**Nyota v Kuria & 20 others (Civil Application E059 of 2023)**
**[2024] KECA 389 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 389 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CIVIL APPLICATION E059 OF 2023**

**WK KORIR, JA**

**APRIL 12, 2024**

**BETWEEN**

**HARRISON MWANGI NYOTA ..... APPLICANT**

**AND**

**EDDY KURIA ..... 1ST RESPONDENT**

**CHRISTOPHER M. KAMAU ..... 2ND RESPONDENT**

**MARGARET WANJIRU ..... 3RD RESPONDENT**

**DAVID ADAMS MBUGUA ..... 4TH RESPONDENT**

**DAVID MBURU GITHERE ..... 5TH RESPONDENT**

**W.K. KIBET ..... 6TH RESPONDENT**

**CATHERINE KOSKEI ..... 7TH RESPONDENT**

**BEATRICE WANGARI ..... 8TH RESPONDENT**

**AUGUSTINE LOMONGIN ..... 9TH RESPONDENT**

**JACQUELIN ADHIAMBO ..... 10TH RESPONDENT**

**STEPHEN NJOROGE KANYORA ..... 11TH RESPONDENT**

**MOHAMMED OSMANI HASSAN ..... 12TH RESPONDENT**

**GLADYS WAIRIMU GICHAGA ..... 13TH RESPONDENT**

**EMMANUEL J. NJAU ..... 14TH RESPONDENT**

**JANE CHAKU NDIGA ..... 15TH RESPONDENT**

**SUSAN K. CHESIALE ..... 16TH RESPONDENT**

**EVERLYN NYAMBURA ..... 17TH RESPONDENT**

**S.K. KOSGEY ..... 18TH RESPONDENT**

**AGNES WANJIKU KARIUNGI ..... 19TH RESPONDENT**

**LEAH NJERI KARANJA ..... 20TH RESPONDENT**

**NAIVASHA MUNICIPAL COUNCIL ..... 21ST RESPONDENT**

***(Being an application for extension of time to file a notice and record of appeal out of time to the decision of High Court at Nakuru (R.P.V. Wendoh, J.) dated 20th December, 2018 in HCC No. 110 of 1998)***

## RULING

1. Before me is a notice of motion dated 18th July 2023 and filed pursuant to Articles 159 and 259(2) of the *Constitution*, sections 3A and 3B of the *Appellate Jurisdiction Act* and rules 1(2), 4, 43, and 77 of the *Court of Appeal Rules*. Through the application, the applicant, Harrison Mwangi Nyota, seeks leave to file and serve a notice of appeal out of time against the judgment of the High Court delivered on 20th December 2018 in Nakuru HCC No. 110 of 1998. The applicant also seeks leave to file the record of appeal out of time. He additionally prays that the costs of the application be provided for. The application is premised on the grounds on its face, as well as the averments of the applicant in the supporting affidavit sworn on 18th July 2023.

2. The applicant's case is that the judgment he intends to appeal was delivered on 20th December 2018. The applicant being dissatisfied with the judgment instructed his then advocates on record, P.K. Njuguna & Co. Advocates, to appeal against the entire judgment and a notice of appeal was filed to that effect on 28th December 2018 but the same was never served upon the respondents. That the applicant believed that the notice of appeal had been served upon the respondents as his former advocates kept on assuring of him of that fact. That vide an application dated 7th March 2019 the 1st to 20th respondents sought to strike out the notice of appeal. That the application was heard on 27th March 2023 in the absence of the applicant or his advocates as he had changed advocates. And that vide a ruling dated 30th June 2023, the Court struck out the said notice of appeal. The applicant avers that the failure to serve the said notice of appeal upon the respondents was occasioned by the negligence of his former advocates. The applicant also avers that the intended appeal is arguable and that the mistake of his former advocates should not be visited upon him so as to defeat his appeal. He also deposes that this application has been brought timeously and that he is keen on pursuing the appeal and that the record of appeal is ready for filing. He therefore prays that the application be allowed with costs.

3. The application is opposed by the 2nd respondent, Christopher Kamau, through his replying affidavit sworn on 7th September 2023. The 2nd respondent terms the application incompetent, misconceived and an abuse of the Court process. According to the 2nd respondent, the present application is meant to circumvent the Court's timelines as the applicant's notice of appeal had been struck out for lack of service on the respondents. He further deposes that the applicant did not lodge the record of appeal until 20th February 2020 despite securing the services of another advocate. Further, that the present application was brought over 40 months after the filing of the record of appeal. The 2nd respondent avers that despite the applicant having knowledge of the defect in the notice of appeal, he took no steps to remedy the defect prior to the delivery of the Court decision striking out the notice of appeal. It is further the 2nd respondent's deposition that the applicant only sought the record of appeal almost 8 months after the delivery of the judgment which was way out of time. It is thus the 2nd respondent's

position that the applicant is guilty of laches and not deserving of the equitable relief sought herein. He consequently prays that the application be dismissed with costs.

4. The application was also opposed by the 21st respondent, Naivasha Municipal Council, through an affidavit sworn on 1st August 2023 by Maureen Litunda, a legal officer with the Nakuru County Government.

   The 21st respondent terms the application as misconceived, frivolous, an afterthought and an abuse of the Court process. According to the 21st respondent, the applicant has not explained why he failed to serve the respondents with the notice of appeal filed on 24th December 2018. Further, that the applicant has also not tendered any evidence to show that he was not indolent in regard to the mistake that led to the delay in service of the notice of appeal. It is the 21st respondent's case that the applicant has also not tendered any explanation for the delay experienced between September 2019 when his current advocates came on record and 18th July 2023 when this application was lodged. According to the 21st respondent it will be prejudiced if the application is allowed and thus prays for its dismissal with costs.

5. This application proceeded by way of written submissions on 8th December 2023. For the applicant, the firm of Waiganjo & Co. Advocates filed submissions dated 16th August 2023. Therein, counsel pointed out that the applicant was represented by the firm of P.K. Njuguna & Co. Advocates during the trial and after the judgment the said firm of advocates filed a notice of appeal on 24th December 2018. It was counsel submission that it was unfortunate that the notice was not served on the respondents as required by the law. Subsequently, the applicant procured the services of the present advocates in 2019 who proceeded to file a record of appeal, which was served. According to counsel, the application dated 7th March 2019 seeking to strike out the notice of appeal was heard on 27th March 2023 in the absence of the applicant as his current advocates were not served with the application.

6. Counsel submits that the applicant was not complicit in the failure to serve the notice of appeal as the former advocates assured him that the same had been served and that he had no basis for doubting the advocates as they had also represented him before the trial Court. It is therefore counsel's submission that the mistake occasioning the delay herein is of the former advocates and should not be visited upon the applicant. Counsel placed reliance on the case of *CFC Stanbic Limited v John Maina Githaiga & another* [2013] eKLR in urging me to find that the mistake is solely attributable to the applicant's previous advocates. Additionally, counsel submits that the applicant has demonstrated his willingness and intention to proceed with the appeal by moving the Court immediately his notice of appeal was struck out. Counsel urges the Court to allow the application.

7. The firm of Mirugi Kariuki & Co. Advocates filed submissions dated 7th September 2023 on behalf of the 2nd respondent. In addressing the question as to whether the application is merited, counsel pointed out the importance of service of a notice of appeal as per rule 77(1) of the *Court of Appeal Rules*. Counsel submitted that the applicant is guilty of disobedience of the rules of the Court. Counsel pointed out that the applicant did not lodge the record of appeal until 20th February 2020 which was approximately 2 years and 2 months since the trial Court delivered its verdict on the matter. Counsel asserted that even the belated lodging of the record of appeal was in contravention of rule 82 of the *Court of Appeal Rules*.

8. Still on the issue of delay, counsel pointed out that from the certificate of delay, it appears that the applicant sought for a copy of the proceedings on 24th October 2019 which was approximately 8 months after the statutory 60 days for filing a record of appeal had lapsed. Counsel relied on the case of *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR to urge that the applicant should not be allowed to circumvent the rules of the Court. Counsel also submitted that despite the applicant seeking to blame his former advocates, the disregard for the rules continued way after the

applicant had parted ways with his former advocates. Counsel argued that this continued disregard of the rules makes the applicant complicit and portrays his unwillingness to pursue the appeal but rather his intention to delay the finalization of the litigation journey of the subject matter. In support of this assertion, counsel relied on the case of *Christopher Muriithi Ngugu v Eliud Ngugu Evans* [2016] eKLR. Counsel consequently asked that the application be dismissed with costs to the respondents.

9. The firm of Rodi, Orege & Co. Advocates filed submissions dated 1st August 2023 on behalf of the 21st respondent. Counsel relied on the cases of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR and *Rajesh Rughani v Fifty Investments Ltd & another* [2016] eKLR among others to submit that an applicant who is complicit in the mistakes of his advocates, like the applicant herein, is not deserving of the Court's discretion. According to counsel, the applicant is only interested in obstructing justice and his application should be dismissed with costs.

10. This application invokes the Court's discretion under rule 4 of the *Court of Appeal Rules*, 2022 to enlarge time. The rule 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."

11. The exercise of the Court's discretion under the stated rule is unfettered. However, the same must be exercised based on well- established principles and judiciously. The principles upon which the discretion of the Court is to be exercised include a consideration of the period of the delay, the reasons for the delay, the degree of prejudice to the respondent, public interest as well as whether the intended appeal is arguable, among other factors. This list is neither conclusive nor must all the factors be considered in every single application. Thus, in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR it was stated that:

> " 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..."

12. I have given due consideration to the notice of motion, the affidavits by both parties, the submissions and the authorities cited by both parties. In my view, the main issue for determination is whether the applicant has satisfactorily explained the delay in filing the notice of appeal and the record of appeal.

13. Perhaps to restate the factual background, the judgment which is the subject of this application was rendered on 20th December 2018 and a notice of appeal was filed on 24th December 2018. The notice of appeal was, however, not served upon the respondents. Upon the application of the 1st to 20th respondents, the notice of appeal was struck out on 30th June 2023. In between, the applicant changed his advocates and the present advocates came on record sometime in September 2019. This application is dated 18th July 2023. It therefore follows that the period between the delivery of judgment the applicant intends to appeal and the date of the filing of the instant application is about 4 years and 7 months. As was held by the Supreme Court in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR, the whole period of delay should be declared and sufficiently explained.

14. According to the applicant, the failure to serve the notice of appeal upon the respondents was occasioned by his former advocates and that he was not complicit in that mistake. When dealing with an alleged mistake of advocate, the Court in *Itute Ingu & another v Isumael Mwakavi Mwendwa* [1994] eKLR held as follows:

> "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."

15. The mistake here is such that the resultant delay was for a period of over 4 years. In between and barely one year after the delivery of the impugned judgment, the current advocates came on record for the applicant. It is incomprehensible for the applicant to blame his former advocates for the delay that ensued post September 2019. Blaming the former advocates even for non-appearance in a hearing that was conducted on 27th March 2023 is undefendable. In fact, the application which resulted in the striking out of the applicant's notice of appeal is most likely what triggered the applicant to change advocates as per his averment at paragraph 7 in the affidavit sworn on 13th July 2019 in support of the application for change of advocates where he clearly acknowledged that the 1st to 2nd respondents had filed Nairobi Civil Application No. 11 of 2019 before this Court seeking to strike out the notice of appeal. The applicant and his current advocates were therefore all along aware of the application seeking to strike out the applicant's notice of appeal. The applicant cannot therefore claim that his notice of appeal was struck out because of the negligence of his former advocate. The circumstances of this case are such that the applicant cannot distance himself from the delay. He cannot be heard to be laying blame on advocates who ceased being on record way back in 2019. Further, the applicant has also failed to tender concrete explanation for the delay occasioned between September 2019 and 18th July 2023. Neither has the applicant indicated the efforts put in place to mitigate the mistakes.

16. Additionally, the respondents have pointed out other instances where the applicant was guilty of laches including when the letter of bespeaking certified copies of proceedings was made. According to the certificate of delay annexed to the respondent's replying affidavit, the said letter was lodged with the Registrar on 24th October 2019 and the certified record was supplied to the applicant on 14th January 2020. The letter bespeaking the proceedings was therefore lodged in contravention of rule 84(1) of the *Court of Appeal Rules* which required such request to be made within 30 days of the date of decision to be appealed. A conclusion that the applicant's conduct amounts to indolence of the worst kind is therefore inevitable. Granting him the equitable remedy sought after a delay of about 5 years is against the interests of justice and is prejudicial to the respondents who have had to wait since 1998 to bring the litigation to an end. I must add that the rules of procedure are designed to assist in the administration of justice. They are intended to assist the courts in timely delivery of justice. Where default or disobedience of the rules is such that it is flagrant, flippant, deliberate or reckless, the Court should not be seen to condone such behavior.

17. Flowing from the foregoing analysis, this application is devoid of merit and its fate is nothing but dismissal.

18. With regard to the costs of the application, no reasons have been advanced to warrant my departure from the general principle that costs should follow the event. Consequently, the respondents shall have the costs of this application.

19. The upshot of the foregoing is that the notice of motion application dated 18th July 2023 lacks merit and is hereby dismissed with costs to the respondents.

**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**