Masai alias Mbanda v Kiage & another (Civil Application E471 of 2023) [2024] KECA 1150 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1150 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E471 OF 2023

GV ODUNGA, JA

SEPTEMBER 20, 2024

BETWEEN

ALBERT MUOKI MASAI ALIAS MBANDA ..... APPLICANT

AND

JOSEPHINE MOKAYA KIAGE ..... 1ST RESPONDENT

REBECCA MUTINDI KITHI ..... 2ND RESPONDENT

(An application for leave to file and serve notice of appeal out of time in respect of an intended appeal against the ruling of the Commercial and Tax Division Court at Milimani (Majanja, J.) dated 15th September 2023 in H.C.COMM.ARB/E062/2022)

RULING

1. The applicant, Albert Muoki Masai Alias Mbanda, by his application dated 16th October 2023, seeks orders that: the firm of B.T Atancha & Co. Advocates be deemed to be on record as representing him; that he be granted leave to file and serve a Notice of Appeal and letter requesting for typed proceedings in respect of the High Court's Ruling dated 15th September, 2023; that the Notice of Appeal filed on 16th October, 2023 be deemed as properly filed; and that costs of the application be costs in the intended appeal.

2. A brief background to the application is that in his ruling dated 15th September 2023, Majanja, J adopted the final arbitral award published on 7th October 2023 by the Arbitral Tribunal (Arbitrator). The application for the adoption of the award, which was initiated by way of Chamber Summons dated 31st October 2022 and was expressed to have been brought under section 36 of the *Arbitration Act*, was made by the 1st and 2nd respondents herein, Rebecca Mutindi Kithi and Josephine Mokaya Kiage.

3. The applicant filed a Notice of Appeal dated 16th October 2023 and further requested for certified copies of the proceedings vide a letter of the same date. According to the applicant, at the time of delivering the ruling, the firm of Okumu Kubai & Co. Advocates was on record for him and were subsequently instructed by him to file a Notice of Appeal but failed to do so; that he has now instructed M/s B.T Atancha & Co. Advocates to seek leave to file and serve the Notice of Appeal out of time; that the delay in filing the Notice of Appeal was occasioned by an inadvertent omission on the part of the previous counsel; that the delay is not inordinate or unreasonable; that he will suffer substantial loss if the impugned ruling is not set aside since he had been wrongly enjoined (sic) in the suit; and that he has brought this application without unreasonable delay hence it is in the interest of justice that his application be allowed.

4. In support of the application, the applicant cited Article 159 (2) (d) of the *Constitution* to the effect that courts should administer justice without undue regard to procedural technicality and on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR on the principles for extension of time.

5. It was submitted on behalf of the applicant that the applicant submit that the firm of Okumu Kubai & Co. Advocates recklessly and without due regard to their duty of care to the applicant, failed to act upon his instructions to file a Notice of Appeal; that it is not the applicant's fault that the appeal was not lodged in time, but, without disclosing any grounds, the applicant suspects that his then advocates on record colluded with the other parties to ensure that he failed to lodge the appeal on time; and that the applicant's case is merited with a high chance of success due to the fact that the applicant was a non-participant party in the proceedings leading to the award of the arbitration award in dispute herein and therefore his rights of access to Justice as enshrined under Article 48 of the *Constitution* were denied.

6. The applicant, while setting out the principles guiding the exercise of the Court's discretion in extending time averred that the ruling herein was delivered on the 15th September 2023 and subsequently, this application was filed, one (1) month and one day after the lapse of the 14 day period provided in law for filling the Notice of Appeal, a manifestation of his intention to file an appeal which was only frustrated by his previous Counsel. In his view, the respondents will not suffer prejudice as there is an application in the High Court seeking to stay the execution of the decree and reliance was placed on the case of *Charles Ngugi v ASL Credit Limited* High Court Civil Miscellaneous Application E488 of 2021 to highlight the consideration of counsel's mistake in the exercise of discretion in such application. The applicant urged this Court to invoke its inherent powers under Rule 1 (2) of this *Court's Rules* to allow the orders sought in his application.

7. In opposing the application, the 1st respondent swore a replying affidavit on 23rd November 2023 in which she averred that the application is incompetent as it does not meet the requirements for extension of time as laid out in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others,* (*supra*); that apart from merely blaming his advocate, the applicant has not substantiated the reason of the delay; that based on the case of *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR, the applicant has been reckless throughout the arbitration proceedings and despite attending the first preliminary meeting, refused to participate in the proceedings even after the arbitrator explained the implications of such proceedings; that the intended appeal is not arguable as the Court's interference with the enforcement of an award is limited by section 10 and the grounds set out in sections 35 and 37 of the *Arbitration Act*, and as such the court does not have appellate jurisdiction to interrogate the merits of the award; that the applicant has not attached a memorandum of appeal hence this Court has no way of determining if the appeal is arguable and thus fails to meet the requirements set out in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, (*supra*); that based on the cases of *Nyutu Agrovet Limited v Airtel Networks Kenya Ltd; Chartered Institute of Arbitrators-Kenya Branch (Interested*

Party), Supreme Court Petition No. 12 of 2016, (2019) eKLR; and *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, the applicant does not have an automatic right of appeal, and as such leave to file an appeal from a decision for enforcement of an award under of the *Arbitration Act* must be sought, which leave is only to be granted in exceptional circumstances which has not been demonstrated; and that since the applicant has not sought such leave nor have demonstrated such exceptional circumstances, the application should be dismissed with costs.

8. In their submissions, the respondents rehashed the averment in the replying affidavit and added that leave to file an appeal out of time under rule 4 of this Court's Rules is discretionary and although unfettered, the discretion must be exercised judicially and with sound reasoning (*Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, (*supra*) and *Vishva Stone Suppliers Company Limited v RSR Stone* [2006] Limited [2020] eKLR); that the applicant has not attached any evidence to demonstrate the negligence by his erstwhile advocates hence his reason for the delay is unsubstantiated; and that an application for leave to file an appeal from a decision under sections 35 or 37 of the *Arbitration Act* should be a condition precedent before moving this court in any way or form, including leave to file an appeal out of time hence this application should be dismissed with costs.

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

10. 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 well settled. This Court has unfettered discretion to extend the time prescribed for taking any action permitted under the Rules. 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 considerations that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly (possibly), whether the proceedings for which time is sought to be extended is frivolous; and fourthly, whether the respondent in those proceedings will be unduly prejudiced if the application were to be granted. See *Leo Sila Mutiso v Helen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA

11. 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*.

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

13. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v 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 respondent if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

14. Regarding the length of the delay, the ruling sought to be appealed against is dated 15th September 2023. The Notice of Appeal ought to have been filed within 14 days which lapsed around 29th September 2023. This application is dated 16th October 2023, slightly less than a month after the last day. 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."

15. 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. For example, in Boniface Njuguna Gakuru v Paul Njoroge Gakuru Civil Application No. Nai. 301 of 2009, a delay of a period slightly more than the period in the present case was found not to be inordinate with the Court holding that:

> " The Court have, apart from considering the factors which guide the court in the exercise of the court's discretion under rule 4 of the *Court of Appeal Rules*, also considered the factors that assist in giving effect to the overriding objective as set out in the *Appellate Jurisdiction Act*. This is because the 02 principle is the whole objective of the *Appellate Jurisdiction Act* and therefore the 02 principle is both substantive and procedural. The factual basis is that the total delay occasioned was 37 days which period elapsed as the applicant made arrangements to change representation and the I have also taken into account that the matter involves ownership of land. In addition, I have also taken into account the apparent arguability of what prima facie appears to be a substantive jurisdictional issue touching on the initial tribunal and the decision subsequent making bodies and thus my inclination is to grant a reasonable extension of time. Since the purpose of the overriding objective is to enable the Court to do justice in the special circumstances of each appeal, I consider that in the special circumstances before me (to the effect that the applicant's erstwhile advocate had advised her that there was nothing more that could be done), preventing the applicant from having an appeal which touches on jurisdiction heard on merit because of a delay of 37 days and which has been satisfactorily explained would be unjust."

16. One month's delay, in my view, ought not to be treated as inordinate if there is a reason for the delay.

17. According to the applicant, he issued instructions to his then advocates to appeal the decision but no action was taken. The respondents have taken the position that there is no evidence to that effect. While it would have been prudent for the applicant if he would have explained the manner in which he gave the instructions, the failure to do so is not necessarily fatal to the exercise of discretion.

18. Appreciating that mistake on the part of counsel may warrant extension of time, Shah, JA when faced with a similar situation in *Michael Njoroge B. & Others v Vincent Kimani Chege* Civil Application No. Nai. 217 of 1997 held that such mistakes should not be visited on the client and that the Court of Appeal being the last court (by then and even now in most cases) ought to give a litigant a chance to be heard on merits. The learned single Judge appreciated that whereas it is appreciated professional standards must be maintained, if an error is remediable, the client ought to be heard.

19. In *Mwangi v Mwangi* [1999] 2 EA 234, it was held, while citing *Njoroge "B" And Others v Chege* [1997] LLR 614 B (CAK); *Macfoy v United Africa Company Ltd* [1962] AC 152; Pantin v Wood [1962] 1 QB 594 that:

> " Rules of procedure are said to be good servants but bad masters. This is not to say that they can be flouted with impunity. All rules have their specific purpose(s) but a rule of procedure should not drive a litigant out of judgement seat if other rule(s) allow such a litigant to come back to Court. The tendency of the court of last resort ought to give a chance to the litigant to be heard on merits as far as possible. Our rules of procedure have had their origin in England and the tendency in England is to move away from form to substance...Simple inaction by a lawyer coupled with client's careless attitude may be enough to say: "I am not going to exercise my discretion" but when the litigant himself shows that he is doing his best the Court ought to exercise its discretion which is wide enough, subject only to the requirement of justice to both sides. Procedural requirements are designed to further the interests of justice and any consequences which would achieve a result contrary to those interests should be treated with considerable reservation."

20. I am therefore satisfied that the reason given for the delay is in the circumstances of this case justifiable.

21. Regarding the prospects of success of the 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:
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> ' 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.'

22. 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 that: -

> "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."

23. 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."

24. While in certain borderline cases the Court may consider the chances of success of the intended action, in my view, that condition plays a very peripheral role where the other conditions have been fulfilled particularly where the applicant has a right to take up the proceedings in question. In any case, the issue of the competency or otherwise of an appeal, should, strictly speaking be a preserve of the full bench. If no appeal lies, nothing bars the respondents from seeking to have the Notice of Appeal or even the appeal itself struck out. I am not told by the respondents that they have taken such a step.

25. 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.

26. 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].

27. 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."

28. 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 respondent contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs.

29. 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.

30. 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 16th October 2023. I grant leave to the firm of B.T Atancha & Co. Advocates to come on record for the applicant. I extend the time limited for filing of the Notice of Appeal and for requesting for copies of the proceedings and judgement with such period as would validate the Notice of Appeal and the letter requesting for the proceedings.

31. The costs of this application are awarded to the respondents.

32. 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