Majiwa v Otieno (Civil Appeal (Application) E016 of 2021)
[2023] KECA 92 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 92 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E016 OF 2021

SG KAIRU, JA

FEBRUARY 3, 2023

BETWEEN

OBARE MAJIWA ..... APPLICANT

AND

MARTIN OOKO OTIENO ..... RESPONDENT

(Being an application for extension of time to file and serve record of appeal against the judgment of the Environment and Land Court at Mombasa delivered on 29th June 2018 in High Court Civil Case No. 179 of 2016 and that the record of appeal already filed be deemed as though it was properly filed within such extended time)

RULING

1. The applicant, Obare Majiwa, has by his application dated June 8, 2022 sought orders under rule 4 of the *Court of Appeal Rules* that the time limited for filing and service of the record of appeal be extended and that the record of appeal already filed be deemed as though it was properly filed within such extended time.

2. In his affidavit supporting the application, the applicant deposes that the judgment the subject of the intended appeal was delivered by the Environment and Land Court on June 29, 2018; that he was aggrieved and instructed his advocates then representing him, M/s Okanga & Company Advocates to file an appeal on his behalf; that on July 3, 2018, the said advocates filed a notice of appeal but "made no other step towards prosecuting the intended appeal"; that he made "numerous inquiries about the process on the intended appeal" but he was not given a proper status; that on further inquiry, he was "informed that there was an oversight on the filing process and that the memorandum of appeal had not been filed and the sixty days had already lapsed"; that he then decided to instruct the firm of M/s Gikandi & Company Advocates who prepared a memorandum of appeal dated January 20, 2021 and filed it in court on February 15, 2021.

3. The applicant deponed further that his application dated October 6, 2021 filed before the ELC in which he sought extension of time for his record of appeal to be deemed as properly filed was dismissed by that court in a ruling delivered on April 14, 2022 for want of jurisdiction, whereupon the present application was filed on June 14, 2022. He deponed that the claim before the ELC involved ownership of a Swahili house situated on unregistered plot No 23 Sosiani shopping center containing 19 rooms which formed part of the estate of his deceased father Ogola Majiwa upon whose death, the applicant's stepmother, Margaret Aluoch Majiwa sold the property to the respondent without obtaining letters of administration of the estate of Ogola Majiwa.

4. I heard the application on November 7, 2022 when Mr Kabebe, learned counsel, appeared for the applicant. There was no appearance for the respondent despite service of notice of hearing on October 31, 2022.

5. Mr Kabebe orally highlighted the applicant's written submissions dated September 14, 2022 in urging that the delay in filing the appeal was occasioned by the applicant's previous advocates; that on the strength of the decisions of court in *Belinda Murai & 9 others v Amos Wainaina* [1978] eKLR and *Pithon Waweru Maina v Thuku Mugiria*[1983] eKLR, the mistake of the advocate who caused the delay should not be visited on the applicant; that in the former case, there was a delay of 24 years relative to the delay of 2 years in the present case and yet time was extended.

6. It was submitted that the right of appeal is constitutional right under articles 50 and 163 of the *Constitution*; that the balance of convenience tilts in favour of granting the application and that the respondent will not suffer any prejudice if the application is granted.

7. I have considered the application, the affidavit in support, the written and oral submissions and the authorities cited. The legal standard against which the court considers applications of this nature is set out in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR where the Supreme Court expressed 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.

8. Similarly, in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR Waki, J A stated that:

> "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."

9. In effect, the unfettered discretion conferred on the court under rule 4 of the *Court of Appeal Rules* must be exercised judicially and each case must be considered on its own facts. In the present case, the impugned judgment was delivered on June 29, 2018. Although the notice of appeal has not been annexed to the application, the applicant states that he promptly lodged it on July 3, 2018 and that

a formal request for typed proceedings was made on August 2, 2018. Again, a copy of the said letter of August 2, 2018 bespeaking typed proceedings is not annexed to the present application. Going by the date August 2, 2018 given as the date when the request for proceedings was made, that request was made outside the thirty days of the date of the decision on June 29, 2018 as was required under the proviso to rule 82 of the then applicable *Court of Appeal Rules, 2010*.

10. Nevertheless, under the rules, the applicant should have instituted his appeal by lodging his memorandum and record of appeal within sixty days from July 3, 2018. Sixty days would have taken him to September 3, 2018. That was not done. The next activity on the matter was onFebruary 15, 2021 when M/s Gikandi & Company Advocates on behalf of the applicant filed the memorandum of appeal albeit the same was dated three weeks earlier on January 20, 2021.

11. Between September 3, 2018 and January 20, 2021 is a period of over 2 years 4 months. How does the applicant explain that delay? He says that he "made numerous inquiries" with his former advocates and was not given "proper status update." He does not state when he made those inquiries. He goes on to say that "on further inquiry" he was "informed that there was an oversight on the filing process and that the memorandum of appeal had not been filed." There is no indication or mention of when that further inquiry was made. He then depones that upon receiving instruction, his present advocates, M/s Gikandi & Company Advocates prepared the memorandum of appeal dated January 20, 2021.

12. Taking January 2021 as the time the applicant took steps to engage his present advocates, the delay of a period of over two years before doing so is not in my view satisfactorily explained. As the court stated in *Bi-Mach Engineers Ltd v James Kahoro Mwangi* [2011] eKLR, it is not enough for an applicant to simply accuse his advocate of inaction. The applicant had a duty to pursue his advocates and:

> "If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate."

13. In *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, Waki JA stated:

> "It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. It is true as submitted by Mr Wambola that mistakes of counsel may be excusable. The epic dicta of Madan, J A in Murai v Wainaina (No 4) [1982] KLR 38, quickly come to mind:-
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> "A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by 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 interests of justice so dictate."

14. In present case as in that case, the applicant's previous advocates are simply accused of inaction. Moreover, beyond the statement that he made inquiries with the previous advocates, he has not supplied sufficient information in that regard as to when those inquiries were made or why he waited for over two years to change his advocates. See also *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR.

15. I am also concerned that even though he instructed his current advocates in January 2021, the first attempt to remedy the situation by seeking extension of time, albeit in the wrong court, was the

application made before the ELC dated October 6, 2021 which was dismissed by that court on April 14, 2022. And even after the ELC dismissed that application on April 14, 2022, the present application was filed 2 months later June 14, 2022. No explanation at all has been given for that delay.

16. All in all, the applicant has not provided me with sufficient material to enable me to exercise the court's discretion in his favour. Accordingly, the application dated June 8, 2022 and filed in court on June 14, 2022 fails and is hereby dismissed. As the respondent did not participate in the application, I make no orders as to costs.

17. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

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