Kimetto v Chepkwony & 2 others (Civil Application E106 of 2024) [2025] KECA 835 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KECA 835 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E106 OF 2024

GV ODUNGA, JA

MAY 15, 2025

BETWEEN

EUNICE CHELANGAT KIMETTO ..... APPLICANT

AND

ISHMAEL CHEPKWONY ..... 1ST RESPONDENT

PAMELA CHEPKWONY ..... 2ND RESPONDENT

ALICE CHEPKWONY ..... 3RD RESPONDENT

(Application for extension of time to file and serve Notice of Appeal against the judgment and Orders of the High Court of Kenya at Kericho (J. K. Sergon, J) dated 1st August, 2024 in Succession Cause Number 7 of 2018)

RULING

1. Before me is the applicant's Notice of Motion dated 18th November, 2024, seeking extension of time for filing and service of Notice of Appeal against the judgment and orders of Sergon, J dated the 1st August 2024 in Kericho Succession Cause Number 7 of 2018 and for an order that the Notice of Appeal dated 11th November 2024 be deemed as duly filed and properly on record.

2. The application is based on grounds that: the applicant's former advocates, out of unintentional, genuine inadvertence or mistake, failed to file the notice of appeal within the prescribed period of fourteen (14) days from the 1st August 2024 when the decision intended to be appealed against was made; that a notice of appeal dated 11th November 2024 was filed outside the mandatory period required by the Rules of the court; that this application has been filed without undue delay upon realizing the inadvertence on the part of the former advocates for the applicant; and that the applicant has an arguable appeal with overwhelming chances of success as per the grounds of appeal set out in the Draft Memorandum of Appeal dated 15th November 2024.

3. In support of the application, the applicant avers that she instructed her former advocates to appeal against the entire judgment of the High Court, and was advised that succession matters are only appealable upon obtaining leave of the Court; that her former advocates prepared an application for leave to appeal dated 2nd August 2024 which was opposed by the respondents; that by a ruling dated 7th November 2024, the court declined to grant her leave to appeal against the judgment and orders of the Court dated the 1st August 2024 for reason that no Notice of Appeal had been filed and served; that she trusted her advocates to do all required and stick to the stipulated timelines prescribed by the law but they omitted to file Notice of Appeal before filing her application for leave to appeal and that is the reason her application was dismissed; that her former advocates filed Notice of Appeal dated 11th November 2024, outside the statutory period required by the rules of the Court and her current advocates advised her that she has to seek orders deeming the Notice of Appeal as duly filed and properly on record; that her former advocates did not bring to her attention that the Notice of Appeal was never filed in time; that granting the extension of time will avoid a miscarriage of justice and the imminent disinheritance of the applicant and her sisters caused by inadvertence and mistakes of her former advocates; that the intended appeal has high chances of success; that her application has been filed without undue delay and the period of delay is not inordinate in the circumstances; that by a letter dated the 14th November 2024, the respondents have shown intention to proceed with execution of the Certificate of Confirmation of Grant by demanding that she signs transmission forms and avail necessary documents for transmission, thus her intended appeal will be rendered nugatory; and that the respondents stand to suffer no prejudice if the application is granted.

4. In opposition, the 1st Respondent, authorized by the 3rd Respondent, has sworn a replying affidavit dated 17th December 2024 wherein he avers: that the application is a violation of rule 84 of this Court's Rules as the Record of Appeal is incomplete as it does not bear the primary documents; that this application was served 14 days later contrary to this Court's directions issued on 2nd December 2024 requiring service to be done within 3 days and the mandatory requirement under rules 84 and 86 of this Court's Rules; that the delay in serving the application constitutes a failure to take an essential step within the prescribed time, rendering the application fatally defective and incompetent under; the Notice of Appeal is defective and incompetent for non- compliance with Rule 77 which requires its timely service; that the non-compliance offends the overriding objectives set out under rule 4 of this Court's Rules; and that the delay and irregularities have caused undue prejudice to the respondents compromising their right to a fair and expeditious response to the instant application and the appeal process as a whole.

5. It was further deposed: that the applicant has not explained in her affidavit the period between 1st August 2024 and 11th November 2024, thus there is no basis to find that the delay is excusable; that the fling of the Notice of Appeal more than 3 months after the delivery of the judgment is inordinate delay; that vide a ruling delivered on 7th November 2024, the High Court denied the applicant leave to appeal against the judgment; that the Notice of appeal was lodged without seeking leave to extend time and was never served upon all parties including the estate of the 2nd respondent; that mistakes of an advocate are not a blanket excuse for procedural non-compliance; that the application should be struck out in its entirety for being frivolous, vexatious and being an abuse of the court process.

6. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon and which I need not reproduce herein.

7. Rule 4 of the Court's Rules provides that:

> " The Court may, on such terms as may be just, by order, 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."

8. 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 well settled. This Court has unfettered discretion to extend the time prescribed for taking any action permitted under the Rules. 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 considerations that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly (possibly), whether the proceedings for which time is sought to be extended is frivolous; and fourthly, whether the respondent in those proceedings will be unduly prejudiced if the application were to be granted. See Leo Sila Mutiso v Helen Wangari Mwangi, Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231.

9. 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. The Court would of course also consider the overriding objective spelt out in Sections 3A and 3B of the *Appellate Jurisdiction Act*.

10. Those principles were restated by Waki, JA in Fakir Mohamed vs. 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."

11. 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 respondent if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

12. Regarding the length of the delay, 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."

13. In the instant case, the applicant's application for leave to appeal was dismissed on 7th November 2024. This application is dated 18th November 2024 which period, in my view is not inordinate. The respondents seem to blame the applicant's advocates for seeking leave to appeal before filing the Notice of Appeal. It is true that rule 61(4) of the Court of Appeal Rules provides that:

> " Where an appeal lies only on a certificate that the case is a fit case for appeal, or with leave, or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such certificate or leave before lodging the notice of appeal."

14. Whereas this Court's jurisdiction cannot be invoked before a notice of appeal is filed, it is doubtful whether the same position applies to the High Court where it is expressly provided that an application for leave may be entertained orally at the time the decision sought to be appealed against is made. That said it is clear that what the Court distinguishes between mere inaction as opposed to error of judgement or a slip. While the former is inexcusable, the latter may be a reason to exercise discretion in favour of an applicant. In cases falling within the latter category, a waiver of technical points may be considered to sustained justice being done between the parties. See Berber Alibhai Mawji v Sultan Hasham Lalji & 2 Others, Civil Application No. Nai 236 Of 1992 [1990-1994] EA 337

15. It is true that the need to obtain leave to appeal in succession matters has until recently been unsettled. The failure by an advocate to appreciate that the notice of appeal may be filed notwithstanding the fact that leave has not been sought and granted is in my view excisable.

16. In Shital Bimal Shah & 2 Others v Akiba Bank Limited, Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323 this Court held that:

> " Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate."

17. Ringera, AJA, as he then was in Githiaka v Nduriri [2004] 2 KLR 67 held that:

> " Under rule 4 of the Court of Appeal Rules the court is perfectly invested with a clear and unfettered discretion to extend the time limited by the Rules or its decisions and such a discretion like all judicial discretions, is to be exercised judicially, that is to say on sound reason other than whim, caprice, or sympathy. In exercising the discretion the Court's primary concern should be to do justice to the parties and in considering which way the scales of justice tilt, the Court should among other things consider the length of the delay in lodging the notice and record of appeal and, where applicable, the delay in lodging the application for extension of time, as well as the explanation therefore; whether or not the intended appeal is arguable; and the public importance, if any, of the matter, and generally the requirements of the interest of justice in the case... Oversight has been defined to mean the omission or failure to see or notice. It is inadvertence. Whilst ignorance may not be equated to a mistake, it may and normally does arise through negligence."

18. I am therefore satisfied that the reason given for the delay is in the circumstances of this case justifiable. Regarding the prospects of success of the reference, the consideration of this issue, however, does not apply in all cases. Dealing with that consideration, this Court in Mwangi v Kenya Airways Ltd, [2003] KLR 486, where the court stated:

> " It is clear that the third issue for consideration, namely, the chances of the appeal succeeding if the application is granted is merely stated as something for a "possible" consideration, not that it must be considered. This is understandable because the "the chances of an appeal succeeding" is normally dealt with by this Court under the rubric of "an arguable appeal" or "an appeal which is not frivolous" and the full court normally considers that issue under rule 5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case of Bhaichan Ghagwanji Shah v D Jamnadas & Co. Ltd [1959] EA 838 where Sir Owen Corrie, Ag. JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:
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> > "..... It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant's affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application."

19. The court then observed that the Shah case (ante) was decided under rule 9 of the former rules which required that "sufficient cause" be shown before extension of time could be obtained. It then concluded: -

> " It must not be forgotten that even the recent case of Mutiso did not lay it down that the single judge is obliged to consider the issue of the chances of an appeal succeeding; the case only put that issue down as one for possible consideration."

20. In Ramesh Shah v Kenbox Industries Limited [2007] eKLR, this Court debunked the myth surrounding the arguability of the intended appeal in applications of this nature by observing that:

> "The issue therefore arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in applications under rule 4. For our part we think, that except in very exceptional and limited circumstances, that proposition is not acceptable and is not borne out by authority. Indeed it is open to abuse. At its absurd best, it would mean that a party who for no or no sufficient reason sleeps over his right of appeal for ages, may one fine morning wake up and persuade the court that he had an arguable appeal after all and ought therefore to be allowed to appeal despite the delay."

21. While in certain borderline cases the Court may consider the chances of success of the intended action, in my view, that condition plays a very peripheral role where the other conditions have been fulfilled particularly where the applicant has a right to take up the proceedings in question. In this case where what is sought is extension of time to file a reference, it would be inadvisable to go into the prospects of the success of the reference

22. On the issue of prejudice, the respondent's position is that this application is an afterthought aimed at keeping the appellant from its rightful judgment. However, as appreciated by 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:

> "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."

23. The other issues raised by the respondents such as the failure to incorporate "primary documents" in the record and failure to serve the notice of appeal within time do not deprive this Court of the jurisdiction to issue orders in the nature sought in this application.

24. 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."

25. 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. In this case, I did not hear the respondent contend that if the application is allowed, they will suffer such prejudice that cannot be compensated by an award of costs.

26. 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.

27. In the circumstances of this case, I find that this is a just and proper case to exercise discretion in favour of the applicant. I accordingly allow the Notice of Motion dated 18th November 2024, and extend time for filing and service of Notice of Appeal against the judgment and orders of Sergon, J dated the 1st August 2024 in Kericho Succession Cause Number 7 of 2018 with such time as would validate the Notice of Appeal dated 11th November 2024.

28. The costs of this application are awarded to the respondent.

29. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF MAY, 2025.

G. V. ODUNGA

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. JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR