Dhanjal Brothers Limited v Dhanjal & another (Both sued as the administrator of the Estate of Jaswant Singh Dhanjal) (Civil Application E003 of 2022) [2024] KECA 71 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KECA 71 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E003 OF 2022

GV ODUNGA, JA

FEBRUARY 7, 2024

BETWEEN

DHANJAL BROTHERS LIMITED ..... APPELLANT

AND

S JOGINDER SINGH DHANJAL ..... 1ST RESPONDENT

SUKHWANT KAUR KUNDI ..... 2ND RESPONDENT

BOTH SUED AS THE ADMINISTRATOR OF THE ESTATE OF JASWANT SINGH DHANJAL

(Being an Application for enlargement of time and leave to file the Notice of Appeal and Record of Appeal out of time from the Ruling of the Mombasa High Court (Njoki Mwangi J.) delivered on 8th October, 2021 in HCCC No. 84 of 2020 (OS)

RULING

1. The Applicants moved this court by a Motion on Notice dated 27th January, 2022 seeking extension of time within which to file both the Notice of Appeal and the Record of Appeal out of time against the Ruling and Order made on 8th October 2021 in Mombasa HCCC No. 84 of 2020 (OS).

2. According to the applicant, after the hearing of the preliminary objection raised in the said Originating Summons the learned Judge scheduled the delivery of her ruling thereon on notice but no notice was issued that it was not until on 22nd December, 2021 when a copy of the ruling was emailed to the applicant's advocates on record indicating that the ruling was delivered on 8th October, 2021 in the absence of all parties; that by then the time prescribed for the filing of the Notice of Appeal had lapsed; that the delay in filing the Notice of Appeal was not intentional on the part of the applicant as the cause of the delay was beyond its control; that no prejudice will be occasioned to the respondent if

orders sought are granted as the order dismissing the suit in the High Court does not affect the estate in any way; and that on the other hand, the applicant is prone to harassment by the estate through its administrators without recourse.

3. It was further averred that the applicant has a good appeal with high chances of success hence the Applicant should be given an opportunity to ventilate; and that the Applicant is willing to abide by such conditions as may be set by the court while granting leave.

4. The Applicant submitted the power of this Court under Rule 4 is discretionary and must be exercised judicially considering that it is wide and unfettered. Reliance is placed on *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* [2014] eKLR to submit that the court should take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding and the degree of prejudice to the Respondent if the application is granted. The Applicant conceded that there is delay of almost 4 months but that it was not inordinate considering the fact that there was period of the Christmas vacation which is not reckoned in the computation of time and that the applicant needed to get its Board's resolution before taking a step in the matter.

5. When this matter was called out before me on 7th February, 2024, learned counsel, Mr Charama, appeared for Ms Wanjiku Nduati for the applicant while there was no appearance for the respondent despite having been duly served. Similarly, there was no response to the application.

6. I have considered the application, affidavit in support of and the submissions and authorities relied upon.

7. 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.

8. 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 v Mwangi* Civil Appl. Nai. 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M'Ethare & Attorney General* Civil Appl. Nai. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38."

9. 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.

10. In *Leo Sila Mutiso v Helen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

11. In this case, the applicant averred that it was not served with a notice for the delivery of the decision. Order 21 rule 1 of the *Civil Procedure Rules* provides that:

> In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.
>
> Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

12. That notification is required whether the decision to be made is a ruling or judgement is not in doubt. It therefore follows that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to a sufficient reason for the purposes of enlargement of time to appeal if the applicant moves the Court for regularisation of his position expeditiously. See Kwach, JA in *Zacky Hinga v Lawrence Nthiani Nzioki & Another* Civil Application No. Nai. 359 of 1996. In fact, this Court held in *Ngoso General Contractors Ltd. v Jacob Gichunge* Civil Appeal No. 248 of 2001 [2005] 1 KLR 737 that:

> " The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection...The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant's right of appeal was grossly compromised...An order was made by the Magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule

which accords with fundamental rules of natural justice and the right to be heard which the *Constitution* safeguards."

13. Similarly, in *Leonola Nerima Karani v William Wanyama Ndege* Civil Application No. Nai. 21 of 2007, it was held that:

> " Since there is no indication that the judgement of the Superior Court was delivered with notice to the parties or their advocates which would be a serious breach of the rules, it would follow that the breach threw the litigation timetable off balance and the advocates on record for the applicant at the time cannot be blamed for filing the notice of appeal and the letter bespeaking copies of the proceedings and judgement when they did."

14. In *Kisumu Paper Mills Ltd v National Bank of Kenya Ltd & 2 Others* Kisumu HCCC No. 413 of 2001, it was held that:

> " A party not invited to a date when an important and essential determination is made against him is usually not afforded an opportunity on its case...The court as a matter of obligation was required to issue and serve a notice on all the parties to the suit and the advocate for the applicants ought to have been given an opportunity to be present so that he could represent his client's interest including applying for leave to appeal as it is not the business of an advocate to keep checking with a Judge or a magistrate about the delivery of a particular judgement as rulings and judgements of the Court must ordinarily and as a matter of good practice be delivered on the due date and if not delivered parties must be sufficiently and adequately notified of the date of delivery by issuing a notice...The practice, procedure and regulation of the Court where a Judgement/ruling is not delivered on its due date is to notify all parties involved and their respective advocates and the notice is issued in accordance with the rules of proper service which must be in tandem with the requirement in the Civil Procedure otherwise there would be a serious breach of procedure amounting to a denial of the right to be heard...As a matter of protocol and good advocacy, an advocate is obligated to inform an absent advocate immediately of the delivery of the Judgement/ruling."

15. In this case the application was not opposed. While an applicant for extension of time is required to explain the reasons for the delay in taking a step in the proceedings, regarding delay, it was appreciated in the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor* [2014] eKLR 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. It is however 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. The court, as is often

said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See *Philip Chemwolo & Another v Augustine Kubende* [1986] KLR 492; (1982-88) KAR 103.

17. 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, there is not contention that if the application is allowed the respondent will suffer such prejudice that cannot be compensated by an award of costs. 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.

18. In the premises, I allow the Motion dated 27th January, 2022 and extend time for filing the and service Notice of Appeal and the Record of Appeal. I direct that the Notice of Appeal be filed and served within the next 14 days and that the record of appeal be filed and served within 60days from the date of filing of the Notice of Appeal.

19. There will be no order as to the costs of this application.

20. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY, 2024.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR