criteria following Applications for leave to appeal out of time. Cited was a case of *Charles N. Ngugi vs ASL Credit Limited* (2022) eKLR which adopted the holding in the case of *Thuita Mwangi vs Kenya Airways Ltd* (2003) eKLR. That in the latter case the court set out the factors to consider in allowing an appeal out of time and these are ;

    a. The period of delay.

    b. The reason for the delay

    c. the arguability of the appeal.

    d. The degree of prejudice which could be suffered by the respondent if the extension is granted.

    e. The importance of compliance with time limits to the particular litigation or issue and

    f. Lastly, the effect if any on the administration of justice or public interest if any is involved.

16. The respondents aver that the Ruling which the applicant seeks to appeal against was delivered on the 16th July 2019 yet the Application was filed on the 22nd of May 2023, which is approximately four years since the Ruling was delivered . It is submitted that the delay is inordinate and unreasonable and that no plausible reasons have been put forth by the applicant. It is further argued that the applicant has not attached any evidence to show that he had instructed his previous advocates to appeal against the

Ruling in question and that the applicant is only shifting the blame to his previous advocates because they are not party to these proceedings anymore and cannot defend themselves from such allegations.

17. As to what amounts to unreasonable delay counsel referred the court to the case of *Nzoia Sugar Company Limited vs W Kenya Sugar Limited* (2020) eKLR where the court held as follows -

> 'On whether the delay is inordinate or inexcusable the court in Mwangi S. Kimani –vs- The Attorney General and another(supra) considered what constitutes inordinate delay and said as follows;
>
> There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth. Nevertheless inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore inexcusable. Therefore inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond excitable limits In the prosecution of cases.'

18. On the draft memorandum of appeal the respondents aver that the appeal does not raise any triable issue for determination. It is pointed out that the Ruling of a 22nd of May 2018 was reviewed by the Ruling of 16th June 2019 and that the court did not make any error in entertaining the Application for review. That under Order 45 Rule 1(CPR) it is a right to a party who will not prefer an appeal to apply for a review and that the respondents had rightly applied for review before the trial court, which concurred with the respondents. That therefore the applicant cannot seek to appeal on the ground that there were two contradictory Rulings and that cannot form a ground of appeal.

19. It was also argued by the respondent that having obtained an irregular ex parte Judgment, the applicant herein proceeded with the execution of the same against the respondents. However the court discovered the injustice occasioned against the respondents and agreed to review the Ruling of 22nd May 2018 and effectively allowed the respondents to defend themselves in the suit. That allowing this Application would prejudice the respondents who have been ready to defend the suit. That litigation has to come to an end.

20. Having considered the Application, the response thereto and the submissions by the parties, it is my view that the only issue for determination is whether there are sufficient grounds adduced to grant leave to the applicant to appeal out of time.

21. Section 79G of the Civil Procedure Rules provide for leave to appeal out of time. It reads as follows;

> 'Time for filing appeals from subordinate courts.
>
> Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.'

22. The principles adopted by the court in determining such an Application were as set out in Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission and 7 others

(supra) and Thuita Mwangi vs Kenya Airways (supra). The same principles were enunciated in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, the Court of Appeal held that:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. 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."

23. It is not in dispute that the Ruling in question was delivered on the 16th of July 2019. The applicant states that he had instructed his previous advocates to appeal against that Ruling but they did not do so. That it is upon discovery that they had not appealed against that Ruling that he changed advocates and filed the present Application .

24. The question is, has there been inordinate delay in making this Application and if so has there been sufficient reason fronted by the applicant to explain the delay?

25. Four years have lapsed since the Ruling was delivered. By all standards 4 years is a long time. The applicant has sought to explain himself as to why there was a delay in making this Application. Parties instruct advocates to act for them. They entrust the advocate to pursue their case with due diligence. The applicant stated that he was of the opinion that the appeal had been filed, but this turned out to be not the case. I am of the view that the explanation does not sufficiently explain why he did not prefer an appeal, even though he continued to prosecute the suit in the lower court. I am not satisfied the delay of 4 years can be excused. A shorter period would have been acceptable on the grounds presented.

26. As to the question of whether the appeal, is arguable, the applicant has pointed to the alleged conflicting Rulings of the trial court.

27. I have looked at the both Rulings. In the first Ruling the court was of the view that service of the summons was effected and thus dismissed the Application to set aside the Judgment in default.

28. In the second Ruling, the court found that the request for Judgment in default of appearance was never endorsed by the court as required and therefore there was no Judgment to speak of. The court did also find that this was a new discovery that was not the subject of the first Ruling and allowed the Application for setting aside the 'Judgment'.

29. I am of the view that there are no contradictions as alleged. The first Application was dealt with on the presumption that there was a Judgment entered in default of appearance. The second Ruling was dealt with upon discovery that there was no Judgment in the first place. Even the High Court was not aware that there was no entry of Judgment when it delivered its Ruling.

30. I am therefore not satisfied that the appeal has any chance of success. The appeal cannot reinstate a 'Judgment' that did not exist in the first place.

31. It is ironic that the applicant seeks to have a chance to be heard on the intended appeal, which would, if allowed, be shutting out the respondent from the seat of justice in the main suit in the lower court. The applicant's case was never heard on merits. It was a Judgment in default of appearance. To me, the scales of justice favour a determination of the actual dispute on merits and it would be unfair not to allow the respondent have his day in court.

32. In conclusion, I find that the Application lacks merit and is dismissed with no orders to costs.

33. I direct that the parties proceed to have the suit in the lower court heard and determined.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Miss Awuor for Applicant

Miss Mwaniki for Respondent