Kariuki v Wangeci & 7 others (Civil Application E250 of 2023)
[2024] KECA 1692 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KECA 1692 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E250 OF 2023

AO MUCHELULE, A ALI-ARONI & GV ODUNGA, JJA

NOVEMBER 22, 2024

BETWEEN

BENSON MUGO KARIUKI ..... APPLICANT

AND

MARGARET WANGECI ..... 1ST RESPONDENT

JORAM BERNARD KARIUKI ..... 2ND RESPONDENT

BENSON MWANGI KARIUKIT ..... 3RD RESPONDENT

JANE WAMBUI KUNGU ..... 4TH RESPONDENT

ESTATE OF NAHASHON CHEGE KARIUKI ..... 5TH RESPONDENT

ROBERT KIMEMIA KARIUKI ..... 6TH RESPONDENT

ESTATE OF EVA NJERI ..... 7TH RESPONDENT

ESTATE OF GEOFFREY KAMAU KARIUKI ..... 8TH RESPONDENT

(An application for extension of time within which to lodge a Notice of Appeal and Appeal out of time from the judgment of the High Court of Kenya at Nairobi (Maureen A. Odero, J.) delivered on 24th March, 2023 at the Nairobi High in Succession Cause No. 1234 of 2007)

RULING

1. The applicant, Benson Mugio Kariuki being aggrieved by the judgment of the High Court of Kenya at Nairobi (Maureen A. Odero, J.) delivered on 24th March 2023 in Succession Cause No. 1234 of 2007, lodged a Notice of Appeal dated 8th June 2023, out of time. He sought to regularise the filing of the Notice of Appeal as well as the Record of Appeal vide his Notice of Motion dated 8th June 2023 expressed to be brought under sections 3A and 3B of the *Appellate Jurisdiction Act* and rules 4 and

82 of this Court's Rules, 2010. The said Motion was based on the grounds that his advocates then on record did not apply for certified copies of proceedings and judgment in time hence the delay was caused by circumstances beyond his control.

2. In his supporting affidavit, the applicant averred that he intends to appeal against the whole of the impugned judgment and decree; that he is desirous to have the matter pursued to get his justice; that when he learnt that his advocates had not applied for the certified copies of proceedings and judgment in time, he went to court and paid for the copies on 18th April, 2023; that copies of the judgment was supplied to him on 24th April 2023 but the proceedings are yet to be supplied; that it was upon obtaining the court judgment, he looked for someone to assist him to file this application in an effort to lodge the appeal; that the mistake is not his and is excusable since he was not indolent but a mistake of his advocate which should not be visited to him; that he has arguable appeal with chances of success based on the grounds of appeal in his Draft Memorandum of Appeal; that the respondent is not likely to suffer any prejudice if leave to file appeal out of time is granted and it is in the interest of justice and only fair and just that his application is allowed.

3. His application was, however, dismissed on 22nd March 2024 by a single Judge of this Court (Kiage JA) who found that there was no requirement for one to obtain certified copies of proceedings and the judgment before lodging the Notice of Appeal, hence the explanation given for failing to file the Notice of Appeal within time was unsatisfactory. The learned Judge declined to exercise his discretion in favour of the applicant.

4. Dissatisfied with the said decision, the applicant made this reference before the full bench in which he submitted that the learned single Judge's decision ought to be reviewed based on the grounds that; a mistake of counsel should not be visited on an innocent client; he is an old man who is ignorant of the procedure; and the appeal has probability of success if allowed. In his submissions, he relied on the Supreme Court decision of Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others [2015] eKLR that laid down general guidelines for determining applications for enlargement of time to file an appeal and submitted that enlargement of time is an exercise of discretion which is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. The applicant further cited the case of Itule Ingu & Another v Isumael Mwakavi Mwendwa [1994] eKLR where this Court exercised its discretion to allow an application seeking an extension of time to file an appeal out of time where there was a mistake of an advocate and submitted that the question for determination is whether mistake of advocate was reasonable or bona fide and whether it has been explained to the satisfaction of the court. He cited Shah H Bharmal & Brothers v Kumari [1961] EA 679 for the proposition that mistakes of legal advisor may constitute "sufficient cause"; Belinda Murai & 6 Others v Amos Wainaina [1978] KLR to support the position that the court ought to do whatever is necessary to rectify the mistake if the interest of justice so dictate; and Philip Chemwolo & Another v Augustine Kubende [1982-88] KLR for the contention that blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.

5. According to the applicant, he is an old man who is 77 years old and a poor man who trusted that his advocate who was representing him on a pro bono basis would file the Notice of Appeal and appeal within the required time, which his advocate did not do; that he was unaware of the legal procedures and lacked knowledge on what to do hence he didn't file the appropriate documents in time; that as a result of the failure of his advocate, he sought help from Kituo Cha Sheria when it was too late; and that now he is representing himself in this matter after his advocate failed to take the necessary steps

and relied on Abdalla v Patel & Another (1962) EA 447 where the Court noted a litigant however poor should be permitted to bring his proceedings without hindrances and have his case decided.

6. According to the applicant, if the application is allowed, the appeal has a high possibility of success, as there are a lot of issues that the High Court Judge did not take into consideration and he urged this Court to give him an opportunity to argue his appeal on merit so that he will not suffer injustice.

7. On behalf of the respondent, reliance was placed on the authorities in Rajesh Rughani v Fifty Investments Limited & Another [2016] eKLR for the proposition that it is not enough to blame previous counsel on record without an explanation as to the action taken by the litigant to show that he did not condone or collude in the delay; Paul Makokha Okoiti v Equity Bank & Attorney General [2016] eKLR to highlight the position that self- representation is not a panacea or licence to demand that one must get what he asks; and Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR to highlight the need to respect the rules and timelines.

8. It was submitted on behalf of the respondent that the applicant had not provided credible, satisfactory and sufficient grounds to necessitate a review of the single Judge's decision; that the applicant, while relying on mistake of his counsel, did not identify the advocate in question, the mistake referred to or demonstrate the tangible steps taken by him in following up the matter with his advocate; that there was no evidence that the applicant was an ignorant old man as he contended; that the applicant is bound by the rules of procedure irrespective of his age and status; and that litigation is not an everlasting endeavour and must come to an end. In the respondent's view, the reference ought to be dismissed with costs.

9. We have considered the submissions made by the parties in this reference. Rule 57(1)(b) of the Court of Appeal Rules, 2022 provides that:

> Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge—
>
> (b) in a civil matter, wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, that person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.

10. The learned single Judge in his decision under challenge found that the applicant had failed to satisfactorily explain the reasons for the delay in making the application for an extension of time to file the Notice of Appeal and the Record of Appeal. The applicant's reason for not filing the same was that he had been let down by his then counsel on record. This averment was not controverted since the respondents did not respond to the application.

11. The circumstances under which a full bench of this Court interferes with the exercise of discretion by a single Judge are now well settled. This Court in *Kenya Canners Limited v Titus Muiruri Doge Civil Application No. Nai. 119 of 1996* held that:

> "A reference to the full court is not an appeal although it is in the nature of one and in exercising the discretion under rule 4, the single judge was exercising the power on behalf of the full court and his discretion would not therefore be easily upset except on sound principles and these are that the single judge took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account; that he misapprehended or not properly

> appreciated some point of law or fact applicable to that issue; or that the decision, looked at in relation to the available evidence and the relevant law is plainly wrong...A breach of any or all of such principles would entitle the full court to interfere and the applicant must satisfy the Court that it ought to do so."

12. In this case the learned Single Judge did not address the issue of the advocate's mistake as a ground for extending time. There is no doubt that an advocate's mistake may, on some occasions, constitute a ground for extending time. 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."

13. 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."

15. As we have stated, the learned single Judge in his ruling did not address the impact, if any, of the applicant's advocate's mistake in the application for an extension of time and whether or not the grant of the orders sought by the applicant was in the wider interest of justice, considering that the application was not opposed. We are also mindful of the fact that the learned single Judge determined the application based only on the paucity of the reasons for the delay in filing the Notice of Appeal

and did not deal with the other factors which were identified by Waki, JA in Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR as in which he expressed himself as hereunder:

> " 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."

16. A full bench of this Court while allowing a reference from a decision of a single Judge of the Court in Virginia Wambui Chege v Nyamo Waitathu Civil Application No. Nai. 77 of 1998 (UR), expressed itself as follows:

> "Since the applicant's advocates had been notified of the fact of the proceedings and judgement being ready which information was conveyed to them by the Superior Court's letter dated 19th February, 1998, the position therefore, procedurally at least, was that they could have lodged the record of appeal within say 60 days of 18th February, 1998 provided they had lodged a notice of appeal and provided they had copied their letter bespeaking copies of proceedings and judgement to the respondent's advocates. They did not obviously act in the interests of their client. The client, however, could not possibly have been aware of the fact of non-lodging of the notice of appeal and the non-copying of the said letter. She would assume that her lawyers would follow the relevant procedure...Whilst the learned single judge was absolutely right in saying that the lodging of notice of appeal is, per se, a simple act, we are of the view that had he considered the applicant's problems, as alluded to by the court, he would have exercised his discretion, which he undoubtedly has, to allow the application. We are of the view that the advocates for the applicant did not argue their client's application before the single judge at length and in the peculiar circumstances of the case reference allowed."

17. While we cannot speculate as to the decision the learned single Judge would have arrived at had he considered that factor, it is clear to us that the learned single Judge failed to take into account a relevant matter which he ought to have taken into account and that entitles us to interfere with the exercise of the discretion by the learned single Judge. See *Kenya Farmers Association Ltd. v Charles Otieno Ochieng Civil Appeal No. 116 of 2000* (UR).

18. In the circumstances, we find merit in this reference, set aside the order of the learned Single Judge dismissing the applicant's Notice of Motion dated and substitute therefor an order granting the same. Let the applicant file and serve his Notice of Appeal within 14 days and file and serve his Memorandum and Record of Appeal within 60 days from the date of filing of the Notice of Appeal.

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

20. It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 22NDDAY OF NOVEMBER, 2024.

ALI-ARONI

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR