Mbare v Celestino (Civil Application E134 of 2024)
[2025] KECA 138 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KECA 138 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E134 OF 2024

GV ODUNGA, JA

JANUARY 30, 2025

BETWEEN

JOHN NJERU MBARE ..... APPLICANT

AND

MARGARET KARIMI CELESTINO ..... RESPONDENT

(Being an Application for extension of time to file an appeal out of time in respect to the decision of the High Court at Chuka (L.W Gitari, J) dated 13th April, 2023 in Succession Cause No. 58 of 2016)

RULING

1. By his Notice of Motion dated December 17, 2024, the applicant seeks: extension of time for filing an appeal in relation to the ruling delivered on 13th April 2023 by L.W Gitari, J in Chuka High Court Succession Cause No. 58 of 2016; a temporary order of maintaining the status quo in respect of the entire deceased's estate as per the Court Registrar's report from Meru High Court dated 22nd March 2012 pending the hearing and determination of this application; and that upon granting prayers 1 above, the Court be pleased to provide timelines for filing the Notice of Appeal and Record of Appeal.

2. The brief facts of this matter is that the applicant filed Summons for: Revocation or annulment of the Grant dated 28th February, 2022; seeking stay of execution of the Confirmed Grant issued on 14th February 2019; and revocation or annulment of the Certificate of Confirmation of Grant issued on 14th February 2019 in the Estate of Sarastino M'chabari Mukabi alias Chabari Ukabi (Deceased) all on the grounds that the Grant was issued through forgery of the deceased's signature in the last Will and Testament dated 12th January, 2013. In response, the respondent filed a Notice of Preliminary Objection dated 21st March 2022 contending that the application was res judicata and should be dismissed with costs.

3. In the ruing of 13th April 2023, the learned Judge found that the main issues in the application being the validity of the deceased's Will, were the same issues that were canvassed by the judgment of the Court delivered on 13th December 2018 between the same parties, upheld the preliminary objection and struck out the applicant's application with costs.

4. The applicant then filed a Notice of Motion dated 6th June 2023 seeking leave to appeal against the said ruling. However, in the ruling of 24t May 2024, the learned Judge held that since the *Law of Succession Act* is silent on the requirement of leave to appeal, the intention of Parliament was that an appeal shall lie to this Court as of right and a party need not seek leave to do so hence no need to give such leave. Further, that pursuant to Article 164(3) (a) of *the Constitution*, there is no requirement of leave where the appeal is against decisions of the High Court exercising its original jurisdiction. It was further found that the respondent had demonstrated that the parcel of land no longer existed having been subdivided in 2020 and the beneficiaries issued with title deeds and thereafter transferred to third parties, thus the applicant had failed to establish a prima facie case with chances of success.

5. According to the applicant the delay was occasioned by: the applicant being advised to seek leave from the High Court before approaching the Court of Appeal, resulting in prolonged delays; the delay in delivering the ruling on the application for leave at the High Court that necessitated the intervention from the Office of the Judiciary Ombudsman; and the applicant's health challenges immediately after the ruling, coupled with financial constraints caused by medical expenses, college fees for his children, and reliance on small-sale farming, hindered timely filing of the appeal.

6. In the applicant's view, in determining the Preliminary Objection, the learned Judge misapplied to his detriment the law. He averred that the respondent has begun authorizing subdivision and interference with the property in dispute, specifically Land Parcel No. Karingani/Ndagani/655, without a valid court order when his father had already subdivided the said property as per the report by the Registrar of Meru High Court. According to him, the respondent's actions have disrupted family harmony, led to unauthorized sales of family assets, and caused immense emotional and financial distress to the family and avers that the intended appeal raises serious legal issues and has high likelihood of success.

7. The submissions largely regurgitated the same issues.

8. In response, the respondent stated: that the applicant is a serial litigant who opposes each and every finding of the court; that the preliminary objection was well founded in law; that it was not necessary to seek leave of the court to appeal; that there was no need to seek the intervention of the Judiciary Ombudsman in a matter that was live before the court; that the medical reports relied upon by the applicant were stage- managed and were obtained from a medical facility where the applicant's daughter was working; that the respondent has never subdivided or caused to be subdivided the properties as alleged; that it is the applicant's acts that have led to disharmony in the family; that even if the applicant is granted leave to appeal out of time, he will not persuade this Court that the Will was invalid; and that it is in the interest of justice, fairness, peace and harmony that the application be dismissed.

9. The submissions largely mirrored the above response.

10. The application was heard on the Court's virtual platform on 30th January 2025 when the applicant appeared in person while the respondent was not present. I must state that the hearing notice clearly informed the parties that the application was to be heard by way of written submissions and both parties had complied. So the applicant's attendance was inconsequential.

11. I have considered the application, affidavit in support of and in opposition to the application and the submissions.

12. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into as guiding principles. These are first the period of the delay must be considered. Second the Court has to consider the reasons for such a delay. Thirdly, the Court would consider whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal. Fourthly, the Court is required to consider if the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.

13. Those principles were restated by Waki, JA in Fakir Mohamed v Joseph Mugambi & 2 others [2005] eKLR as follows:

> " The exercise of this Court's discretion under Rule 4... 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 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 Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38."

14. On its part, the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

15. In this case, the factual averments in so far as they address the said principles are not seriously disputed. In the case of Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor [2014] eKLR it was appreciated that:

> "Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to 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. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

16. From that authority, it is clear that the litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. Therefore, the fact that there is a long delay does not, of itself, necessarily mean that the delay is inordinate. All the surrounding circumstances, including the reason for the delay must be considered by the Court.

17. The applicant's explanation for the delay is that he was under the impression that he need leave of the court to appeal to this Court. In my view, such belief, even if mistaken is a reasonable in light of the fact that the *Law of Succession Act* is not explicit whether or not leave to appeal to this Court in succession matters is necessary. The respondent contends that the applicant is a perennial litigant who appeals each and every decision made. However, as this Court held in The fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant. See Moses Kipkolum Kogo v Nyamogo & Nyamogo Advocates [2004] 1 KLR 367.

18. As was held by Madan, J (as he then was) in Official Receiver v Sukhdev [1970] EA 243:

> "In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."

19. As regards the reasons for the delay, the applicant's position is that the delay was occasioned party by his ill health and and exhibited documents in support of that fact. Ill health of oneself, in my view, may constitute a satisfactory reason for the delay in taking a step in the proceedings.

20. As regards the issue of prejudice, none has been alluded to by the respondents save that the matter may be delayed. Lakha, JA in Touring Cars (K) Ltd & Anor v Ashok Kumar N. Mankanji Civil Application No. 78 of 1998, was of the view that rule 4 of the Court of Appeal Rules confers the widest measure of discretion in an application for extension of time and draws no distinction whatsoever between the various classes of cases and that the rule clearly requires the Court to look at the circumstances and recognises the overriding principle that justice must be done. He further held that prejudice or lack of it is a highly relevant matter in considering the justice; it may be an all-important one.

21. Waki, JA, while citing Grindlays Bank International (K) & Another v George Barbour Civil Application No. Nai. 257 of 1995 and Gichuhi Kimira v Samuel Ngunu Kimotho & Another Civil Application No. Nai. 243 of 1995 in Janet Ngendo Kamau v Mary Wangari Mwangi Civil Application No. Nai. 338 of 2002 held that:

> "Unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should in so far as it may be reasonable prefer, in the wider interest of justice, to have a case decided on its merits... The consideration that one case should not hang over the heads of parties indefinitely must be weighed against the wider interests of justice, namely that where possible cases must be brought to a close after a hearing on the merits." [Emphasis mine].

22. It is now appreciated that the broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of

costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. In Chemwolo and Another v Kubende [1986] KLR 492; [1986-1989] EA 74, it was held that:

> "Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

23. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure.

24. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See Waljee's (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.

25. In the circumstances of this case, I find that this is a just and proper case to exercise discretion in favour of the applicant. This matter, which is rather acrimonious ought to be determined with finality so that a party does not go away feeling that his side of the story was never listened to. I accordingly allow the Motion dated December 17, 2024. I extend the time limited for the filing of the appeal with a further period of 14 days from the date of this ruling.

26. I however, have no jurisdiction, as a single Judge to deal with the prayer for maintenance of status quo.

27. The costs of the application are awarded to the respondent.

28. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY 2025.

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

G. V. ODUNGA

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JUDGE OF APPEAL