County Government of Narok & another v Mwavali (Civil Application E072 of 2023) [2024] KECA 390 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 390 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E072 OF 2023

WK KORIR, JA

APRIL 12, 2024

BETWEEN

THE COUNTY GOVERNMENT OF NAROK ..... 1ST APPLICANT

KESIKE OLE WOTUNI ..... 2ND APPLICANT

AND

WYCLIFFE ONDARI MWAVALI ..... RESPONDENT

(Being an application for extension of time to file a notice of appeal out of time to the decision of High Court of Kenya at Narok (F. Gikonyo, J.) dated 16th March 2023inNarok HCCC No. 2 of 2021)

RULING

1. Before me is a notice of motion application dated 15th August 2023 brought pursuant to Article 159 of the *Constitution*, sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and rules 4, 33, 42(b), 43, 44, 45, 49 and 50 of the *Court of Appeal Rules*. Through the motion, the applicants, the County Government of Narok and Kesike Ole Wotuni, seek extension of time to file an appeal against the judgment of F. Gikonyo, J delivered on16th March 2023 in Narok HCCC No. 2 of 2021. The applicants also pray that the notice of appeal dated 22nd March 2023 and a draft memorandum of appeal dated 15th August 2023 be deemed as properly filed upon payment of the requisite court fees. The application is based on the grounds on its face as well as the averments made by John Maiyani Tuya in the supporting affidavit sworn on 15th August 2023.

2. The applicants' case is that the judgment which is the subject of the intended appeal was delivered on 16th March 2023 and the applicant being aggrieved by the judgment intends to appeal. It is averred by the applicants that the delay in lodging the appeal was occasioned by the fact that the firm of Maina Ngaruiya & Co. Advocates was not properly on record and regularizing appearance took time. According to the applicants, they had already made a request for typed proceedings and judgment on

27th March 2023 for purposes of lodging the appeal and even though the certified record was issued on 23rd May 2023 the process was halted due to the need to regularize the issue of representation. The applicants also aver that the respondent has extracted a decree emanating from the judgment and intend to execute the same and in the event the orders sought are not allowed, they will stand to suffer irreparable harm in view of the huge amount of public funds involved and which are at risk of being lost. They further contend that they have an arguable appeal and are willing to abide by any conditions to be set by the Court. The applicants assert that the application has been brought without unreasonable delay and the respondent stands to suffer no prejudice if the application is allowed.

3. The application is opposed vide a replying affidavit sworn on 20th September 2023 by Wycliffe Odari Mwavali, the respondent. According to the respondent, the application is frivolous, vexatious and an abuse of the court process. He avers that the dispute between the parties has been in the court corridors for over 10 years as a result of delays orchestrated by the applicants. The respondent recounts the journey of the litigation before the High Court and enumerates the various steps taken by the applicants to re-open the case at that level. He further avers that the present application is intended to deny him the fruits of a judgment entered in his favour after prolonged litigation. He contends that the notice of appeal and the draft memorandum of appeal by the applicants cannot be sanctioned as the same were filed irregularly and that Article 159 of the *Constitution* as well as sections 3A and 3B of the *Appellate Jurisdiction Act* cannot be invoked to aid counter-procedural actions of the applicants. In the alternative, the respondent asserts that if leave is granted, it should be on condition that the applicants deposit the entire decretal sum together with costs in Court.

4. The application proceeded through written submissions. Counsel for the applicants filed submissions dated 4th October 2023 while that of the respondent filed submissions dated 11th October 2023.

5. Counsel for the applicant submits that the Court has judicial discretion under Rule 4 to grant the prayers sought in this application. He states that the reason for the delay in lodging the appeal was due to the fact that the applicant's counsel was not properly on record and hence there was need to regularize the representation. It is counsel's submission that the regularization took time and the issue of representation was dealt with through a Court order dated 19th July 2023. Counsel relied on the case of *Sokoro Savings & Credit Co-operative Society Ltd v. Mwamburi* [2023] KECA 381 (KLR) to buttress this point. Counsel also reiterated the grounds in support of the application and submitted that it was in the interest of justice that the application be allowed. He urged that the applicants stood to suffer irreparable damage as public funds would be lost as they may not be recoverable. Counsel also submitted that the applicants have an arguable appeal and are willing to abide by any conditions set by the Court. Counsel cited *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 others* [2014] eKLR and *Mombasa County Government v. Kenya Ferry Services & Another* [2019] eKLR as highlighting the factors to be considered in applications for extension of time and urged that the application should be allowed as it has met those conditions.

6. On the other hand, counsel for the respondent contends that the application is without merit. Counsel submitted that the applicants instructed their present advocates after the delivery of the judgment and that it was incumbent upon them to seek the consent of the respondent's counsel in regard to the change of advocate but never did so and the delay is therefore of the applicants' own making. Counsel further argued that the purported notice of appeal does not exist as the advocates lacked locus standi to file it. Counsel maintains that the present application is frivolous, vexatious and an abuse of the Court process and that it is merely intended to delay and deny the respondent the enjoyment of the fruits of the judgment delivered in his favour. Counsel reiterated the grounds of opposition and urged that Article 159 of the *Constitution* should not be used to bend or circumvent the rules of the Court. It is also counsel's submission that sections 3A and 3B of the *Appellate Jurisdiction Act* are not available

to the applicants arguing that inherent jurisdiction cannot be used to oust statutory or constitutional provisions. Counsel subsequently urged that the application be dismissed with costs.

7. The jurisdiction that I am being asked to exercise is donated by Rule 4 of the *Court of Appeal Rules*, 2022 which provides as follows:

> "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. Although the jurisdiction donated under rule 4 is unfettered, it must be exercised judiciously. This Court and the Supreme Court have established certain principles to guide the exercise of the discretion to extend time. For example, in *Paul Wanjohi Mathenge v. Duncan Gichane Mathenge* [2013] eKLR this Court stated as follows:

> " The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance..."

Also see the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.

9. The principles illustrated above are not conclusive and need not be applied to each and every application. Courts are enjoined to ascertain the relevant principles or considerations that determines a particular application. Guided by the foregoing authorities, it is my considered view that the only issue that determines this application is whether the applicants have tendered satisfactory explanation for the delay in lodging the intended appeal.

10. It is the applicants' case that the delay was occasioned by the time taken to regularize the issue of representation of the applicants. I note that the period between the date of the delivery of the judgment and the filing of the application is about 152 days. The question is whether the delay is inordinate. In considering what constitutes inordinate delay, this Court in *Cecilia Wanja Waweru v. Jackson Wainaina Muiruri & another* [2014] eKLR held that:

> "There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned Judge in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed."

11. The judgment the applicants intend to appeal was delivered on 16th March 2023 while the application is dated 15th August 2023. During this period, the applicants filed a notice of appeal dated 22nd March 2023. They also proceeded to make a formal request for the certified copies of the proceedings and judgment through a letter dated 26th May 2023 and a certificate of delay was issued on 30th May 2023. However, all these processes were undertaken by the current advocates who were not properly on record. The applicants' current advocates then made an application before the trial Court dated 26th

June 2023 seeking to officially come on record. Subsequently, vide an order issued on 19th July 2023 the current advocates were permitted to come on record for the applicants.

12. What can be seen from the foregoing is that the applicants were diligent enough and instructed the present advocates immediately the judgment was delivered. They showed an intent to pursue the appeal. The delay is attributable to counsel's misconception of the appellate procedure and the applicable rules. Furthermore, the subsequent steps undertaken on behalf of the applicants to prepare for the intended appeal shows diligence on their part and that ought to count for something in the determination of this application. In my view, it would be against the tenets of justice to punish the applicants as a result of their counsel's omissions. To this end, I associate myself with the holding in *Sokoro Savings and Credit Co-operative Society Ltd v. Mwamburi* [2023] KECA 381 (KLR) where the Court held thus:

> " Mere allegation of counsel's indolence is not enough to warrant grant of extension of time. It must also be seen that parties on their part were not careless. The applicant herein moved within reasonable time to follow up on the matter and instructed counsel to file the instant application without unreasonable delay. The delay cannot therefore be said to be inordinate in the circumstances. In my view, the explanation tendered by the applicant is plausible and sufficient considering the delay period was only 43 days. Additionally, I note that the delay occasioned was as a fault of the advocate in the conduct of the matter and the applicant cannot be blamed for the delay. Without evidence to the contrary, I am unable to find carelessness in the actions of the applicant hence the explanation offered for the delay is sufficient."

13. I must observe that in this matter the explanation in relation to the advocates' fault is only for the period up to 19th July 2023. This is because the Court order allowing the present counsel to come on record was issued on that date. The present application is dated 15th August 2023 and there was therefore a further delay of about 27 days. The applicants are under an obligation to disclose the entire period of the delay and explain the delay-see *County Executive of Kisumu v. County Government of Kisumu & 8 others* [2017] eKLR.

14. The applicants have also pleaded the issue of public interest and that the public is bound to suffer irreparable harm if the orders are not granted. This is all about balancing the interests of the parties as was stated in *Kenya Railways Corporation v. Quicklubes E.A. Limited* [2015] eKLR that:

> "The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case *M/S POrtreitz Maternity V James Karanga Kabia*, Civil Appeal No. 63 OF 1997 where the Court stated:
>
> "That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."

15. I take judicial notice of the fact that the 1st applicant is a devolved government unit which is financed by public taxes. I also note that the decretal amount is big. The public interest element would require that the applicants be given a chance to appeal. The prejudice on the public interest outweighs the prejudice that would be suffered by the respondent. In *Pati Limited v. Funzi Island Development Limited & 4*

others [2019] eKLR, the Supreme Court highlighted the place of public interest in applications such as the instant one thus:

> "(39) We therefore find that it is in the public interest that this Court settles with finality the question whether the land subject of this matter belongs to the Applicant or whether it fraudulently acquired its title. At play also is the balancing between private interests vis-s-vis public interest. This balancing and determination is a matter of general public interests." (Emphasis mine)

16. This application is therefore for allowing. However, before I conclude, I need to comment on the respondent's justified complaint, as from the record, that the applicants have been deploying various tactics to delay the finalization of this matter. In as much as I sympathize the respondent, I wish to associate myself with the words of the Supreme Court in *Hassan Nyanje Charo v. Khatib Mwashetani & 3 others* [2014] eKLR that:

> "In the emerging jurisprudence, the concept of "timelines and timeliness" is generally upheld, as a vital ingredient in the quest for efficient and effective governance under the *Constitution*.
>
> However, even as we take due account of that context, we remain cognizant of the Court's eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice."

17. In the end, I find the application dated 15th August 2023 has merit and I hereby allow it in terms of prayers 2, 3,4 and 5 of the motion. Ordinarily, the appropriate order on costs would have been to direct that they abide the outcome of the intended appeal. However, considering the applicants' conduct at the trial, the just order is to direct that they (applicants) shall meet the respondent's costs for this application.

18. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF APRIL, 2024

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR