



REPUBLIC OF KENYA



**Mutisya v Hemuth (Civil Application 66 of 2019)
[2023] KECA 418 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 418 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION 66 OF 2019
GV ODUNGA, JA
APRIL 14, 2023**

BETWEEN

MARIA MUTISYA APPLICANT

AND

KIENZL HEMUTH RESPONDENT

(Being an intended Appeal from the Judgement of the Environment and Land Court of Kenya at Mombasa by Honourable Justice C. Yano delivered on 20th September, 2018 in the Environment and Land Case No. 8 of 2015)

RULING

1. The Applicants moved this court by a Motion on Notice dated July 23, 2019 seeking extension of time to lodge the Record of Appeal out of time against the Judgement and subsequent decree of the Environment and Land Court at Mombasa delivered at Mombasa by Honourable Justice C Yano on September 20, 2018 in the Environment and Land Case No 8 of 2015.
2. According to the applicant, being aggrieved by the said judgement, she filed a Notice of Appeal dated the 21st of September 2018 and on October 8, 2018, requested for proceedings and judgement. However, the time for filing the Record of Appeal lapsed hence the application seeking to have the time extended.
3. It was the Applicant's case that the delay in filing the Record of Appeal was occasioned by the erstwhile advocate on record and should not be visited upon her. In her view, the Applicant's intended appeal has high chances of success and that the Respondent herein will not suffer any prejudice if the Application is allowed.
4. In response to the application, the Respondent herein swore a replying affidavit on August 16, 2019, in which he deposed that he had sold the suit property to a third party and was no longer the registered owner thereof. According to him, the applicant ought to pursue the registered owner as the matter has



- now been overtaken by events. It was the Respondent's view that the Applicant ought to deposit the costs awarded as security for costs as a condition for proceedings with her appeal.
5. It was averred that there is no consent filed between the former advocate and the current advocate for the applicant that would enable the latter file the present application.
 6. According to the Respondent, no explanation has been given as to why the appeal has not been filed within the prescribed time.
 7. In her submissions, the applicant, through her learned counsel, Mr Gicharu Kimani, reiterated the contents of the supporting affidavit and emphasised that the applicant ought not to suffer for the oversight by her erstwhile advocates. It was further submitted that the delay involved is not so inordinate.
 8. In support of her case, the applicant relied on *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR and *Richard Ncharpi Leiyangu v Independent Electoral and Boundaries Commission* [2013] eKLR.
 9. On behalf of the Respondent, it was submitted, through his learned counsel, Ms Omollo, that extension of time cannot be granted when no leave to appeal has been obtained. According to the Respondent, he has applied to have the appeal struck out on that very ground. In support of his submissions, the Respondent relied on, *inter alia*, *Isaac Mbugua Ngirachu v Stephen Gichobi Kaara* [2021] eKLR and *Nyutu Agrovet vs Airtel Networks Ltd* [2015] eKLR.
 10. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon. From the outset, I must state that the parties herein have, with due respect, treated this matter rather casually. For example, the nature of the decision sought to be appealed against is not disclosed. Without that disclosure, the Respondent's submissions that leave to appeal was necessary is not substantiated.
 11. 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.
 12. 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.”

13. 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.
14. 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 ie 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.
15. In this case, the Applicant averred that whereas she filed her Notice of Appeal promptly and requested for proceedings, the same were not supplied to her till after the period limited for filing a record of appeal had lapsed. On the other hand, the Respondent’s position is that the property the subject matter of the dispute has changed hands hence the matter has been overtaken by the events.
16. Starting with the Respondent’s averment, the mere fact that the subject matter of the dispute is no longer in existence does not deprive a party from challenging the judgement. Even in cases where execution has been completed, the Court cannot deny a party desirous of exercising his or her right to appeal from doing so. A right cannot be taken away simply because some intervening event has taken away the substratum of the matter. See *Machakos District Co-Operative Ltd v Nzuki Kiilu* Civil Application No Nai 17 of 1997 and *Seventh Day Adventist Church East Africa Ltd & Another v M/S Masosa Construction Company* Civil Application No Nai 349 OF 2005.
17. The Respondent also alluded to the fact that there is a pending application to strike out the appeal. However, sitting as single Judge it is not within my province to deal with the competency of the appeal.
18. Regarding the issue of security for costs, that is an issue which ought to be properly presented in an appropriate application and not in response to an application for extension of time.
19. Going back to the reason why the appeal was not filed within the prescribed time, if the Applicant’s contention is true that she requested for the proceedings within time and copied that request to the advocates for the Respondent, then she would be entitled to the benefit of Rule 84 of the *Court of Appeal Rules*, 2022 which provides as follows:
 1. Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
 - a. a memorandum of appeal, in four copies;



- b. the record of appeal, in four copies;
- c. the prescribed fee; and
- d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- 2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.
 - 3. The period specified in sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.
20. I have myself perused the copy of the letter requesting for proceedings and on the face of it, it does not appear to have been copied to the Respondent's Advocates. If it was not so copied, then its benefit cannot accrue to the Applicant. In those circumstances, the only recourse available to the Applicant is to seek for extension of time to lodge the appeal or to deem the already filed record of appeal duly lodged.
21. In this case it is contended that the applicants were let down by their counsel. As was held in *Shital Bimal Shah & 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. Therefore, the fact of change in the proprietorship of the property in question is neither here nor there. 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 it is opposed merely on the ground that the order will inevitably lead to some delay. It is however 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 her 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 Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.

23. In this case, though the application does not seek to regularise the record, it appears from the submissions filed by both parties that the record of appeal has already been filed. 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. The Respondents can be adequately compensated in costs.
24. In the premises I allow the application, extend the time for filing and serving the Record of Appeal with such period as would validate the same.
25. The costs of this application are awarded to the Respondent.
26. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 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

