**Ohala & 5 others v Wasike (Suing as the legal representative of the Estate of Cornelius Oundo Wasike) (Civil Application E020 of 2024) [2024] KECA 660 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KECA 660 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CIVIL APPLICATION E020 OF 2024**

**HA OMONDI, JA**

**JUNE 7, 2024**

**BETWEEN**

**HILLARY EMMANUEL OHALLA ..... 1ST APPLICANT**

**RAYMOND WANDERA OHALA ..... 2ND APPLICANT**

**DENNIS ROBINS OHALA ..... 3RD APPLICANT**

**DENNIS ROBINS OHALA ..... 4TH APPLICANT**

**WILLIAM WANZALA OHALA ..... 5TH APPLICANT**

**BERNARD JUMA CHALA ..... 6TH APPLICANT**

**AND**

**BOSCO OKHUBEDO WASIKE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CORNELIUS OUNDO WASIKE) ..... RESPONDENT**

***(An application for extension of time to file a Memorandum of Appeal from the judgment of the Environment and Land Court in Busia (Boaz N. Olao, J.) dated 25th September 2023 in ELC Case No. 19 of 2020)***

**RULING**

1. The application dated February 1, 2024, brought pursuant to Order 3, 3A and 3B of the *Appellate Jurisdiction Act*, and Rule 5(2)(b) seeks that: -

    i. The time within which to file memorandum of appeal in Busia ELC Case No. 19 of 2020 be extended.

    ii. Costs.

2. The application is supported by an affidavit of even date sworn by Hillary Emmanuel Ohala, the 1st applicant on behalf of the other applicants, who explains that being aggrieved by the judgment delivered on September 25, 2023, in favour of the respondent, in Migori Environment and Land Court (ELC) No.19 of 2020, their advocates lodged a Notice of Appeal on 2nd of October 2023; and followed it up with a Memorandum of Appeal dated the November 21, 2023; however, at the time of filing in the portal, counsel failed to annex all the relevant documents, including the record of appeal, which mistake they argue, should not be visited on the applicants. The applicants are apprehensive that there is imminent danger of their title deeds being cancelled.

3. In opposing the application, the respondents by a Replying Affidavit dated March 7, 2024 by Bosco Okhubedo Wasike, contend that the application is fatally incompetent as it is premised on Order 3, 3A and 3B of the *Judicature Act*, which provisions are nonexistent in the said Act; that since the present application seeks extension of time to file an appeal, it ought to have been moved under rule 4 of the *Court of Appeal Rules 2022*. In support of this proposition, reference is made to the Supreme Court decisions, in the case of *Daniel Kimani Njihia v Francis Mwangi Kimani & Another* [2015} eKLR, and the case of *Michael Mungai v Housing Finance Co. (K) Ltd & 5 Others* [2017] eKLR, where the court agreed that a litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the *Constitution* .

4. Further, that the applicants did not comply with Rule 84(1); as such the appeal stood withdrawn pursuant to Rule 85; that invoking the excuse about mistake of counsel is not a tenable and or sufficient reason for the exercise of discretion by this court; that the applicant's counsel ought to be acquainted with the practice procedures of court and inaction cannot be equated to an honest mistake; the period of not filing the record of appeal for over 3 months has not been explained hence inexcusable and indolence is not a valid reason for time extension; and the deceased's estate stands to be adversely affected if the application is allowed as title has already reverted to the estate. The respondent argues that the applicants have not demonstrated any plausible explanation, to the satisfaction of the court as to their indolence in exercising their right to appeal. That the applicant's indolence should not be encouraged by the exercise of this Court's discretion in their favor, at the expense of the respondent, a beneficiary of a successful judgment. It is the respondent's submission that the applicants' delay was inordinate and intended to obstruct and delay the cause of justice.

5. The respondent urges this Court to be guided by the approach adopted by Odunga, J in the case of *Dilpack Kenya Limited v William Muthama Kitonyi* /2018} eKLR citing with authority the case of *Berber Alibhai Mawji v Sultan Basham Lalji & 2 Others* [1990-1994] EA 337 which affirmed that inaction on the part of an advocate as opposed to error of judgement, or a slip is not excusable.

6. The respondents fault the application as the applicant has cited the wrong provision of the law and that it should be declared incompetent and not be allowed to see the light of day. Whereas I acknowledge that the wrong provision has been cited in this application (indeed, section 3A addresses the jurisdiction of this Court, whilst section 3B relates to the overriding objectives of the Act; and Rule 5(2)(b) deals with application for stay and injunctive orders); I agree with the respondent that the appropriate provision is rule 4 of the *Court of Appeal Rules*, is the appropriate rule for one seeking extension of time; I nonetheless find that the content of the application clearly communicates the intention of the applicant; and in this instance, Article 159(2)(d) of the *Constitution* offers refuge; and I defer to substance rather than form - indeed no prejudice is occasioned to the respondent. My perception is that counsel on record has not familiarized himself with the Rules, and it will serve him well to dedicate some time towards that.

7. Has the applicant met the prerequisites for granting relief under rule 4 of the Court of Appeal Rules? Rule 4 of the *Court of Appeal Rules* gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso v Rose Wangari* Mwangi Civil Application No. Nai. 255/97 (unreported), held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka v Waruguru Kithaki & 2 Others* [2013] eKLR.

8. M'Inoti, J, had this to say concerning Rule 4 in *Imperial Bank (IR) & Anor v Alnashir Popat and Others* [2018] eKLR:

> " A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show 'sufficient reason' why discretion should be exercised in his favor. After an amendment in 1985 that 'sufficient stricture' was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor."

9. Discretion also depends on circumstances of each case as per *Mongira & Another v Makori & Another* [2005] eKLR

The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR sets down these principles as follows: -

i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.

ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.

iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.

iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.

v. Whether there will be any prejudice suffered by the Respondent if extension is granted.

vi. Whether the application has been brought without undue delay.

vii. Whether in certain cases public interest should be a consideration for extension of time.

10. One other consideration included by the learned judge in the case of Julius Kamau Kitheka (supra) is whether prima facie intended Appeal/Appeal has chances of success or is a mere frivolity. I must point out that the issue as to whether or not the intended appeal has good chances of success, this Court is conscious of the fact that it is not the role of a single judge to determine the merits or otherwise of the appeal. This Court has held in the case of *Athuman Nasura Juma v Afwa Mohammed Ramadhan* [2016] eKLR:

> " ...this court has to be careful to ensure that whether the intended appeal has merit or not is not an issue to be determined with finality by a single Judge".

11. I bear in mind the afore-going principles whilst determining this application – the less said the better – my only observation is that there is nothing to suggest that the intended appeal is frivolous.

12.

1 Rule 84 (1) of the *Court of Appeal Rules* provide that: Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged:

a. a memorandum of appeal, in four copies;

b. the record of appeal, in four copies;

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 after 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 time as 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 the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.

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

In addition, Rule 85. (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.

13. It is not disputed that the applicants had through their counsel prepared a memorandum of appeal, and indeed annexed is evidence that at the attempt to file the appeal, it was rejected on grounds that the record of appeal was not annexed. There seems to be a mix up in the terminology as what was said to be missing from the documents was the record of appeal, not the memorandum of appeal. The applicants state that their counsel failed to attach all annexures on the portal, - the question is, did the advocate become aware of the mistake? Was it as a result of careless omission? The counsel on record, D.K. Nabulindo, in the affidavit dated February 1, 2024, accompanying the certificate of urgency confirms as follows:

> "b. The applicants filed a memorandum of appeal through me, counsel on 30.11.2023 at 11.33am.
>
> c. That while filing the memorandum of appeal through my portal, I failed to annexe all the attachments on the memorandum of appeal, including record of appeal".

14. In *Murai v Wainaina* (No 4) [1982] KLR 38, the court held that such mistakes by counsel ought not to be the reason that a litigant is denied their opportunity to ventilate an appeal, as wrapped up in the words of Madan JA, as he then was) that:

> " 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 senior counsel though in the case of a 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 person of experience who ought to have known better has made a mistake. 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 dictates."

15. Further, this Court has also held in *George Roine Titus & Another vs. John P Nanguri* Civil Application No. Nai. 249 of 1998 (UR) that a mistake is a mistake whether or not it originates from an advocate's ignorance or negligence; and so

long as it is genuine it does not disentitle an applicant to the discretion of the Court being exercised in its favour.

16. The applicant has demonstrated that from the very onset there has been an interest in pursuing the appeal, there was an error of omission on the part of their counsel who has acknowledged as much; but I do not find anything to suggest that this omission was done in blatant disregard of the requirements under Rule 84(1); and by the time the mistake was realized, time had lapsed. I am satisfied with the explanation regarding the delay; and in my view the applicants are deserving of the orders sought, to the extent that leave is granted to the applicant to file and serve the Record of Appeal within seven (7) days of this ruling. The costs shall abide the appeal.

**DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JUNE, 2024.**

**H. A. OMONDI**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**