Mwangang'anzi & 32 others v Kenya Ports Authority & 4 others (Civil Application E096 of 2023) [2024] KECA 698 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 698 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E096 OF 2023

GV ODUNGA, JA

JUNE 21, 2024

BETWEEN

SWALEHE MWANGANG'ANZI & 32 OTHERS ..... APPLICANT

AND

KENYA PORTS AUTHORITY ..... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

THE NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF LANDS ..... 4TH RESPONDENT

THE HON.ATTORNEY GENERAL ..... 5TH RESPONDENT

(Being an application for extension of time to lodge the Notice of Appeal against the Judgment of Lady Justice A.E Dena delivered on 31st March, 2023 in Environment and Land Court Petition No. 11 of 2021)

RULING

1. By a Motion on Notice dated 20th October, 2023, the applicants seek an order for leave to file the Notice of Appeal dated 12th June 2023 and the Memorandum of Appeal dated 30th June 2023 out of time and that the same be deemed as duly filed and properly on record upon payment of the requisite fees.

2. The Motion is premised on grounds that the applicants' new advocates via a letter dated 19th April 2023 requested for the file in respect of this matter from previous advocates who released it on 24th April 2023 by which time the 14 days statutory period for lodging a Notice of Appeal had lapsed. According to the applicants, being dissatisfied with the judgement of the learned Judge delivered on 31st March, 2023, the applicants instructed the firm of Chimera, Kamotho and Company Advocates LLP to take over the conduct of the matter from the firm of Akanga Matende and Company Advocates

on 13th April 2023 and to file the appeal; that the delay to file the intended appeal was not deliberate or unreasonable as it was occasioned by a delay in administrative procedures during the handover of the files from the previous to the current counsels; that the intended appeal has appreciable chances of success as the subject matter touches on emotive land issues affecting not only the applicants but over 600 families hence the applicants should be allowed a chance to exercise their right of access to justice; that the respondents will suffer no real prejudice if this application is allowed as prayed; and that the application has been filed timeously and the delay to file the Intended appeal was not deliberate, unreasonable or unnecessary.

3. In opposing the application, the 1st respondent averred that the stipulated period of 14 days within which to lodge the Notice of Appeal under Rules 77 of the Court of Appeal Rules, 2022 lapsed on 13th April 2023; that this application was filed on 20th October 2023 despite the applicants alleging that their file was obtained from the previous advocates on 24th April 2023 and no explanation was given for the delay in seeking extension of time; that this application was only served 7th months later on 17th May 2024 and no explanation was given for this delay to enable the Court exercise its discretion in the applicants' favour; and that the application should be dismissed with costs for lack of merit.

4. When this matter came before me for hearing on the Court's GoTo Meeting virtual platform on 5th June 2024, learned counsel, Mr. Kipkoech held brief for Mr Chimera for the applicant while Mr. Wafula appeared for the 1st respondent. Though served with the hearing notice, there was no appearance for the 2nd to the 4th respondents.

5. In his submissions, Mr. Kipkoech reiterated the facts set out above and submitted that the Court has unfettered discretion under rule 4 of the Court's Rules. To him, a delay of 6 months was adequately explained and the intended appeal has possibility of success. It was contended that no prejudice is likely to be caused to the respondent if the application is allowed since the appeal is merely seeking for compensation for the expansion of the airport.

6. On his part Mr. Wafula submitted that Rule 4 of this Court's Rules only provide for extension of time and not filing out of time. According to the 1st respondent, it is trite law that where a party wishes to have time extended for doing anything, the Court must first extend time before filing any documents that were out of time. Reliance for this contention was placed on Supreme Court decision of Nicholas Kiptoo Arap Koris Salat vs Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR on the proposition that filing an appeal out of time and subsequently seeking the court to extend time is an illegality. To the extent that the applicants are seeking to extend time allegedly to deem that the Notice of Appeal and the Memorandum of Appeal deemed as filed on time, it was submitted that the application is incompetent. To the 1st respondent, extension of time under rule 4 of the Court of Appeal Rules is an equitable remedy and not as a matter of right and in this case, the application lacks merit and should be dismissed with costs.

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

8. The first objection taken by the respondents is that the orders sought cannot be granted since the applicants have has already filed the documents that they wish to be lodged out of time. and that the prayers cannot be granted as the Court cannot deem a documents irregularly filed as having been duly filed. This submission is based on the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir*

Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR. In that case, the said Court held that:

> "where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record."

9. The danger, in my respectful view, of one filing a documents and seeking that it be legitimised by being deemed as properly filed is that such applications tend to tie the Court's hands since the Court is then left with very little option considering that the document has already been filed and there is no application seeking that it be expunged from the record or struck out. I must however appreciate that there may be situations where a wording of a legal provision permits such deeming. For example, Section 79G of the *Civil Procedure Act* provides that:

> Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

10. This provision was interpreted in Mugo & Others vs. Wanjiru & Anor [1970] EA 482 where it was held that:

> " Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused."

11. Rule 53 of the Supreme Court Rules, 2012 (since repealed), under which the decision in Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others (supra) was made provided that:

> The Court may extend the time limited by these Rules, or by any decision of the Court.

12. Rule 4 of the Court of Appeal Rules under which the present application is brought provides that:

> 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.

13. It is therefore clear that under the Rules of this Court, this Court has the jurisdiction to extend time for the doing of any act authorised or required by the Rules either before the act is done or even after it is done. In other words, the Court has the power to deem a document filed out of time as duly filed. A full bench, while dealing with a reference from the decision of a single Judge, therefore held in Oceanfreight Shipping Co. Ltd. v Oakdale Commodities Ltd Civil Application No. Nai. 198 of 1995 as follows:

> " Rule 74(2) of the Court of Appeal Rules does not say that an intending appellant who is not aware of the date of delivery of the judgement shall file a notice of appeal within 14 days when he comes to know that judgement has been delivered. So that in case of the present applicant whether his advocate only came to know on the 13th August, 1992, the applicant was still bound to file its notice of appeal within 14 days from the 6th August 1992. The Notice of Appeal was filed one day out of time and unless an application for leave to do so was made and was successful, the notice would be invalid. As the applicant had already filed a notice of appeal which was still on record, the learned single judge was right in holding that what the applicant ought to have asked him to do was to extend the time by such period as would validate the notice of appeal...It is true that in its motion the applicant did not as the learned single judge to extend time by such period as would validate the notice of appeal filed, but the court does not agree that that failure took away the learned Judge's discretion under rule 4 to extend the time by such period as would validate the notice already filed. After all there cannot be any sense in having two notices of appeal and validating the one already filed would still amount to an extension of time, which was what the applicant asked for. That the learned Judge though he could not do so entitles the court to interfere with his exercise of discretion."

14. It is my view and I hold that this Court has the jurisdiction to extend time in order to validate the filing of a document even in cases where what is sought to be validated has already been done.

15. 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. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether 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.

16. Those principles were restated by Waki, JA in Fakir Mohamed vs. 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."

17. On its part, the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, (supra) 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.

18. In Leo Sila Mutiso vs. 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.

19. In this case, the Applicant's ground for seeking extension is that there was some confusion arising from the change of advocates by the applicants. The delay in filing the Notice of Appeal was 6 months. 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 vs. 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."

20. In determining whether or not there has been inordinate delay for the purposes of an application under rule 4 of the Rules, what is to be considered is not merely the length of the period of the delay but also

the circumstances under which that delay was occasioned. 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.

21. 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, the appeal has been filed and the matter involves a claim for compensation by the applicants in respect of a huge parcel of land which they claim was acquired without them being compensated. This Court in Lucy Wambui Maina & 2 Others v Peter Sundra Maina Civil Application No. Nai. 330 of 2004 while appreciating that there is no exhaustive list of the factors that a single judge considering a matter under rule 4 ought to consider and that there is no requirement that the single judge ought to consider all or any number of the relevant factors, cited the case of Wasike v Swala [1984] KLR 591 and held that:

> " It was necessary in the circumstances of this case to consider the nature of the dispute between the parties and make a finding whether it could outweigh other considerations as the appeal related to land which is sensitive and emotive matter in this country though it is not the case that in all cases where land is the subject of a dispute that extension must be given."

22. This Court in Maritim v Kibaru [2005] 2 EA 162 extended time where there the delay was 17 months noting that:

> " In the instant case there was a delay of about seventeen (17) months. The applicant was not informed of the outcome of his case immediately the judgement was delivered by the Superior Court. The court file of the Superior Court went missing. There was an issue of the applicant changing his advocates and the new firm of advocates had to start the process of coming on record and hence, had to make the necessary applications. The dispute relates to land, which is an emotive issue."

23. In determining whether or not extend time what ought to weigh heavily on the mind of the Court is the justice of the case. Tunoi, JA appreciated this position in the case of Peter Amala Mumia & 3 Others v Mary Anyango Ameka & Another Civil Application No. Nai. 220 of 2010 in which he held that:

> " Since the matter in issue in the intended appeal is land, an emotive issue and the applicants are poor peasants and the intended appeal is arguable, it would not be in the best interest of justice to deny the applicants a right to appeal on a technicality. The cardinal principle in such matters like this is that justice shall be administered without undue regard to procedural technicalities."

24. Waki, JA weighed in on the issue when in the case of Origo & Another v Mung'ala [2005] 1 KLR 169, he expressed himself as follows:

> " The dispute relates to land and has refused to go away since its debut in the Courts as long ago as 1979. It is as emotive as all land matters in this country can get. It is certainly in the

interest of both parties that the matter be resolved with finality, if possible on merits, by the highest court in the land."

25. Caution must, however, be exercised since as held by Waki, JA in the case of Leonola Nerima Karani v William Wanyama Ndege Civil Application No. Nai. 21 of 2007, although land matters evoke emotions, that is not to say that in all land matters delays in compliance with procedural rules would be excused as a matter of course and that each case must be considered on its special facts and circumstances.

26. In this case, I did not hear the respondents 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 vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.

27. In my view the delay of 6 months in these circumstances of this case cannot be the basis of denying an applicant the opportunity of exercising her right to appeal.

28. In the premises, I allow the Notice of Motion dated 20th October 2023, and extend time within which to file and served the Notice of Appeal dated 12th June 2023 and the Memorandum of Appeal dated 30th June 2023 with such period as would validate the same subject to payment of the requisite fees.

29. The costs of this application are awarded to the 1st respondent.

30. 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