



**Mukherjee v Karachiwalla Nairobi Limited (Civil Appeal (Application)
304 of 2015) [2024] KECA 75 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 75 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 304 OF 2015
GWN MACHARIA, JA
FEBRUARY 9, 2024**

BETWEEN

SANIVAN MUKHERJEE APPLICANT

AND

KARACHIWALLA NAIROBI LIMITED RESPONDENT

(Being an application for leave to file an application for reinstatement of the appeal out of time against the judgement and decree of the High Court at Nairobi (Havelock, J.) dated 7th August 2014) in HCCC No. 113 of 2012)

RULING

1. Sanjivan Mukherjee, the applicant filed the instant application dated 14th March 2023 under the provisions of article 159 (2)(d) of the Constitution, sections 3A & B of the Appellate Jurisdiction Act and rule 4 of the Court of Appeal Rules. The application is supported by the affidavit of the applicant sworn on even date. The applicant is seeking the following orders: that the time for filing an application to reinstate/restore the appeal in Nairobi Civil Appeal No. 304 of 2015- Sanjivan Mukherjee vs. Karachiwalla Nairobi Limited is enlarged and/or extended; that leave is granted to the applicant to file an application to reinstate the appeal in Nairobi Civil Appeal No. 304 of 2015- Sanjivan Mukherjee vs. Karachiwalla Nairobi Limited within 7 days of this order; and that costs be provided for.
2. The applicant deposed that he learnt on October 25, 2022 that his appeal number 304 of 2015 had been dismissed for non- attendance on April 25, 2021 during the Covid-19 pandemic; that the appeal was listed for hearing on March 29, 2017, but that it did not proceed since there was a pending reference filed by the respondent against the ruling of Warsame, JA., issued on December 4, 2015 in Civil Application No. 253 of 2015.
3. According to the applicant, parties appeared before the Deputy Registrar severally to confirm filing of submissions which the respondent failed to comply with; that his counsel received communication



from this Court on September 17, 2021 on the hearing of an application, being Civil Application No. 117 of 2015; and that he (counsel) responded by informing the Court that Civil Application No. 253 of 2015 was still pending; that at the time of receiving the aforesaid hearing notice, this appeal had already been dismissed for non-attendance on 25th April 2021 unbeknown to him or his counsel; and that the discovery of the dismissal was made on October 25, 2022.

4. The applicant stated that his counsel wrote to the Court requesting for a copy of the order of April 25, 2021, but they are yet to be furnished with it; that he (the applicant) has also been seeking treatment abroad; and that, as such, the dismissal of the appeal was wrongful as he was not afforded an opportunity to be heard.
5. The application was opposed vide a replying affidavit sworn by one John Odera Were, an advocate in conduct of the matter on behalf of the respondent on November 14, 2023. Counsel contended that the hearing of the appeal was scheduled for April 26, 2021 and not April 25, 2021 as averred by the respondent, and that an email dated 15th April 2021 was sent to that effect; that the Deputy Registrar further shared the link to the virtual court session via an email of April 26, 2021; that despite the appeal being dismissed on April 26, 2021, the applicant did not bother to follow up to know the status of his appeal until October 25, 2022, when a period of over one and a half years had elapsed.
6. According to the counsel, the Deputy Registrar sent a further email on 27th April 2021 informing the parties that the appeal was dismissed on April 26, 2021 under rule 56 of the [Court of Appeal Rules](#); that rule 58 (4) provides that an application such as the instant one should be made within 30 days, but the applicant has brought it two years later; that under rule 58 (3), the application should only be affirmatively considered if a party shows that he or she was prevented by sufficient cause from appearing in Court, but that in this case, no plausible explanation to this effect has been proffered by the applicant; that furthermore, it is evident from the email of the Deputy Registrar that all parties were well informed of the hearing date; that the applicant is guilty of laches; that litigation must come to an end; and that a dismissal of the application will grant the respondent the much deserved opportunity to enjoy the fruits of its judgment.
7. The hearing proceeded by way of written submissions. Those of the applicant are dated November 10, 2023 whilst those of the respondent are dated November 14, 2023. Being a regurgitation of the averments in support of, and in opposition to, the application, I shall not rehash the respective submissions save for very pertinent issues, if need be. In this regard, the applicant relied on the Supreme Court case of [Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others](#) (2014) eKLR for the principles the Court should consider in determining whether or not to extend time to do anything, bearing in mind that each case should be considered on its own circumstances. In this regard, reliance was also placed on the case of [Njoroge v Kimani](#) (Civil Application Nai. E049 of 2022) (2022) KECA 1188 (KLR) (28th October 2022) (Ruling), for the submission that the applicant had complied with the directions of filing the submissions, and that he was ready to proceed with the hearing of the appeal; and that the appeal was dismissed during the pendency of a reference which the Court had directed that it be heard first before canvassing the appeal.
8. Finally, it was the applicant's plea that no prejudice would be suffered by the respondent if the application was allowed, and if any existed, it would be compensated by way of damages; and that consequently, the Court should be guided by the overriding objective of doing justice as spelt out under sections 3A & 3B of the [Appellate Jurisdiction Act](#). I was accordingly urged to find merit in the application.
9. The respondent submitted that the applicant did not dispute the email address through which the hearing notice was sent on 15th April 2021, being info@mohammedmuigai.com; that again on 26th



April 2021, parties were sent another link through which they were to log in for virtual hearing; that this application coming too late in the day is a demonstration of laches on the part of the applicant who does not deserve clemency from the Court; and that the excuse proffered by the applicant that he was following up an order of the Court which needed to be issued before filing the application is untenable, as no order was required before the application was filed. In this regard, the respondent relied on the case of *Rajesh Rughani vs. Fifty Investments Limited & Another* (2005) eKLR in which this Court cited the case of *Habo Agencies Limited vs. Wilfred Odhiambo Musingo* (2015) eKLR where it was held that a party has the responsibility to show interest in, and to follow up, their cases even when it is represented by counsel.

The respondent submitted that in this case, the applicant had demonstrated lack of interest.

10. Further reliance was placed on the case of *Mwangi v Kariuki* (1999) LLR 2632 (CAK) for the proposition that the inaction of a counsel coupled with careless attitude of a party would invite a court to rule against an applicant; and the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* (2013) eKLR for the argument that rules and timelines serve to make the process of judicial adjudication and determination fair and just, but that the Court cannot aid in bending or shifting goal posts to aid a litigant.
11. The respondent also contended that the application ought to have been made within 30 days of learning about the dismissal, which was not done; and that this is not the first time that the applicant was making a similar application as the Court had previously condoned him. For all the foregoing, the Court was urged to dismiss the application.
12. I have considered the application, the affidavit in support of, and in opposition to, the application, the submissions by each party, the authorities thereto and the law.
13. I have understood the applicant's application to be one seeking extension of time to file an application in order to reinstate this appeal which was dismissed on 26th April 2021. There is no dispute between the parties that this appeal was indeed dismissed. Rule 105 (3) of the *Court of Appeal Rules*, 2022 provides that:

An application for restoration under the proviso to sub-rule (1) or the proviso to sub-rule (2) shall be made within thirty days after the decision of the Court or, in the case of a party who should have been served with notice of the hearing but was not so served, within thirty days after his or her first hearing of that decision.
14. A party is required to file an application within 30 days after the decision of the Court or within 30 days of the party's knowledge of the dismissal. In the event that a party does not file the application for reinstatement within 30 days, the rules allow a party to move this court under rule 4 to extend the time for filing the application. It provides thus:

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.
15. Extension of time is not a party's right. It is an equitable remedy available to a deserving party which the Court exercises judiciously, without prejudicing the other party as was enunciated by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir* (*supra*).



16. In *Fakir Mohamed v Joseph Mugambi & 2 others* (2005) eKLR, Waki, JA. held 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.”

17. Similarly, Odunga, JA, in *Standard Chartered Bank Limited v Mwailemi* (Civil Application E086 of 2022) (2023) KECA 1384 (KLR) (24 November 2023) (Ruling) had this to say:

“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. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether 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. The Court would of course also consider the overriding objective spelt out in Sections 3A and 3B of the *Appellate Jurisdiction Act*.”

18. Having established the principles to be considered, I will now turn to the facts as pleaded by the applicant in his application.

19. The applicant stated that his counsel was not informed of the hearing date, neither did his counsel know of the dismissal until 25th October 2022. The applicant also stated that in any event, the appeal was erroneously dismissed during the pendency of a reference filed by the respondent against the ruling of Warsame, JA., issued on 4th December 2015 in Civil Application No. 253 of 2015.

20. I have carefully analysed the emails placed before me, informing the parties of the hearing date of the appeal and in particular annexure “SM - 3”, being copies of the email sent to the applicant’s counsel and annexure “JOW -1”, being the emails sent to the respondent’s counsel. The common ground in both emails is that they originated from deputyregistrar.ogombe@gmail.com, and they are dated 15th April 2021. The email annexure by the applicant particularly informing the parties of the hearing date of the main appeal, seems to have been redacted to the extent that it does not indicate its recipients, whilst the email attached by the respondent paints a different picture. The latter indicates that its recipients (who are the parties being informed of the hearing notice) were info@mohammedmuigai.com and oderawere@gmail.com.

21. Further, on 27th April 2021, there was another email from the office of the Deputy Registrar to the same aforementioned recipient emails, informing the parties that the appeal listed before the Court on 26th April 2021 was dismissed under rule 50 of the *Court of Appeal Rules*.



22. It is paramount to note that the same email address of the firm of the applicant's counsel is the same one used for subsequent communications. Hence, I have no doubt in my mind that the applicant's counsel was well aware of the hearing date, and he was also aware of the communication as early as 27th April 2021, informing them (the law firm) that the appeal had been dismissed.
23. Be that as it may, there is an averment by the applicant that the appeal was irregularly dismissed as there was a pending reference filed by the respondent in respect to the decision delivered by Warsame, JA. on 4th December 2015 in Civil Application No. 253 of 2015. The decision by Warsame, JA. precipitated from an application by the applicant seeking leave to file the Notice of Appeal out of time. This position has not been rebutted by the respondent in his replying affidavit. The respondent has not led evidence to demonstrate that the reference was not filed and that even if it was filed, it was withdrawn to pave way for hearing of the main appeal.
24. In my view therefore, there being pendency of interlocutory proceedings within an appeal, the correct procedure would be to hold the appeal in abeyance pending the determination of the reference. While not excusing the failure of the applicant to diligently appear in Court during the hearing of the appeal, I believe the respondent deliberately failed to inform the Court of the pending reference in Civil Application No. 235 of 2015 in order to steal a march. Counsel for the respondent owed the Court a fiduciary duty as a good officer of the Court to disclose that he has a pending reference yet to be determined. He simply cannot have his cake and eat it.
25. Without even delving into the factors to be considered under rule 4 of the Court of Appeal Rules, 2022, for granting extension of time, to wit: the period of the delay; the reasons for such a delay; whether the appeal, or intended appeal from which extension is required is arguable; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted as was held in Standard Chartered Bank Limited (supra), the fact that there is a pending reference is reason enough to allow extension of time of filing an application to reinstate the appeal.
26. In the premise, I find that this is a fit and proper case for exercise of the Court's discretion in favour of the applicant. Accordingly, I allow the Notice of Motion dated 14th March 2023. Time is hereby extended for filing and serving the application for reinstatement of the appeal. The application shall be filed and served within 7 days from the date hereof failure to which the appeal stands dismissed. Costs will be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

G. W. NGENYE – MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

