



**Khamisi & 4 others v Khamisi & another (Civil Application
E004 of 2022) [2023] KECA 356 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 356 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E004 OF 2022
GV ODUNGA, JA
MARCH 31, 2023**

BETWEEN

**AUSTIN SADALA KHAMISI 1ST APPLICANT
CATHERINE WAIHIRA NDAMBIRI 2ND APPLICANT
AGNES NYALE MWANGEMI 3RD APPLICANT
JOSEPHINE MURINGO NDAMBIRI 4TH APPLICANT
MERCY ROSELINE NDAMBIRI 5TH APPLICANT**

AND

**THOMAS JERRY KHAMISI 1ST RESPONDENT
EDWARD MWAMUYE MWADZOYA 2ND RESPONDENT**

(Being an application for extension of time to file and serve the Notice of Appeal and Record of Appeal out of time against the Ruling and/or orders of the Environment and Land Court of Kenya at Malindi (Hon. Mr Justice J. O. Olola) dated 16th July, 2021 in Malindi Environment and Land Case No. 33 of 2018)

RULING

1. The Applicants moved this court by a Motion on Notice dated March 9, 2022 seeking extension of time to lodge a Notice of Appeal and Record of Appeal out of time against the ruling of the Environment and Land Court at Malindi dated July 16, 2021 in ELC Case No 33 of 2018 – Thomas Jerry Khamisi & Another vs Austin Sadala Khamisi & 4 Others. They seek that in so doing, the Court should deem the Notice dated September 6, 2021 and the Record of Appeal dated March 7, 2022 deemed as properly filed.



2. The application was argued on virtual platform on February 28, 2023 when Learned Counsel, Mr Mbura appeared for Mr Kilonzo appeared for the Applicants while Ms Mulemiah appeared for Mr Nyongesa for the Respondents.
3. According to the applicants, on the day the matter came up for hearing their advocates on record instructed another advocate to hold their brief and apply for adjournment of the hearing to enable the Applicants fully prepare for the hearing but the plea was rejected by the court and since the said advocate was not fully conversant with the matter he did not participate in the hearing hence the Applicants were unrepresented. Accordingly, the defence case was closed. Though an application was made to set aside the said proceedings, that application was not heard and on April 29, 2020, judgement was delivered in the matter. A subsequent application for setting aside the said judgement was dismissed on July 16, 2021. However, the Applicants were unaware of the said ruling since their advocates on record then, did not inform them of the same and by the time they became aware of the ruling, the time limited for filing a Notice of Appeal had lapsed.
4. Upon becoming aware of the said ruling, the Applicants instructed another firm of advocates who immediately filed a Notice of Change of Advocates and a consent to come on record and proceeded to request for copies of the proceedings, judgement and decree as well as the ruling. They then filed a Notice of Appeal dated September 6, 2021 against the decision of July 16, 2021 and served the said Notice upon the Respondents.
5. According to the Applicants by the time they received copies of the proceedings, the time prescribed for filing the record of appeal had similarly lapsed. According to the applicants, the delay in filling this application and Appeal was also occasioned by the fact that their former advocates on record failed to release their file in time to their advocates on record coupled with the delay in furnishing their advocates with the proceedings. It was disclosed that the applicants only obtained the filled pleadings from the Superior Court after their advocates wrote to the Court vide letters dated February 14, 2022 and February 17, 2022.
6. According to the Applicants, they have an arguable Appeal with good prospects of success for and that the intended appeal is not frivolous as it involves loss of substantial property interest affecting several persons that have been denied a hearing.
7. It was their case that the balance of convenience clearly weighs in their favour owing to the fact that they are likely to lose their properties if the orders sought herein are not granted. In their view, no prejudice will be occasioned on the Respondent if the orders sought herein are granted.
8. In opposing the application, the Respondents averred that the ruling was delivered following a notice sent by Court through the emails of the advocates of the parties and other counsel in other cases on July 6, 2021 and a further email on July 12, 2021. The notice was also posted on the Kenya law website after the same notice was sent to Kenya Law. According to them, the court could not notify the applicants individually since they had an advocate on record.
9. They averred that there was also no proof the applicants followed up on the progress of their case with their advocate as diligent litigants. It was stated that the ruling sought to be appealed against was delivered on July 16, 2021 and the applicant filed the application before court on March 29, 2022 and that the delay is not explained at all. To the Respondents, in the absence of a Certificate of Delay from the superior court certifying the delay in the compilation and typing of the proceedings as being attributable to it, the applicants' allegation that the delay in filing this application and subsequent appeal was due to delay in typing remain unjustifiable. It was contended that the letter asking for typed



proceedings was never served upon the respondent's advocate as required under the Court of Appeal Rules.

10. The Respondents contended that the applicant was not candid since from the annexures attached to the supporting affidavit, the current advocates purportedly came on record on September 8, 2021 then requested typed proceedings on September 7, 2021 and then filed a consent allowing them to come on record on September 13, 2021. In their view, it is improbable that the advocates asked for proceedings before they came on record, later came on record and then filed a consent allowing them to come on record.
11. The Respondents refuted the allegation that the inordinate delay has been because of the previous counsel and averred that the applicants' conduct has always been that of dillydallying, lackadaisical and forum-shopping in their conduct of this case. It was stated that through their former advocate, the applicants filed an application seeking stay pending appeal and leave to appeal out of time, dated July 9, 2020 before they instructed their then advocates to abandon it because they saw no need for stay and leave to appeal out of time. They are now before this Court with a similar application claiming that the delay in filing the 'appeal' and 'leave to appeal out of time' was due to their previous advocate's delay.
12. It was their case that that the mandate of the Court under Article 159(2) in so far as it is discretionary, is not for this Court to encourage indolent litigants. They denied that the applicants were denied a hearing and substantive justice when it is their indolence and lackadaisical manner when dealing with their case at the superior court that led to their predicament. In the Respondents' view, no substantial loss will be suffered by the applicants because none of them resides on the suit property and none of them is in actual possession of the property. To the contrary, the applicants want to continue collecting rent from tenants who are staying on the property, tenants they put on the premises while the case was pending contrary to court orders of the court. They were accordingly accused of not coming to Court with clean hands.
13. The Respondents lamented that this application is prejudicial to us as we will not be able to enjoy the fruits of justice in this matter more than three years down the line and urged that the application be dismissed.
14. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon.
15. 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.



16. Those principles were restated by Waki, JA in [*Fakir Mohamed vs 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 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.*'

17. 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.

18. In this case, the Applicants rely on the fact that they were let down by their erstwhile counsel who did not notify them of the date of the ruling which they intend to appeal against. Further the said Counsel failed to release to them the file in order for their new Counsel to take up the matter and that there was also a delay in furnishing them with the proceedings by the Court.

19. The application is opposed principally on the ground that the Applicants' past conduct is undeserving of the exercise of the discretion by this Court. Further the delay has not been explained and the delay will prejudice the Respondent who is unable to enjoy the fruits of his judgement.

20. In *Leo Sila Mutiso vs Helen Wangari Mwangi Civil Application No Nai 255 of 1997 [1999] 2 EA 231* this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly, the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

21. In this case it is contended that the applicants were let down by their counsel. It is not, as the Respondents has understood it, the Court that is being blamed. As was held in [*Sbital Bimal Shab & 2 Others vs Akiba Bank Limited Civil Appeal \(Application\) No 159 of 2005 \[2006\] 2 EA 323:*](#)

' An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the Rules of the Court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake.



A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a 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 interest of justice so dictate.'

22. The matter before me is not an application for stay. What is being sought is the validation of the already filed Notice of Appeal and the Record of Appeal. The broad approach in these matters is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. The question for the purposes of this kind of application is whether is merely that the order will inevitably lead to some delay but it is my view that the delay that is likely to be occasioned thereby must be weighed against the denial of an opportunity to the Applicant to put forward its case on merits. In considering the exercise of discretion, the Court must consider the risk of injustice if the court found in favour of the Respondent, than if it determined this application in favour of the applicant and having considered that to opt for the lower rather than the higher risk of injustice. This is the principle of proportionality under the overriding objective. That delay, may be compensated by an award of costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See *Waljee's (Uganda) Ltd vs Ramji Punjabbai Bugerere Tea Estates Ltd [1971] EA 188*.
23. In this case, the record of appeal has already been filed and the appeal is seeking the setting aside of the order closing the case without the applicants being heard.
- It is my view that the broad interest of justice requires that the discretion be exercised in favour of the appeal being heard. Having considered the issues raised in this application, I find no serious prejudice that is likely to be occasioned to the Respondents by allowing this application. The Respondents can be adequately compensated in costs.
24. In the premises I allow the application, extend the time for filing and serving the Notice of Appeal and the Record of Appeal with such period as would validate the same.
25. The costs of this application are awarded to the Respondents.
26. 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

