Dele alias Gazi Mvoi v Awadh & another (Civil Application E166 of 2023) [2024] KECA 723 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 723 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E166 OF 2023

GV ODUNGA, JA

JUNE 21, 2024

BETWEEN

HAMISI SULEIMAN DELE ALIAS GAZI MVOI ..... APPLICANT

AND

SALIM AWADH ..... 1ST RESPONDENT

MUTHAMA JUVENALIS ..... 2ND RESPONDENT

(An application for enlargement of time to file and serve appeal out of time from the decision of the High Court of Kenya at Mombasa (F.Wangari J.) dated the 17th day of March 2023 in Civil Appeal No. E110 of 2021)

RULING

1. Hamisi Suleiman Delle alias Gazi Mvoi, the applicant herein was dissatisfied with the judgment of Lady Justice F. Wangari delivered at Mombasa on 17th March, 2023 in Civil Appeal No. E110 of 2021 and lodged a Notice of Appeal dated 22nd March, 2023 on 23rd March, 2023. He also lodged a Memorandum of Appeal dated 2nd October, 2023.

2. Obviously being out of time in respect of the Memorandum of Appeal, the applicant filed a Notice of Motion dated 9th October, 2023, the subject of the present ruling, wherein he seeks an order to extend the time for filing and serving of the Appeal and that the said Notice of Appeal be deemed as being properly on record. The application is premised on ground that the advocate in charge of the law firm that was handling his matter was appointed as a Judge of the High Court necessitating a transition to another advocate thereby occasioning unintended, inadvertent and excusable delay in lodging an appeal.

3. In support of the application, the applicant, through an affidavit sworn on 9th October, 2023 by Zahra A. Said, an associates advocate in the applicant's advocate's firm averred that the applicant's erstwhile

advocate, M. S Shariff, was appointed as a Judge of the High Court; that as a consequence, the firm of advocates, then on record for the applicant, was unable to carry on its legal business as it was undergoing transition to enable a new advocate take over; that the delay in filing the applicant's Memorandum of Appeal, which was not inordinate, was occasioned by reasons beyond the applicant's control; that the delay was sufficiently explained; that the applicant has an arguable appeal with good probability of success; that no prejudice will be suffered by the respondent should the orders be granted; that the mistake of counsel should not be visited upon the applicant; and that the applicant risk having the Notice of Appeal struck out for non-compliance despite it having been filed and served within time.

4. Opposing the application, the 2nd respondent vide his replying affidavit sworn on 16th October, 2023, averred that it was admitted that the applicant lodged a Notice of Appeal and applied for copies of proceedings on 17th Marc, 2023 hence the appeal ought to have been lodged by 17th May, 2023; that Lady Justice M.S Shariff was appointed as a judge in the year 2022 during which time the associate was in charge of the firm and even prosecuted the appeal in the High Court by filing a Notice of Appeal against the judgment and requested for proceedings on 17th March, 2023; that it was not true then that firm had been unable to carry out any legal business;

> that apparently the new firm was registered on 15th August, 2023 but the Record of Appeal, Memorandum of Appeal and this Application were lodged two months later; that since the supporting affidavit was sworn by the associate, there is nothing on record to show that the delay was caused by "reasons beyond the applicant's control".

5. It was averred by the said respondent that the delay of 5 months from 17th May, 2023 when the appeal was due to be filed to October, 2023 when it was filed without leave is inordinate and unexplained in a plausible way; that his advocate was served with the Record of Appeal on 11th October, 2023 hence extending time for filing the appeal will serve no purpose; that since the record of appeal has already been served, the applicant should instead have filed an application to have the appeal deemed as filed and served within time; and that the application is incompetent having been filed within the appeal.

6. The respondent lamented that this litigation has been hanging over his head since 2015 during which time he has incurred what he termed as "exhibital" legal fees and costs which the applicant has not shown any signs of refunding. In his view, justice delayed is justice denied.

7. When this matter came before me for hearing on the Court's GoTo Meeting virtual platform on 5th June 2024, learned counsel, Ms. Caroline Nganga appeared for the applicant while Mr. Ken Kioko held brief for Mr. Njenga for the respondents.

8. In his submissions, the applicant relied on the cases of Kenya National Highway Authority v Joseph Ndolo Mutua [2020] eKLR and Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231 highlighting the factors that the Court takes into account in granting such applications. According to the applicant, the change of practice as a result of the previous sole proprietor joining the bench was the reason for the delay and was on pure legal grounds beyond his control; that the explanation was sufficient to justify the court in exercising its discretion in his favour; that his appeal has high chances of success as per the grounds outlined in the Draft Memorandum of Appeal.; that the applicant sustained serious injuries that left him with lack limbs leaving him at the mercy of a house help to access and fulfil his basic needs and social enmities; that in the circumstances, he will suffer a continued prejudice; and that his application should be allowed with costs.

9. In support of his submissions the applicant relied on the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR highlighting the fact that the law does not prescribe the period of the delay and that what matters is the explanation for the delay.

10. The respondents on their part submitted that a case had not been made by the appellant to warrant extension of time within which to file an appeal. Based on the case of *Njoroge v Kimani (Civil Application Nai E049 of 2022*) (2022) KECA (KLR), it was submitted that an unsatisfactory explanation for any period of delay will normally be fatal to an application irrespective of the applicant's prospects of success; that the cause of the delay is averred by the current advocate and not the appellant; that the High Court appeal was prosecuted by a different advocate and not the Judge up to delivery of the judgment; that there is no proper or reasonable explanation for the delay and the application should be dismissed with costs.

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

12. 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. 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.

13. 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*.

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

15. 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.

16. I agree with Mativo, JA in his decision in the case of *Njoroge v Kimani (Civil Application Nai E049 of 2022*) [2022] KECA 1188 (KLR) (28 October 2022) where he stated that in granting leave, the court has to balance the competing interests of the applicant with those of the respondent. He cited the decision in M/S Portreitz Maternity v James Karanga Kabia Civil Appeal No. 63 of 1997 in which it was held that:

> " 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."

17. In arriving at his decision, Mativo, JA noted that in deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation therefore, and the prospects of success and explained that list is not exhaustive and each case will depend on its peculiar facts and circumstances. He cited the case of National Union of Mineworkers v Council for Mineral Technology [1998] ZALAC 22 at para 10, where it was held that:

> " The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused."

18. Mativo, JA then concluded that:

> " In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays."

19. In this case, the applicant's ground for seeking extension is that the failure to lodge the Notice of Appeal was due to the appointment of the then proprietor of the firm representing the applicant, M. S. Shariff, to the position of Judge of the High Court. Whereas the respondent protested pointing out that even after the appointment of the said advocate to the position of Judge, certain steps were taken in the proceeding. Ms. Nganga explained that during the time between when M.S. Shariff left and the time the application was made, there was a period when the administrator was handling the matters of the firm.

20. It is true that 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."

21. Similarly, in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR, the Court stated that:

> The law does not set out any minimum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable [sic].'"

22. 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.

23. 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, apart from the delay I concluding the matter, I did not hear the respondent contend that if the application is allowed they 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.

24. In this case, it is clear that the applicant put the respondent to notice that it was intending to appeal to this Court. The inability of the applicant to take the n3cessary steps within the prescribed period cannot be placed on the applicant's doorsteps. Such inaction, is properly blamed on the changes that

took place in the applicant's advocate's firm. As was held in Shital Bimal Shah & 2 Others v Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323:

> " An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the Rules of the Court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate."

25. In the circumstances of this case, I find that this is a just and proper case to exercise discretion in favour of the applicant. I accordingly allow the Notice of Motion dated 9th October, 2023. I extend the time for filing and service of the Notice of Appeal dated 22nd March 2023 lodged on 23rd March 2023. I also extend the time for service of the appeal. If already filed then the same is regularised with the result that both the Notice of Appeal and the Memorandum and Record of Appeal are deemed to be properly filed. If not already filed, I hereby direct that the record of appeal be filed and served within 7 days of the delivery of this ruling. The costs of this application are awarded to the respondents.

26. It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify this to be a true copy of the original

Singed

DEPUTY REGISTRAR