



**Director of Public Prosecutions v Kanya t/a Kanyi J & Company Advocates & 11 others; Ethics and Anti-Corruption Commission & another (Interested Parties) (Civil Application 59 of 2020) [2023] KECA 312 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 312 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 59 OF 2020  
P NYAMWEYA, JA  
MARCH 17, 2023**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT**

**AND**

**JOSEPH KARANJA KANYA T/A KANYI J & COMPANY  
ADVOCATES ..... 1<sup>ST</sup> RESPONDENT  
KIKAMBALA DEVELOPMENT COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT  
JANE NJERI KARANJA ..... 3<sup>RD</sup> RESPONDENT  
FREDRICK OTIENO OYUGI ..... 4<sup>TH</sup> RESPONDENT  
MAURICE MILIMU AMAHWA ..... 5<sup>TH</sup> RESPONDENT  
EPHRAIM MAINA RWINGO ..... 6<sup>TH</sup> RESPONDENT  
SELINE CONSULTANTS LIMITED ..... 7<sup>TH</sup> RESPONDENT  
JOAN ZAWADI KAREMA ..... 8<sup>TH</sup> RESPONDENT  
RENSON THOYA JUMA ..... 9<sup>TH</sup> RESPONDENT  
HARRY JOHN PAUL ARIGI ..... 10<sup>TH</sup> RESPONDENT  
JOY KAVUTSI MUDAVADI ALIAS JOY K ASIEMA ..... 11<sup>TH</sup> RESPONDENT  
KENYA PORTS AUTHORITY RETIREMENT BENEFIT SCHEME .... 12<sup>TH</sup>  
RESPONDENT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY  
CHIEF MAGISTRATE'S COURT, MOMBASA ..... INTERESTED PARTY**



*(An application for extension of time to serve the Notice of Appeal dated 20th May 2020 and filed on 22nd May 2020 out of time in an intended appeal from the judgment of the High Court of Kenya at Mombasa (E. K. Ogola J.) dated 12th May 2020 in Mombasa Constitution Petition No. 1 of 2019)*

**RULING**

1. The Director of Public Prosecutions, the Applicant herein, seeks extension of time to serve its Notice of Appeal dated 20<sup>th</sup> May 2020 and filed on 22<sup>nd</sup> May 2020 upon the Respondents herein, and that the Notice of Appeal served upon the Respondents between 2<sup>nd</sup> and 3<sup>rd</sup> June 2020 be deemed to have been properly served within time. The said Notice of Appeal is against a judgment of the High Court of Kenya at Mombasa (E. K. Ogola J.) delivered on 12<sup>th</sup> May 2020 in Mombasa High Court (Anti- Corruption and Economic Crimes, Division) Constitutional Petition No. 1 of 2019. These prayers are in a Notice of Motion application dated 3<sup>rd</sup> August 2020, which is supported by an affidavit sworn on even date by Berryl Marindah, a Prosecution counsel with the Applicant.
2. The Applicant's case is that the impugned judgment was scheduled to be delivered on 24<sup>th</sup> March 2020, but was thereafter delivered on 12<sup>th</sup> May 2020 in the absence of the Applicant, who was not served with the notice of delivery of the judgment. That after learning of the said judgment, which quashed its decision to charge and prosecute the Respondents herein, the Applicant applied for certified copies of the proceedings, and simultaneously and timeously filed its Notice of Appeal within the requisite 14 days. However, that they served the Respondents on 2<sup>nd</sup> and 3<sup>rd</sup> June 2020, and that the failure to serve the Respondents within the requisite 7 days was occasioned by the Government of Kenya COVID - 19 containment measures, including cessation of movement in and out of Nairobi and Mombasa counties and social distancing requirements which limited access to the Court and the advocates' office. The Applicant further contended that they did not have the Respondents' email addresses to enable them serve the Respondents electronically by way of substituted service. That the delay was therefore explainable, reasonable and excusable in the circumstances.
3. The Applicant further argues that the 3-day delay was not inordinate, and that the appeal raises matters of great public interest and should be heard on its merits. Additionally, that the intended appeal has a high chance of success therefore it was in the interest of justice and fairness that the Notice of Appeal be deemed duly served and upon the Respondents and the substantive appeal. Lastly, that the Respondents would not suffer any prejudice if this Court enlarged time for the service of the Notice of Appeal. The Applicant attached copies of a letter dated 20<sup>th</sup> May 2020 addressed to the Deputy Registrar, High Court of Kenya at Mombasa requesting for certified Copies of the proceedings and judgment, of the Notice of Appeal dated 20<sup>th</sup> May 2020 and lodged on 22<sup>nd</sup> May 2020, the Kenya Gazette dated 6<sup>th</sup> April 2020 containing the Legal Notices containing the COVID 19 containment measures, and a draft memorandum of appeal.
4. Mr. Gikandi Ngibuini, the advocate having conduct of the matter on behalf of the 1<sup>st</sup> Respondent filed a replying affidavit he swore on 13<sup>th</sup> October 2020 in opposition to the application. The counsel asserted that since the Applicant timeously lodged its Notice of Appeal on 22<sup>nd</sup> May 2020, the alleged lack of knowledge of the date of the delivery of the judgment was a non-issue. According to the 1<sup>st</sup> Respondent, the Applicant served the Notice of Appeal out of time, and the effect of the late service was the subject before this Court in Civil Applications No. 183 and 184 of 2020 respectively, and it



- was found that the impugned notice was served without leave. The 1<sup>st</sup> Respondent contended that their advocate's offices were within Mombasa Central Business District, yet the Applicant had failed to render any explanation as to why they could file the Notice of Appeal in this Court but failed to serve it upon the said advocates. Additionally, that the 1<sup>st</sup> Respondent's advocate's email address had been readily available on their website and at the Law Society of Kenya. The 1<sup>st</sup> Respondent concluded that filing of the instant application during the pendency of two applications challenging the Notice of Appeal was an erroneous assumption that extension of time was obtainable as of right.
5. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents also filed a replying affidavit opposing the application, which was sworn on 14<sup>th</sup> September 2020 by Fredrick Ouma Adhoch, an advocate having conduct of the matter on their behalf. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents reiterated the averments made by the 1<sup>st</sup> Respondent, save to add that their advocate's office was right opposite Mombasa Law Courts, yet the Applicant failed to serve them with the Notice of Appeal.
  6. During the virtual hearing of the application was held on 1<sup>st</sup> February 2023, learned counsel Mr. Owiti appeared for the Applicant, learned counsel Mr Kabebe holding brief for learned counsel Mr. Gikandi Ngibuini appeared for the 1<sup>st</sup> Respondent, learned counsel Mr. Adhoch together with learned counsel Mr. Nelson Achoka appeared for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents, learned counsel Mr. Omwenga appeared for the 5<sup>th</sup> Respondent, while learned counsel Mr. Henry Kariuki appeared for the 12<sup>th</sup> Respondent and held brief for learned counsel Mr. Munyao for the 11<sup>th</sup> Respondent. There was no appearance for the 8<sup>th</sup> to 11<sup>th</sup> Respondents and 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, despite their advocates having been duly served with the hearing notice.
  7. Mr. Owiti relied on his written submissions dated 27<sup>th</sup> January 2023 and identified the single issue for determination as whether or not the Applicant had made a case for the enlargement of time for service of the subject Notice of Appeal. The counsel reiterated the reasons for the delay in serving the Notice of Appeal, and submitted that the delay was therefore explained and was excusable. Additionally, that this Court has power to extend the timelines for compliance, and the counsel cited Rules 4 and 17 (1) of this Court's Rules of 2010, to the effect that the Court could for sufficient reason extend or reduce timelines upon such terms and conditions it deemed just and expedient. They also placed reliance on the holding in the case of *Mistry Premji Ganji (Investments) limited v Kenya National Highways Authority* [2019] eKLR that failure to serve the Notice of Appeal on time may be excused for good reason(s), if the appellant is able to satisfy the Court that the same was excusable in the circumstances.
  8. The Applicant's application was supported by Mr. Kariuki, the counsel for the 12<sup>th</sup> Respondent, in oral submissions made during the hearing.
  9. On the other hand, Mr. Kabebe, while relying on written submissions dated 26<sup>th</sup> April 2021, submitted that the requirements for the exercise of the Court's discretion to extend time were laid down in the case of *Fakir Mohammed vs Joseph Mugambi & 2 others* [2005] eKLR. Further, that the Applicant attributed the delay in serving the Notice of Appeal in time to the Covid 19 containment measures, and yet they were able to file the Notice of Appeal in Court at the same period during the said Covid 19 restrictions, and in any event there were no Covid 19 restriction movements within Mombasa where both the Respondents and the Applicant were resident. In addition, that there were at the time Practice Directions on Electronic Case Management published in Gazette Notice No. 2357 of 4<sup>th</sup> March 2020 which the Applicant did not comply with.
  10. Further, that the fact that no explanation had been tendered by the Applicant on the efforts made to obtain the Respondents' email addresses was a clear indication of laxity on its part, and it therefore had no reason for not serving the impugned Notice of Appeal within time. The counsel submitted that the reason for the delay must be plausible, and placed reliance on the case of *Andrew Kiplagat Chemaringo*



vs Paul Kipkorir Kibet [2018] eKLR where the Court stated that the law does not set out any minimum or maximum period of delay, and all it states is that any delay should be satisfactorily explained.

11. Mr Adhoch and Mr. Achoka on their part, while supporting the submissions made by Mr. Kabebe, in addition submitted that the provisions of Rule 77 (1) of the Court of Appeal Rules of 2010 are mandatory, and a sufficient explanation for the delay in service must be provided. Reliance was also placed on the holding in the case of Kericho Technical Institute vs Finmax Community Based Group & 3 others [2016] eKLR, where the Court stated that the requirement for service of a notice of appeal is not a mere technicality. Therefore, that the Applicant failed to render a candid and satisfactory explanation for the delay and they are not deserving of the orders sought. Lastly, Mr. Omwenga, the counsel for the 5<sup>th</sup> Respondent, associated himself with the submissions made by the counsel for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents, while also pointing out that the Applicant had not demonstrated that it had an arguable appeal.
12. Various references has been made by the parties herein to the applications in Civil Applications No. 183 and 184 of 2020, and the relationship between the said applications and the instant application needs to be clarified at the outset. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Respondents herein had filed the applications in Civil Applications Nos. 183 of 2020 and No. 184 of 2020, which were both dated 26th June 2020, seeking to have the Applicant's Notice of Appeal dated 20th May 2020 and lodged on 22nd May 2020 struck out for reasons that it was served on the Respondents outside the stipulated timelines without leave.. After hearing the parties, this Court (Gatembu, Nyamweya & Lesiit JJA) made the following orders in a ruling delivered thereon on 16<sup>th</sup> December 2022:
  - (1) The Civil Application Nos. 183 of 2020 and 184 of 2020 dated 26th June 2020 are allowed.
  - (2) The order allowing the applications dated 26th June 2020 in (1) above is suspended pending the outcome of Civil Application No. 59 of 2020 filed by the 1<sup>st</sup> Respondent.
  - (3) The Civil Application No. 59 of 2020 be fixed for hearing on a priority basis by the registry.
13. In effect therefore, the validity of the Applicant's Notice of Appeal dated 20th May 2020 and lodged on 22<sup>nd</sup> May 2020 is dependent on whether this Court extends time or not for its service on the Respondents. In this regard, while the discretion of this Court to extend time under Rule 4 of the Court of Appeal Rules may be unfettered, it must still be exercised judiciously. The factors that govern the exercise of the discretion to extend time under the said Rule were well stated in the case of Leo Sila Mutiso vs Rose Hellen Wangare Mwangi Civil Application No Nai 255 of 1997 (ur) as being the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted. Rule 77(1) of the Court of Appeal Rules of 2010 which was then applicable, required that a Notice of Appeal, once lodged, was to be served within seven days on all parties affected by the appeal. The same requirement is now found in Rule 79 (1) of the Court of Appeal Rules of 2022.
14. It is not in dispute that the judgment intended to be appealed from by the Applicant was delivered on 12<sup>th</sup> May 2020, and that the Notice of Appeal was timeously lodged on 22<sup>nd</sup> May 2020, but was served out of time on the Respondents on 2<sup>nd</sup> and 3<sup>rd</sup> June 2020. The relevant period of delay that requires to be explained therefore, is firstly the 3-day delay in serving the Notice of Appeal, and secondly, the delay of about two months between 3<sup>rd</sup> June 2020 and the date of lodging of the instant application for extension of time on 14<sup>th</sup> August 2020.
15. I have considered the reasons for the delay proffered by the Applicant, and this Court in this regard takes judicial notice of the disruptions caused to Court operations by the Covid-19 pandemic.



However, as noted by the Respondents, it is not plausible how the Applicant managed to file the Notice of Appeal timeously when the Covid 19 restrictions were already in place, yet failed to serve the Respondents' advocates, whose offices were demonstrated to have been within Mombasa town. The 3- day's delay in service of the Notice of Appeal, while not lengthy, has in the circumstances not been fully explained. The Respondents have also pointed out that there were electronic case management guidelines in place at the time, and the Applicant did not bring any evidence of any attempts to utilise this option in serving the Notice of Appeal. It is also notable that the Applicant has not explained the delay between the date of service of the Notice of Appeal on 2<sup>nd</sup> and 3<sup>rd</sup> June 2020 and the date of lodging of the instant application on 14<sup>th</sup> August 2020.

16. I therefore find that the reasons provided by the Applicant for the delay in serving the Notice of Appeal are not plausible, and that the delay has not been satisfactorily explained and is therefore inexcusable. I consequently decline to exercise discretion to extend time, and accordingly dismiss the Applicant's Notice of Motion application dated 3<sup>rd</sup> August 2020. The costs of the application are awarded to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents.
17. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH 2023.**

**P. NYAMWEYA**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original Signed*

**DEPUTY REGISTRAR**

