Muchiri v Muchiri (Civil Application E233 of 2022) [2024] KECA 274 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 274 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E233 OF 2022

F TUIYOTT, JA

MARCH 8, 2024

BETWEEN

FRANK MUCHIRI .... APPLICANT

AND

ROSEJOY NKATHA MUCHIRI .... RESPONDENT

(Being an application for extension of time to file an Appeal out of time from the judgment of the High Court of Kenya at Nairobi (Maureen Odero, J.) Dated 4th March, 2022 in Civil Suit No. 64 of 2018)

RULING

1. By a Notice of Motion dated 30th March, 2023 said to be brought pursuant to Articles 159 and 259(1) of the *Constitution*, Sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and Rules 1(2), 4, 42, 43(1), 77, 5(2)(b) and 47 of the *Court of Appeal Rules*, 2010, the applicant seeks the following orders:-

    1. That pending the lodging, hearing and determination of the applicant's intended appeal, this Honourable Court do grant a stay of execution of the High Court's judgment and decree delivered on 4th March, 2022 in HCC.OS/64/2018: *Rosejoy Nkatha v Frank Muchiri*;

    2. That this Honourable Court be pleased to grant leave to the applicant to file the Record of Appeal and serve the already filed Notice of Appeal out of time against the said decision of the High Court made on 4th March 2022;

    3. That the Notice of Appeal lodged in the High Court on 10th March 2022 and the Memorandum of Appeal lodged on 20th April 2022 vide the e-filing portal be deemed duly filed and to be properly on record;

    4. That the Notice of Appeal served on the Respondent on the 29th of March 2023 be deemed as duly served.

2. As this Court has often said, the jurisdiction of a single judge is circumscribed by Rule 55 of the *Court of Appeal Rules*, 2022. Obviously, I am bereft of jurisdiction to hear the application for stay and shall say no more on it. This decision is on the prayer for extension time.

3. In support of the application is an affidavit of the applicant sworn on even date where he deposes that once the judgment was delivered on 4th March, 2022, his advocates on record filed a notice of appeal on 10th March, 2022. The notice of appeal was not served upon the respondent due to an inadvertent error but has since been done. There is also delay in filing the record of appeal blamed on lateness in the High Court registry providing typed proceedings, the decree and certificate of delay despite the applicant having paid for them. It is contended that the respondent will not suffer prejudice by the grant of the orders sought herein.

4. The application is opposed by the respondent in her replying affidavit sworn on 11th April, 2023. She states that the current application has been filed one (1) after the date of delivery of judgment of the High Court on 4th March, 2022 and the applicant has failed to provide any reasonable explanation for the delay. She contends that the application was triggered by her application dated 17th November, 2022 seeking to strike out the appeal. The Court is told that the notice of appeal, memorandum of appeal and letter requesting for typed proceedings were not served upon her and on 29th March, 2023 the applicant purported to serve the same through e-mail in contravention of the law. She laments that no record of appeal has been filed despite the judgment, decree and proceedings being ready. She deposes that failure to comply with the procedure was not a technicality and as such any document filed after the defective notice of appeal cannot sustain the appeal. I am informed that her striking out application is pending ruling and therefore the current application is a stratagem to hoodwink the court from proceeding to deliver its ruling. She contends that it is unacceptable for the applicant to hide behind his advocate's inaction as such a defence is tantamount to an admission or collusion with his advocate not to prosecute the suit. She urges the Court not grant the orders sought as she will be kept away from enjoying the fruits of her judgment.

5. In their submissions, the parties restate the positions taken in their respective affidavits.

6. Rule 84 makes provision for institution of appeals and reads: -

> " (1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
>
> a. a memorandum of appeal, in quadruplicate;
>
> b. the record of appeal, in quadruplicate;
>
> c. the prescribed fee; and
>
> d. security for the costs of the appeal.
>
> Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such times may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

3. The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction."

7. On record is a notice of appeal dated 15th March, 2022 supposedly lodged on 10th March, 2022 and a memorandum of appeal lodged on 20th April 2022. There is also a letter dated 10th March, 2022 bespeaking certified copies of the proceedings. None of these documents were served upon the respondent, admitted by the applicant. Service was eventually effected on 29th March, 2023, a year later.

8. The delay in serving the documents is attributed to an inadvertent error on the part of counsel which the applicant urges should not be visited on him. In *Itute Ingu & another v Isumael Mwakavi Mwendwa* [1994] eKLR. Omolo JA had this to say about mistake by counsel;

> "Since the amendment to this Court's rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court's discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes.....
>
> .... There ought to be an end to litigation, and in my view to allow the present application would amount to saying that so long as a mistake, of whatever nature, is shown to have been made by an advocate and not the client, then the client is entitled to a favourable consideration from the Courts. I would myself reject that kind of contention and hold that
>
> while a mistake by counsel is not necessarily a legal bar to the Court exercising its discretion in favour of the victim of the mistake, the Court is nevertheless entitled to examine the nature and quality of the mistake before deciding in which direction the discretion should go."

9. While the character and implication of the mistake by counsel matters, so too, in some instances, is the conduct of the client. This Court in *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR observed;

> "In *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In *Mwangi -v- Kariuki* [1999]LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude."

10. It has taken the applicant 12 months to move the Court for amends in respect to the failure to serve the notice of appeal. Second, there is no explanation by the applicant's advocates on record, who for good measure are the advocates who committed the transgression of failing to serve, as to how and when they became aware of their failure. Is it possible that they were only jolted into action by the filing and service of respondent's application of 17thNovember for striking out before this Court as argued by the respondent? And even then, it took the applicant another 3 months to move the Court when the need to move with eagerness and urgency was obvious. When no clarification is made on such apparent

laxity then the explanation given is unsatisfactory and is not a badge of diligence on the part of counsel. Again, and he will rue it, the applicant does not give an account of follow ups, if any, he made with his advocates on the progress of the intended appeal in the one year that has passed. It would seem to me that, just as his advocates, the applicant is guilty of inaction and on the reasoning in *Rajesh Rughani* (supra) would be disentitled to exercise of my discretion in his favour.

11. The application of 30th March, 2023 is without merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

F. TUIYOTT

……………………

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR