



MAS v FMS (Civil Application E088 of 2021) [2023] KECA 13 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KECA 13 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA**

CIVIL APPLICATION E088 OF 2021

JW LESSIT, JA

JANUARY 20, 2023

BETWEEN

MAS APPLICANT

AND

FMS RESPONDENT

(An application for extension of time for giving notice of appeal and for leave to appeal out of time from the directions of the High Court/Family Division of Kenya at Mombasa (Thande, J) given on 23rd February 2021 in HC Matrimonial Cause No. 9 of 2018)

RULING

1. The applicant, Mohamed Ali Salim, by a Notice of Motion dated November 19, 2021, brought under Rule 4 and 5 (2) (b); 20; and 47 (now 49 under 2022 Rules) of the Court of Appeal 2010, seeks several orders. The only order that I can consider as a single judge is No. 4 which prays for:

That for extension of time within which to file a notice of appeal from the judgment and decree of the High Court Family Division at Mombasa Matrimonial Cause No. 9 of 2019 given on February 23, 2021.

2. The grounds on which the application for extension of time is premised are on the face of the application and are:
 - a. That after the suit before the High Court was heard and determined judgment thereon was to be given on a date to be notified to parties.
 - b. That the notice of delivery of judgment was sent through email to all advocates in the matter on February 10, 2021.
 - c. That the said email was never brought to the attention of the applicant's advocate and by reason thereof, the applicant's advocate was not in attendance on the date the judgment was delivered.



- d. That the applicant's advocate only became aware of the judgment on April 20, 2021 when the respondent's advocate sent a letter forwarding the draft decree for approval at which point the time for filing a notice of appeal had lapsed.
 - e. That immediately the applicant's advocate became aware of the judgment he notified the applicant who gave instructions to appeal against the judgment.
 - f. That by reason of the expiry time for filing an appeal, the applicant filed an application for stay of execution of the judgment in question and sought leave to file a notice of appeal out of time. The same was heard and in a ruling issued on October 22, 2021, the application was dismissed.
 - g. That the failure to attend the delivery of the ruling was not deliberate on the applicant's part and in any event, the mistake was caused by the applicant's advocate who failed to see the notice of the delivery of judgment.
 - h. That it was not deliberate that a notice of appeal was not filed on time and that the intended appeal has very high chances of succeeding,
 - i. That since the respondent is in occupation of the property the subject to the intended appeal, no prejudice shall be suffered if the orders are granted and that it is in the interest of justice to grant the orders sought as the applicant is desirous of exercising his right to appeal.
3. The application is supported by an affidavit sworn by the applicant and filed on the November 19, 2021. The affidavit rehashes the grounds on the face of the application.
 4. The application is opposed by FMS, the respondent through her replying affidavit sworn on December 9, 2021. The respondent contends that the applicant does not merit the exercise of the Court's discretion. She avers that a similar application was dismissed by J.N Onyiego, J. on October 22, 2021. She avers that the allegation that the email bearing the notice of the delivery of judgment was not brought to the attention of the applicant's advocate cannot help the applicant since there was no affidavit sworn by a staff of the applicant's advocates' office swearing to those facts. The respondent deposed that judgment was delivered on February 23, 2021 yet the applicant moved to this Court on November 19, 2021, over 9 months later and contends that the application was an afterthought. The respondent avers that applicant's application before the High Court was dismissed on October 22, 2021 and it took the applicant about one month to move this Court.
 5. The application was heard on the virtual platform on the December 6, 2022. Learned counsel Mr. Adam Hamza and learned counsel Mr. Oluga were present for the applicant and the respondent respectively. Each counsel relied on his written submissions, which each highlighted before me.
 6. Mr. Hamza's submissions rehashes the grounds on the face of the application. Counsel urged that after Thande, J. heard the matter judgment was to be delivered on notice. He urged that judgment was delivered in his absence, and that initially he thought that no notice was sent to him but later on checking his email and file realized it had been sent by email but not brought to his attention. Counsel urged that they have annexed the draft Notice of Appeal. Counsel relied on the case of *John Karani Mwenda v. Japhet Bundi Chanari* (2021) eKLR on the principles upon which this Court exercises its discretion under Rule 4. Counsel also relied on *Philip Chemowolo & Another v. Augustine Kubede* (1982-88) KAR 103 at 1040; and *Richard Ncharpi Leiyagu v. Independent Electoral Boundaries Commission & 2 Others* (2013) eKLR for the proposition that mistakes made by counsel ought not to be visited upon a client.



7. Mr. Oluga relied on the written submissions and the replying affidavit sworn by the respondent. Counsel brought to the court's attention that the applicant's advocate or staff did not swear any affidavit to support the applicant's affidavit where he contends that notice of delivery of judgment was not brought to his advocate's attention, and that they ought to have sworn such affidavit. For that proposition counsel relied on *Jimcab Services Ltd vs. Barthlomew Bernard Osodo & another* [2018] eKLR.
8. Mr. Oluga urged that the delay of five months from when the applicant's advocate became aware of the judgment on April 3, 2021 and November 19, 2021 when this application was filed was not explained. Counsel urged that the applicant had not disclosed that a similar application was dismissed by the High Court for lack of forthrightness on service of the judgment notice. Counsel relied on the principles set out in *Paul Musili Wambua v. Attorney General & 2 Others* (2015) eKLR to guide the Court in deciding the application.
9. In a brief reply, Mr. Hamza drew the Court's attention to page 46 of the record where a copy of the High Court order dismissing the applicant's application was annexed and urged that there was full disclosure. He also submitted that his affidavit in which he explains the reasons the delay in bringing the application are given. He admitted that the mistake in bringing the application was by counsel and urged Court not to visit counsel's mistake on the client.
10. I have considered the arguments brought for and against the application for extension of time to file the notice of appeal. As I noted at the beginning of this ruling, the only order for consideration by a single judge is order 4 of the application and that is the order under consideration. Rule 4 of the Court of Appeal rules gives a single judge unfettered discretion to extend time, but such discretion must be exercised judiciously. In *Mwangi v Kenya Airways Ltd* [2003] KLR 486 at 487, this Court stated of this discretion and the manner it ought to be exercised that:

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, (Civil Application No. Nai.255 of 1997) (unreported), the Court expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay:

thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”



11. As set out in the case cited above, the principles that guide the Court in its decision under Rule 4 are settled. These are first, the length of the delay: secondly, the reason for the delay: thirdly, the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted. In this case it is not in dispute that the judgment of the High Court was delivered February 23, 2021. The instant application was filed on November 19, 2021 which is a period of eight and a half months later.
12. The explanation advanced for the delay is by Mr. Adam Hamza, counsel for the applicant, in his affidavit that is annexed to the affidavit sworn by the applicant in support of this application. Contrary to Mr. Oluga's submission, Mr. Hamza has sworn an affidavit to explain the delay.
13. I have considered the explanation given which is that even though notice of the judgment was sent to all counsel through email, that notice was not brought to his attention for which he averred he accepted blame. He averred that the normal practice was for the court to send process servers to effect physical service and that for that reason he never expected service through the internet. In the applicant's affidavit in support, he deposes that he first filed an application for stay of execution of the High Court judgment and leave to file a Notice of Appeal out of time dated April 23, 2021. He deposed that the application was dismissed in its entirety on the October 21, 2021. It is after that ruling that the instant application was made.
14. The question to answer is whether the explanation is plausible. It is my view that the explanation by counsel that he never expected service of judgment notice through mail a reasonable explanation considering the period under consideration. I take judicial notice that the use of internet for service of court process and even for virtual hearing was introduced by March 2021 following lock downs in the Country caused by the Covid- 19 pandemic. Therefore, in February 2021 when the impugned notice of judgment was sent, the service of process by that medium was novice.
15. I note that the applicant filed an application in April 2021 upon becoming aware of the judgment, and the same was dismissed on October 23, 2021, and on November 19, 2021, the instant application was filed. Therefore, in terms of delay in bringing this application, I find the delay involved, whether computed from February 2021, April 2021 or even November 2021, the same was not inordinate; and in any event the delay involved has reasonably been explained.
16. The next question to ask is whether the intended appeal has a likelihood of success. The case before the High Court involved matrimonial property. There is a draft memorandum of appeal annexed. Without giving a definitive answer to this question, I think that the appeal raises issues that deserve consideration by the court.
17. The other issue for consideration is what prejudice the respondent stands to suffer if the application is granted. The applicant deposed that the respondent is in occupation of the property which is the subject of the appeal. That has not been contested. I find that even though the respondent stands to suffer some prejudice for reason she will now have to go through another court process, I do not find it so grievous, bearing in mind that the applicant has a right to exercise his right of appeal.
18. Having considered this application and come to the conclusions I have, I do allow the Notice of Motion application dated November 19, 2021 in terms of order 4 and issue the following order:
 - i. an extension of time to file a notice of appeal is granted. The applicant to file his notice of appeal within 14 days from the date of this ruling and to serve the same on the respondent within 14 days from the date of filing of the notice of appeal herein.



- ii. In default of compliance with the order granted under (i) herein, the extension granted will lapse.

Dated and delivered at Mombasa this 20th day of January, 2023

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

