Ibrahim & another v Zumzum Investment Limited & another (Civil Application E058 of 2024) [2024] KECA 862 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KECA 862 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E058 OF 2024

GV ODUNGA, JA

JULY 26, 2024

BETWEEN

NEDIM MOHAMED IBRAHIM ..... 1ST APPLICANT

SARA ABDELLA ABDUSEMED ..... 2ND APPLICANT

AND

ZUMZUM INVESTMENT LIMITED ..... 1ST RESPONDENT

ABDULKARIM SALEH MUHSIN ..... 2ND RESPONDENT

(Being an Application for extension of time to lodge the Notice of Appeal against the judgement of the High Court, Mombasa (Kizito Magare, J) delivered on 9th May 2024 in Commercial and Tax Division Case No. E001 of 2023)

RULING

1. By a Notice of Motion dated 31st May 2024, the applicants seek that the time for lodging the Notice of Appeal against the judgement of Magare, J delivered on 9th May 2024 in Mombasa High Court, Commercial and Tax Division Petition No. E001 of 2023, be extended for such period as this Court may deem fit.

2. The application is supported by an affidavit sworn by Paul Mwangi, the applicants' advocate. According to the deponent, at the time the subject petition was filed in the court below, there was pending before the High Court Mombasa between the same parties Civil Case No. E051 of 2021 concerning a mediation agreement between the same parties that resolved all the issues raised by the Petitioners; that judgement in the latter case was delivered on 24th November 2023 upholding mediation agreement between the parties that resolved all commercial issues between them, particularly regarding the assets and management of the nominal respondent Zumzum Investment Limited; that following the filing of the said petition, the applicant filed an application to dismiss

the petition as an abuse of the process because the petitioners controlled seventy percent (70%) of the nominal respondent and were seeking orders as an oppressed minority; that the application was never attended to until 21st February 2024 when the learned Judge dismissed it; that in the meantime the decision in Civil Suit No. 051 of 2021 was delivered which resolved all issues pending between the parties regarding the nominal respondent; that following that judgement, the applicants filed an application dated 29th February 2024 bringing to the court's attention the said judgment and asking the court to hold that the matter between the parties having been resolved, the petition was res judicata; that the learned Judge declined to make any interrogation sought, dismissed the application and allowed the petition; that the deponent was not in attendance when the decision was made; that the reason for non- attendance was due to human error occasioned by the omission to diarise the judgement date as a result of multiplicity of litigation between the same parties, whose particulars he set out; that the fact of the judgement in the said petition only came to his attention on 28th May 2024 when his firm received a letter dated 24th May 2024 from the respondent's advocates requesting the approval of the draft decree, extracted from the judgement in the petition; that by ten the applicants were 4 days out of time prescribed for filing the Notice of Appeal; that the applicants are eager and determined to pursue the appeal which is arguable and has high chances of success based on the issue of res judicata; and that the respondent will not suffer any prejudice if the extension sought is granted.

3. In response to the application, the 1st respondent, Abdulkarim Saleh Muhsin, swore an affidavit on 7th June 2024 in which he introduced himself as a director and the majority shareholder of the 2nd respondent in which he averred that the application is premised on misrepresentation and non-disclosure of material facts; that that the affidavit in support of the application, in so far as it is deposed to by the applicants' advocates, violates rule 9 of the Advocates Practice Rules; that the account given by Counsel as the basis for failure to file a Notice of Appeal within 14 days from the date of the judgement is misleading; that prior to settling on the date of 9th May 2024, on 21st February 2024, as he date for delivery of judgement, the court had scheduled to deliver the judgement on 18th April 2024 which date was scuttled by the filing of an application dated 29th February 2024; that when the application came up for directions on 11th April 2024 in the presence of counsel for both parties, the court directed that it would deliver its judgement in respect of bot the application and the petition on 9th May 2024; that on 18th April 2024, counsel for the parties appeared virtually and informed sought clarification on the delivery date as the court's online portal reflected 18th April 2024 as the delivery date of the judgement; that the learned Judge confirmed the delivery date as 9th May 2024; that in those circumstances the averment in the supporting affidavit were misleading.

4. It was further averred that the contention that the judgement undermines the decision in Civil Case No E051 of 2021 and in Civil Appeal No E109 of 2024 is devoid of merits; that the issue raised in the petition were not similar to those raised in the Civil Case; that the decision in the said Civil Case is subject of Civil Appeal No E084 of 2024; that the contention that the petition seeks orders as an oppressed minority is not true; that the issue in the petition revolves around the provisions of sections 780 and 782 of the *Companies Act* which permit the court to intervene in situations where the conduct of the affairs of a company are shown to be undertaken in a prejudicial and oppressive manner; that the issue before the court in the said civil case as not about the alleged mediation agreement which agreement was abandoned by the parties and is mutually unenforceable; that it is not true that the mediation agreement resolved all the issues in the petition.

5. The deponent then went on to set out what in his view are the issues in the petition and averred that the present application is nothing but a perpetration of the applicants' conduct that is calculated and geared towards delaying, derailing and/or scuttling the hearing and determination of the petition. In the deponent's view, there is no cogent basis for presenting the application for leave to file a Notice of

Appeal out of time and the applicants are undeserving of the favourable exercise of the discretionary powers.

6. In his rejoinder vide an affidavit sworn on 13th June 2024, Paul Mwangi, counsel for the applicants explained that he was the advocate in conduct of the petition and swore the affidavit since the delay in filing the Notice of Appeal was occasioned by his mistake; that the respondents admitted that he was not in court on the date when the delivery date was changed from the initial date but was represented by his associate, Ms. Wangui Njoroge, advocate; that he appeared in court 18th April 2024 believing that it was the judgement date; that the case was not listed on 9th May 2024; that he acted expeditiously and without delay upon noticing the error; that his mistake should not be visited on his client.

7. I heard the application on the Court's virtual platform on 3rd July 2024 during which Learned Counsel Mr. Paul Mwangi appeared for the applicants while Mr. Muchoki appeared for the 1st respondent. There was no appearance for the 2nd respondent whom I was informed never participated in the court below despite service. Considering the nature of the dispute and the fact that it is the entity around which the dispute coalesces, its non-representation in these proceeding is not surprising. Both counsel relied on their written submissions which they briefly highlighted.

8. It was submitted on behalf of the Applicant that this Court has unfettered discretion to extend time as observed in Samuel Mbugua Githere v Kimungu [1984] eKLR. The case of Leo Sila Mutiso v Rose Hellen Wangari, Civil Application No. Nai 255 of 1997 was cited to highlight the matters that this Court takes into account in deciding whether to exercise its discretion to grant extension of time. While rehashing the background of the application the cases of *Belinda Murai and Others v Amos Wainaina Civil Application No. Nai 9 of 1978* and Shah H Bharmal and Brothers v Kumari [1961] EA 679 were cited for the proposition that mistake of counsel may be a basis for granting extension of time. It was reiterated that the intended appeal is arguable and has a very high chance of success based on the ground of res judicata and that no prejudice will be occasioned to the respondents by the grant of the application.

9. On behalf of the 1st respondent, reliance was placed on the case of Magnolia Pvt Limited v Synermed Pharmaceuticals (K) Ltd [2018] eKLR cited in Kwacha Communications Limited & Another v Pindoria Holdings Limited & Another [2022] KLR to highlight the position that advocates ought not to swear affidavits in contentious matters touching on disputes between parties contrary to rule 9 of the Advocates Practice Rules. As regards the principles governing the exercise of discretion, the 1st respondent relied on the decision of the Supreme Court in Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission and 7 Others [2017] eKLR to highlight the fact that extension of time is discretionary hence the need to satisfy the Court that there exist sufficient and/or satisfactory cause and/or reason to warrant the discretionary power. The 1st respondent also cited the case of Parimal v Veena cited with approval in Wachira Karani v Bildad Wachira [2016] eKLR on what constitutes sufficient cause.

   According to the 1st respondent, the applicants failed to demonstrate the existence of any justifiable reason(s) to warrant exercise of discretion in their favour since they were not truthful and were guilty of misrepresentation and non- disclosure of material facts hence came to Court with unclean hands. It was noted that whereas the date of 9th May 2024 was given in the presence of Ms Wangui Njoroge, an advocate practicing in the firm representing the applicants, no affidavit was sworn by the said counsel regarding what she did or did not do in so far as diarising dates was concerned.

10. It the 1st respondent's view, since counsel for the applicants were aware of the date for delivery of the judgement, the Court's discretion is not intended to aid the conduct that borders on slackness and laxity. While setting out the background of the dispute, it was submitted that the applicants intended

appeal cannot be said to be arguable. Highlighting that litigation must come to an end the cases of Gideon Sitelu Konchella v Daima Bank Limited [2013] KLR, Mobil Kitale Service Station Limited v Mobil Oil Kenya Limited [2004] eKLR and Catherine Kigasis Kivai v Ernest Ogesi Kivai & 4 Others [2021] KLR in urging that the application 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 first objection taken by the 1st respondent is that the affidavit in support of the application is incompetent, having been sworn by an affidavit in respect of contested issues. This objection is based on rule 9 of the Advocates Practice Rules which provides that:

> No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non- contentious matter of fact in any matter in which he acts or appears.

13. The general rule is that advocates should not swear affidavits in contested matters. Where the client is available to swear to the disputed facts, the depositions in the affidavit of the advocate, may amount to hearsay unless their sources and grounds for belief are disclosed. More importantly, an advocate who swear an affidavit in contested matters potentially of exposes himself to playing the role of both advocate and witness should they be called upon to take the witness stand in order to be cross-examined on the said affidavits. That was the opinion in the case of Magnolia Pvt Limited Vs Synermed Pharmaceuticals (K) Ltd (2018) eKLR in which advocates were cautioned from swearing affidavits on their clients' behalf, the court stating that:

> "Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deponed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."

14. This Court however explained in Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] eKLR, citing its decision in Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015 that:

> " As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters."

15. This Court in Pattni v Ali and Others [2005] 1 EA 339; [2005] 1 KLR 269 held that:

> " Whereas it is right that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so as this accords with the spirit of the best evidence rule and in view of the provisions of Order 18 rule 2, with common sense and it would be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one to become a witness, there is otherwise no express prohibition against an advocate who on his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot find his client but has information, the sources of which he can disclose and state the grounds for believing the information."

16. In the present case, the affidavit was sworn by Paul Mwangi, learned counsel for the applicants in the matter. His deposition is however meant to inform the Court about his own shortcomings in not diarising the judgement date. That is a fact that was within his knowledge as opposed to that of his client. In fact, his client cold only have deposed of the same based on the information furnished by Mr. Mwangi. In my view, in the circumstances of this case the best person to have sworn the affidavit was Mr. Mwangi. I therefore find nothing wrong with the affidavit as sworn and I dismiss the objection.

17. On the merits of the application, 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. The Court would of course also consider the overriding objective spelt out in Sections 3A and 3B of the *Appellate Jurisdiction Act*.

18. 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."

19. 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.

20. 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.

21. Regarding the length of the delay, in the case of Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor [2014] eKLR it was appreciated 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."

22. In the instant case, the applicants were out of the prescribed time with 4 days. It has not been contended by the respondents that four days delay was inordinate. Onyango-Otieno, JA while dealing with similar circumstances in *Njiru Kiriragia v Silvester Njiru Njeru Civil Application No. Nai. 301 of 2007* found that a delay of 4 days in taking a necessary step was not inordinate. I find that the delay in this application was not inordinate.

23. Regarding the second condition, an applicant for extension of time is required to explain the reasons for the delay in taking a step in the proceedings. In this case, the applicants' ground for seeking extension is that the failure to lodge the Notice of Appeal was due to inadvertence on the part of its counsel in omitting to diarise the date of the delivery of judgement. The reason advanced for this is that there are several matters involving the same parties in several courts and due to that conundrum, learned counsel for the applicant inadvertently failed to diarise the same. The 1st respondent's objection is that the date was fixed in the presence of the counsel for the parties hence in cannot be an excuse that the date was unknown.

24. This Court appreciated in Shital Bimal Shah & 2 Others v Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323 that:

> "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 Meghji Velji Chhaya v Attorney General & 3 Others Civil Application No. Nai. 136 of 1996, this Court held that an omission by an advocate's clerk to enter a hearing date in the diary is sufficient cause for reinstatement of a dismissed application. Similarly, in Kalemera v Salaama Estates [1971] EA 284, it was held that:

> " In this case the failure to attend at the hearing was due to the fact that the applicant's advocate wrongly diarised the date and immediately he became aware of the error he filed the present application. To treat such mistake as an indication of negligence would be to take an extreme view of the circumstances. I prefer to treat the circumstances as arising out of honest mistake...The test to be applied under section 101 which speaks of "the ends of justice" is wider in its terms and permits a greater discretion. Poverty of the excuse is not the sole matter which must be considered, the defence, if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally it should always be remembered that to deny the subject a hearing should be the last resort of a court."

26. In my view, the applicants have proffered a satisfactory explained for failing to file the Notice of Appeal within the prescribed time.

27. The third issue is possibly the chances of success of the intended appeal. The consideration of this issue, however, does not apply in all cases. Dealing with that consideration, this Court in Mwangi v Kenya Airways Ltd [2003] KLR 486, where the court stated:

> " It is clear that the third issue for consideration, namely, the chances of the appeal succeeding if the application is granted is merely stated as something for a "possible" consideration, not that it must be considered. This is understandable because the "the chances of an appeal succeeding" is normally dealt with by this Court under the rubric of "an arguable appeal" or "an appeal which is not frivolous" and the full court normally considers that issue under rule 5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case of Bhaichan Ghagwanji Shah v D Jamnadas & Co. Ltd [1959] EA 838 where Sir Owen Corrie, Ag. JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:
>
> > "..... It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant's affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application."

28. The court then observed that the Shah case (ante) was decided under rule 9 of the former rules which required that "sufficient cause" be shown before extension of time could be obtained. It then concluded: -

> "It must not be forgotten that even the recent case of Mutiso did not lay it down that the single judge is obliged to consider the issue of the chances of an appeal succeeding; the case only put that issue down as one for possible consideration."

29. In Ramesh Shah v Kenbox Industries Limited [2007] eKLR, this Court debunked the myth surrounding the arguability of the intended appeal in applications of this nature by observing that:

> "The issue therefore arises as to whether the arguability of an intended appeal would outweigh all other relevant factors open for consideration in applications under rule 4. For our part we think, that except in very exceptional and limited circumstances, that proposition is not acceptable and is not borne out by authority. Indeed it is open to abuse. At its absurd best, it would mean that a party who for no or no sufficient reason sleeps over his right of appeal for ages, may one fine morning wake up and persuade the court that he had an arguable appeal after all and ought therefore to be allowed to appeal despite the delay."

30. While in certain borderline cases the Court may consider the chances of success of the intended appeal, in my view, that condition plays a very peripheral role where the other conditions have been fulfilled particularly where the applicant has a right of appeal. In this case however, the issue of res judicata is certainly arguable. It may not necessarily succeed but that is not a determination that is within the province of a single Judge. An arguable appeal, it has been held, is one which ought to be argued fully before the court; one which is not frivolous. See Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

31. 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. In Chemwolo and Another v Kubende [1986] KLR 492; [1986-1989] EA 74, it was held that:

> "Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

32. 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, 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.

33. In the circumstances of this case and in the absence of any prejudice alluded to by the respondents, 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 31st May 2024, and extend the time within which the Notice of Appeal against the judgement of Magare, J delivered on 9th May 2024 in Mombasa High Court, Commercial

and Tax Division Petition No. E001 of 2023, is to be filed with a further 7 days from the date of the delivery of this ruling. The costs of this application are awarded to the 1st respondent.

34. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JULY, 2024

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR