Attorney General v Kazungu (Civil Application E077 of 2022)
[2023] KECA 357 (KLR) (31 March 2023) (Ruling)

Neutral citation: [2023] KECA 357 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E077 OF 2022

GV ODUNGA, JA

MARCH 31, 2023

BETWEEN

THE ATTORNEY GENERAL ..... APPLICANT

AND

DR JOHNNSON KAZUNGU ..... RESPONDENT

(Being an application for extension of time for service of a Notice of Appeal from the decision of the Honourable Justice Byram Ongaya Delivered on June 17, 2022 in Employment and Labour Relations Court Cause No 55 of 2020)

RULING

1. The Attorney General, the applicant herein, moved this court by a Motion on Notice dated October 28, 2022 seeking, in substance that this court be pleased to order an extension of time for service of the Notice of Appeal dated June 30, 2022 and lodged on July 4, 2022.

2. According to the applicant, due to an omission on the part of the court clerk entrusted with the task of filing and service of the Notice of Appeal, although the Notice of Appeal was lodged on July 4, 2022, the same was not served within the prescribed 7 days. It was deposed by the said court clerk that during the time of the filing of the said notice, he was the only clerk at the applicant's Mombasa office as his colleagues were on leave. However, he suddenly fell ill and by the time he returned to work, the documents awaiting his attention and service were very many. As a result, by the time he saw the Notice of Appeal, the prescribed seven days limited for service of the Notice of Appeal had lapsed.

3. The said court clerk explained that though he sent a letter requesting for the proceedings to the respondent's advocates vide post, he did not send the Notice of Appeal. It was his deposition that the omission to do so was not deliberate and he annexed a copy of the sick sheet to support this position. According to him, the delay is not inordinate as the typed proceedings are yet to be furnished to him. Accordingly, no prejudice is occasioned to the respondent by the delay.

4. In the submissions filed on behalf of the applicant which were highlighted by learned counsel Ms Opio this court was urged not to visit the mistakes of counsel or court clerk on the applicant and reliance was placed on *County Executive of Kisumu vs County Government of Kisumu and 8 Others* [2017] eKLR, *Kibunja v Kariuku and Others* [2021] KECA 384 and *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR.

5. In response to the application, the respondent noted that that the application is in the name of the Attorney General who has not filed any Notice of Appeal against the judgment of the Employment and Labour Relations Court. It was further noted that the application is not signed contrary to the prescribed Form A which requires that Motion be signed. Accordingly, it was contended that there is no valid application for extension of time before the court hence the application ought to be dismissed as a nullity.

6. It was further noted that whereas the notice of appeal for which the court is asked to extend time to serve says that the intended appeal is going to be against parts of the judgment appealed from, it does not specify the parts as required by the rules. It was therefore the respondent's position that the Notice of Appeal is defective and extending time to serve it will not cure the defect in it or in the appeal that will be filed.

7. From the record, it was noted that while the letter requesting for the proceedings was received on July 7, 2022, the deponent of the supporting affidavit did not explain who delivered it when he had been given sick off from July 4, 2022 to July 8, 2022. He was therefore doubtful as to the truthfulness of the averments in the supporting affidavit and urged the court to dismiss the application with costs.

8. On behalf of the respondent, it was submitted by Mr Mwenesi that where there is no valid notice of appeal, time cannot be extended. In support of the submission, reliance was placed on *Ogumbo v Kyambo & Another* [2022] eKLR, *Hanos (K) Ltd v Dhiren Mohanlal Shah* [2021] eKLR and *Ramji Devji Vekaria v Joseph Oyula* [2011] eKLR and the Court was urged to dismiss the application.

9. I have considered the application, affidavit in support of and in opposition to the application, the submissions and the authorities cited.

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 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.

11. 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 vs 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."

12. 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.

13. In this case, what is sought is the extension of time within which to serve a Notice of Appeal. In those circumstances, the applicant ought to show that there exist a Notice of Appeal whose time to be served is sought. In other words, the court cannot extend time to serve a non-existent Notice of Appeal. However, it is my view that a distinction must be made between the existence of "a Notice of Appeal" and a valid "Notice of Appeal". Just like in applications for stay of execution the applicant is not expected, at the stage of seeking extension of time to show that its Notice of Appeal is valid. This is because at that point the court is not concerned with the validity or otherwise of that Notice. This court therefore expressed itself in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR as hereunder:

> " The applicant filed its notice of appeal against the said decision on May 26, 2005; the court accordingly has jurisdiction to hear and determine the motion for stay. Mr Ohagga, learned counsel for the respondents Aquinas Francis Wasike (1st respondent) and Lantech Ltd. (2nd respondent) tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out Rule 5 (2) (b) does not provide that "..... where a valid notice of appeal ....;" the Rule simply provides that: -
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> 'In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74 ' rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under rule 5 (2) (b) is being considered."

14. The reason why this court, presiding over by a single judge cannot delve into the issue of the validity or otherwise of the Notice of Appeal is because that is an issue preserved for the full bench pursuant to rule 55 of the rules of this court. See *Attorney General v Kamlesh Mansukhlal Damji Pattni & 2 Others* Civil Application No Nai 59 of 1999. Accordingly, I decline to make a determination on whether the Notice of Appeal is valid for failure to state the part of the decision the intending appellant seeks to challenge.

15. Regarding the contention that the Notice of Appeal was not signed, I have confirmed that the copy of the Notice of Appeal that forms part of this record was duly signed and that is what matters and not the copy that was served on counsel.

16. That said, it is however my view that the party seeking extension of time to be permitted to serve the Notice of Appeal must be the party seeking to appeal. A stranger to a Notice of Appeal cannot therefore move the court for extension to serve a Notice of Appeal filed by a different party. This must be so because the court when extending time does so to a particular party and not to the whole world. For example, where A is granted extension of time to file an appeal out of time, B cannot rely on the same to file an appeal but may, where circumstances permit file a Notice of Cross-Appeal.

17. In this case, the Notice of Appeal whose extension of time to serve is sought states that the person intending to appeal is Kenya Marine & Fisheries Research Institute. However, the applicant in this application is the Attorney General. Ms Opio's position is that since the Attorney General represents the government in legal proceedings, there is nothing wrong in the application being brought in the name of the Attorney General.

18. Kenya Fisheries and Marine Institute was established under the repealed Science and Technology Act, and was, pursuant to section 13 thereof, a body corporate with perpetual succession and a common seal with the power to sue and be sued in its corporate name and to acquire, hold and dispose of movable and immovable property for its own purposes. Upon the repeal of the said Act by the *Science, Technology and Innovation Act*, No 28 of 2013, section 53 thereof provides that:

> The research institutes set out in the Fourth Schedule which were established under the repealed Act shall continue to operate as if they
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> had been accredited under this Act and shall forthwith each be issued with a Certificate of Registration by the Commission.

19. It follows that Kenya Fisheries and Marine Institute continue to have the status of a body corporate with perpetual succession and a common seal with the power to sue and be sued in its corporate name. I believe that it was due to that corporate capacity that it became a party to the proceedings from which the Notice of Appeal has been filed. Whereas it may not be objectionable for the office of the Attorney General to represent Kenya Fisheries and Marine Institute in legal proceedings, it is another thing altogether for proceedings to be brought in the name of the Attorney General as a party, particularly where the proceedings are at appellate stage and the Office of the Attorney General was not a party to the proceedings appealed against. This Court in Joseph Nathaniel Kipruto Arap Ng'ok v Attorney General (On Behalf of the Permanent Secretary Ministry of Trade & Industry) & another [2010] eKLR expressed itself as hereunder:

> The AG cannot competently step into the shoes of a state corporation which has power to sue and be sued in its corporate name and institute a suit in his own name on behalf of a state corporation. The suit can only be instituted in the name of the specific state corporation.

20. In the circumstances I agree with the respondent that the application before me is incompetent. In those circumstances, I am not called upon to determine the merits of the motion. Consequently, the motion dated October 28, 2022 is hereby struck out with costs to the respondent.

21. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF MARCH, 2023.

G V ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR