Kabiru & 3 others v Njau (Civil Application E080 of 2024)
[2024] KECA 1154 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1154 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E080 OF 2024

GV ODUNGA, JA

SEPTEMBER 20, 2024

BETWEEN

ANNE WANGUI KABIRU ..... 1ST APPLICANT

MARION WANJIKU KABIRU ..... 2ND APPLICANT

GEORGE KARIUKI KABIRU ..... 3RD APPLICANT

JAMES MUIRURI KABIRU ..... 4TH APPLICANT

AND

KARIUKI NJAU ..... RESPONDENT

(Application for extension of time to file a Notice of Appeal and Record of Appeal in an intended appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (Okong'o, J.) dated 18th April 2023 in ELC Appeal No. 93 of 2019)

RULING

1. The Applicants herein, moved this court by a Motion on Notice dated 22nd February 2024 seeking leave to file and serve a Notice of Appeal and file an appeal against the judgment and decree of the Environment and Land Court at Nairobi (Okong'o, J.) dated 18th April 2023 in ELC Appeal No. 93 of 2019.

2. The applicants' case is that their father, Kabiru Muiruri (now deceased) filed ELC No. 22 of 1985 against the respondent before a Resident Magistrate which case was determined in the deceased's favour. However, a subsequent appeal to the Environment and Land Court in ELC Appeal No. 93 of 2019 was allowed on 18th April 2023 in which the learned Judge upheld the appeal and set aside the learned magistrate's ruling. According to the applicant's their late father died on 12th April, 2023 and it was not until 1st May 2023 that they learnt of the decision which they are dissatisfied with. Due to lack of legal capacity, they were unable to file a Notice of Appeal immediately and embarked on the

process of substitution. Their application for grant of limited letters of representation was granted on 16th May, 2023 and their subsequent application for substitution was allowed on 20th June, 2023.

3. According to the applicants, the failure to lodge the Notice of Appeal was due to factors beyond their control as the deceased, having passed away, did not receive the outcome of the case in order to instruct his advocates and they were unaware of the same. It was the applicants' case that the matter touches on a very sensitive aspect being land, hence it is only fair and just for the court to grant the orders sought. In their view, the execution of the judgement is likely to result into the tampering with land boundaries of several parties thus occasioning irreparable loss and disruption of quiet possession to the Applicants who will be denied a portion of ½ acre awarded to their late father by elders and adopted by the Magistrate Court. In their view, the grant of the orders will not prejudice either of the parties since they have lived together 1965.

4. The application was not opposed by the respondent.

5. I have considered the application, affidavit in support of the application and the submissions.

6. 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 as guiding principles. These are first the period of the delay must be considered. Second the Court has to consider the reasons for such a delay. Thirdly, the Court would consider whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal. Fourthly, the Court is required to consider if 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.

7. 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."

8. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. 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.

9. In this case, the factual averments are not disputed. 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."

10. From that authority, it is clear that the litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. All the surrounding circumstances, including the reason for the delay must be considered by the Court.

11. Having considered the averments, I find the delay in this matter not inordinate.

12. As regards the reasons for the delay, the principal litigant dies in the course of the proceedings and the applicants, upon being made aware of the proceedings immediately took steps to obtain letters of representation and to have themselves substituted in place of their deceased father. The delay after the substitution was occasioned by the inadvertent mistake in filing an application seeking similar orders before the trial court which was eventually withdrawn upon the realisation that the trial court had no jurisdiction to entertain such an application. The delay has been explained to my satisfaction.

13. As regards the issue of prejudice, none has been alluded to by the respondents. Lakha, JA in *Touring Cars (K) Ltd & Anor v Ashok Kumar N. Mankanji Civil Application No. 78 of 1998*, was of the view that rule 4 of the Court of Appeal Rules confers the widest measure of discretion in an application for extension of time and draws no distinction whatsoever between the various classes of cases and that the rule clearly requires the Court to look at the circumstances and recognises the overriding principle that justice must be done. He further held that prejudice or lack of it is a highly relevant matter in considering the justice; it may be an all-important one.

14. Waki, JA, while citing Grindlays Bank International (K) & Another v George Barbour Civil Application No. Nai. 257 of 1995 and Gichuhi Kimira v Samuel Ngunu Kimotho & Another Civil Application No. Nai. 243 of 1995 in Janet Ngendo Kamau v Mary Wangari Mwangi Civil Application No. Nai. 338 of 2002 held that:

> " Unless there is fraud, intention to overreach, inordinate delay or such other circumstances disentitling a party to the exercise of the Court's discretion, the Court should in so far as it may be reasonable prefer, in the wider interest of justice, to have a case decided on its merits... The consideration that one case should not hang over the heads of parties indefinitely must be weighed against the wider interests of justice, namely that where possible cases must be brought to a close after a hearing on the merits." [Emphasis mine].

15. It is now 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."

16. 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.

17. 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.

18. In the circumstances of this case, I find that this is a just and proper case to exercise discretion in favour of the applicants. I accordingly allow the Motion dated 22nd February 2024. I extend the time limited for the filing of a Notice of Appeal against the judgment and decree of the Environment and Land Court at Nairobi (Okong'o, J.) dated 18th April 2023 in ELC Appeal No. 93 of 2019 and direct that the Notice of Appeal be filed and served within 14 days and that the record of appeal be filed and served within 60 days from the date of filing of the said Notice of Appeal.

19. There will be no order as to the costs of this application.

20. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR