



REPUBLIC OF KENYA



**Said v Shume (Civil Application E024 of 2022)
[2023] KECA 292 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 292 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E024 OF 2022
GV ODUNGA, JA
MARCH 17, 2023**

BETWEEN

HUSSEIN ABDALLA SAID APPLICANT

AND

YAWA CHOME SHUME RESPONDENT

(Being an appeal from the judgement and decree of the Environment and Land Court at Malindi (Hon. Mr Justice J. O. Olola) dated 26th June, 2019 in Malindi Environment and Land Case No. 52 of 2010)

RULING

1. Hussein Abdalla Said, the applicant herein, moved this court by a motion on notice dated November 2, 2022 expressed to be brought pursuant to rule 4 of the *Court of Appeal Rules*, sections 3A and 3B of the *Appellate Jurisdiction Act* cap 9 of the Laws of Kenya and article 159 of the *Constitution 2010*. The motion sought extension of time to file/lodge and serve the notice and the record of appeal and that the notice and record of appeal in Malindi Civil Appeal No 152 of 2019 be readmitted and deemed to be the notice and record of appeal respectively for the purposes hereof.
2. The applicant's case is that he was aggrieved by the judgement delivered by the Environment and Land Court in ELC Case No 52 of 2010 on June 26, 2019 and instructed his counsel on record then to commence an appeal against the said decision. Unfortunately, the said advocate upon filing the notice of appeal failed to serve it within the prescribed time. The applicant then instructed another firm of advocate to handle his appeal but due to the ensuing confusion the new advocate proceeded to prepare the record of appeal without regularising the service of the notice of appeal.
3. As a result of the foregoing the applicant's record of appeal was struck out on February 4, 2022. Though the applicant subsequently sought extension of time to serve the notice and record of appeal,



his application was dismissed on the ground that there was no notice of appeal that could be served, the earlier notice having been struck out with the record.

4. According to the applicant his intended appeal is meritorious and raises matters of general public importance as regards the sanctity of title.
5. In opposing the application, the respondents filed grounds of opposition in which they contended that what is sought is that this court sits on appeal on its decision striking out the earlier record and notice of appeal and the subsequent ruling dismissing the application for extension of time to serve the notice of appeal hence the application is an abuse of the court process. It was therefore contended that the matter is *res judicata* and that the applicant has not explained the inordinate delay.
6. It was submitted that this court cannot reinstate documents which have been struck out.
7. I have considered the application, affidavit in support of the application, the grounds of opposition to and the submissions.
8. 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.
9. 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 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.”

10. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v 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.



11. In this case, the factual averments are not disputed. The respondent has taken issue that since the earlier proceedings were struck out, to entertain this application would amount to this court sitting on appeal on the earlier decisions. With due respect that position cannot hold. Once an appeal is struck out, nothing prevents a party from starting the process a fresh by seeking extension of time to file a fresh record of appeal which is what the applicant herein is seeking. That his earlier application seeking service of the non-existent notice of appeal was similarly disallowed does not bar him from moving this court for proper or appropriate reliefs. Accordingly, this application does not fall afoul of the principle of res judicata.
12. 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 v Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.
13. Having considered the issues raised in this application, I find no serious prejudice that is likely to be occasioned to the respondent by allowing this application. However, it is my view that a struck out appeal cannot be reinstated by a subsequent application seeking extension of time to lodge a fresh appeal. Different proceedings have different numbers and once an appeal is struck out, unless that very appeal is reinstated, a fresh appeal cannot bear the same number.
14. In the premises I allow the application, extend the time for filing and serving the notice of appeal and the record of appeal with a further period of 30 days from today's date.
15. The costs of this application are awarded to the respondent.
16. It is so ordered.

Dated and delivered at Mombasa this 17th 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

