



REPUBLIC OF KENYA



KENYA LAW
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**Khaminwa v Spiga & 6 others (Civil Appeal (Application)
68 of 2020) [2023] KECA 678 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 678 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) 68 OF 2020
GV ODUNGA, JA
MAY 26, 2023**

BETWEEN

JOHN MUGALASINGA KHAMINWA APPLICANT

AND

PAOLO SPIGA 1ST RESPONDENT

GIAFRANCO MARIA SANTUCCI 2ND RESPONDENT

ESTELLA DUMINGA FURULI 3RD RESPONDENT

ESTELLA COMPANY LIMITED 4TH RESPONDENT

ANGELO 5TH RESPONDENT

ILARIO BARBIERI 6TH RESPONDENT

SERGIO BATTISTI 7TH RESPONDENT

(Being an Application for extension of time to serve the Notice of Appeal and Record of Appeal in Civil Appeal No. 68 of 2020 upon the 3rd to 7th Respondent and an application for the mode of service upon the 3rd, 4th, 5th and 7th Respondent from the ruling and order of the Environment and Land Court at Malindi (Hon. Mr Justice J. O. Olola) dated 9th April, 2019 in the Environment and Land Case No. 35 of 2009)

RULING

1. The Applicant, by his notice of motion dated November 28, 2022, made within this pending appeal, moved this Court seeking extension of time within which to effect service of his Notice of Appeal and Record of Appeal in the instant appeal upon the 3rd to 7th Respondents. In the said Motion, the Applicant seeks that the said service upon the 3rd Respondent be by way of advertisement in a local



- daily newspaper with national circulation while that on the 4th, 5th and 7th Respondents be by way of service outside Kenya.
2. According to the Applicant, this appeal arises from the decision of the Trial Court dismissing the Applicant's counterclaim in a matter in which all the Respondents herein were Defendants. Whereas the 1st and 2nd Respondents have been served, by the Applicant, the 3rd to 7th Respondents were never served due to the fact that the Applicant was unable to trace their locations. Whereas the 3rd Respondent is a Kenyan Company, the Applicant averred that its registered office was unknown to the Applicant. The 4th, 5th and 7th Respondents on the other hand, are Italian Citizens who are not ordinarily resident in the Republic of Kenya hence the need to effect service upon them outside the jurisdiction of Kenya.
 3. According to the Applicant, during the hearing of the suit before the ELC, the Applicant attempted to effect service of the Notice of Summons on the 4th, 5th and 7th Respondents but was informed by the Ministry of Foreign Affairs that the attempts to effect service was unsuccessful and that it was that failure to effect service that led to the dismissal of the Counterclaim. It was however disclosed that though the 6th Respondent was in the country, being an Italian national, could leave the country anytime.
 4. It was disclosed that though the 3rd to 7th Respondents never participated in the proceedings before the Court below, for this Court to arrive at a reasoned determination it is in the interest of justice that the Court is granted an opportunity to hear from all the parties in the suit.
 5. It was however disclosed that the Deputy Registrar of this Court did on October 17, 2022 grant the Applicant an opportunity to effect service of the Record of Appeal upon the 3rd to 7th Respondents and that the matter was set for mention on December 7, 2022 for the Applicant to show what steps the Applicant had taken in effecting service upon the said parties.
 6. The application was opposed by the 1st and 2nd Respondents by way of a replying affidavit sworn by their Advocate on record, Tukero Ole Kina, on February 9, 2023. It was deposed that the Applicant seeks to serve the record of appeal on the Respondents who he never served as directed by the trial court in 2011. In the deponent's view, this will not be possible due to the fact that the Appellant does not have the said Respondents current addresses in Italy as he readily admits. It was therefor averred that this Court would be issuing orders in vain. Further, that there is no attempt made to find the offices of the 3rd Respondent set out in the order for this Court to determine whether efforts were sufficiently exhaustive hence the discretion is sought without full disclosure.
 7. It was deposed that any attempt to effect service through diplomat is means will return similar outcome as the earlier one where the Permanent Secretary informed the Deputy Registrar of the difficulty in effecting service.
 8. As regards service in a daily newspaper with national circulation, it was deposed that the same would be illegal as service of process on a litigant who is not domiciled in this country can only be effected under Order 5 rules 27, 28 29 and 30 of the [Civil Procedure Rules](#) as contemplated by Rule 17(1) of this Court's [Rules](#).
 9. The deponent clarified that it is not true that the Applicant's counterclaim was dismissed and that it was directed that the counterclaim would stand dismissed should the Applicant fail to serve the same within 30 days. It was deposed that there was no way of confirming whether the 6th Respondent was actually in the country as alleged and whether the order of service upon him would be efficacious in the circumstances.



10. It was averred that since the 3rd to 7th Respondents have never been served and therefore never participated in the proceedings in the High Court, the Applicant should have availed himself of the opportunities provided under Rule 71(1) of this Court's Rules. However, there has been an inordinate delay in the presentation and prosecution of this application bearing in mind that the suit in the High Court was instituted on April 8, 2009 and the counterclaim was on 2nd June, 2009.
11. This Court was therefore urged to dismiss the application with costs.
12. At the virtual hearing of the application Learned Counsel, Dr Khaminwa represented himself while Mr Tukero Ole Kina represented the 1st and 2nd Respondents. Both Counsel filed written submissions which they highlighted before me.
13. Apart from the affidavits and the written submissions, Dr. Khaminwa submitted urged that since there is already a pending appeal no prejudice is likely to be caused to the Respondents if this application is granted. On the other hand, he argued that he is entitled to fair hearing. He took issue with the fact that the replying affidavit was sworn by the counsel for the 1st and 2nd Respondents and not the clients themselves.
14. On his part Mr Ole Kina contended that what he found problematic with the application was the proposal to serve the other Respondents by way of advertisement in Kenya yet the applicant is aware that the parties are not in Kenya. It was Mr Ole Kina's position that the Applicant having been granted leave by the High Court to effect service by substituted mode and having failed to do so and as the appeal is against an order given in those proceedings, the Applicant cannot seek the same orders that he sought and was granted before the High Court.
15. I have considered the application, the affidavits both in support of and in opposition to the application, the respective submissions and the authorities cited.
16. Rule 17(1) of the Court of Appeal Rules provides as hereunder:

Where a document is required to be served on any person under these Rules, service may be effected in such way as the Court may direct and, in the absence of any such direction, shall be made personally on the person to be served or any person entitled under rule 22 to appear on his or her behalf or by any other recognized mode of service as provided under Order 5 of the Civil Procedure Rules, 2010.
17. Order 5 of the Civil Procedure Rules elaborately sets out the procedure for effecting service. It also provides for service outside Kenya in Rule 21. Rule 25 of the said Rules provides that:

Every application for leave to serve such summons or notice on a defendant out of Kenya shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is not resident in Kenya or not, and the grounds on which the application is made; and no such leave shall be granted unless it is made sufficiently to appear to the court that the case is a proper one for service out of Kenya under this Order.
18. The guidelines for issuance of an order for substituted service were given in *Ranchubhai J Patel v Arusha Cycle Mart* (1954) 27 LRK 40. In that case it was held that the Court will not make an order for substituted service on a mere statement that the defendant is evading service and that the grounds for that statement must be given in the affidavit in support, which must state the efforts which have been made to find the defendant and the reasons for believing that he is keeping out of the way to avoid



service. It was however appreciated that the primary consideration is to bring the suit instituted to the personal attention of the defendant. It was held that the affidavit should state:

- (1) that the summons have been duly issued;
- (2) that efforts have been made to serve the defendant personally (and these efforts must be set forth with great particularity);
- (3) that all practical means of effecting personal service have been exhausted;
- (4) that prompt personal service is impossible;
- (5) that the substituted service which is proposed will probably come to the knowledge of the defendant;
- (6) if the defendant is evading service, the deponent's belief to that effect, giving the facts upon which the inference is founded;
- (7) that the defendant is out of jurisdiction.

19. In this case it is clear that the facts deposed to by the Applicant do not meet the threshold for the issuance of an order for substituted service. However, it is agreed that the High Court did issue an order for substituted service. That being the position, in the absence of any evidence to the contrary, this Court may well presume that the circumstances prevailing at the time that order was made have not changed. The High Court having been satisfied that it was necessary to effect service on some of the Respondents outside the jurisdiction, the fact that the Applicant has not met the threshold in the instant application does not necessarily render the application unmerited as long as that order remains unchallenged.

20. Before me it was argued that since the High Court made an order for service outside jurisdiction, this Court cannot make a similar order. Rule 79(1) of the Rules of this Court provides that:

An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal: Provided that the Court may, on application which may be made *ex parte*, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.

21. Therefore, the general rule is that all persons directly affected by the appeal must be served. The Rule is clear that even those who were not parties to the proceedings before the lower court, if directly affected by the appeal, must be served. In this case, since the Respondents were parties to the proceedings appealed from, they were required to be served and it does not matter that they did not participate in those proceedings.

22. However, the Applicant could have opted to take advantage of the proviso to that rule by an *ex parte* application to be made within seven days after the lodging of the notice of appeal, for direction that service need not be effected on any person who did not take part in the proceedings in the superior court. Since the Respondents whose service is sought in this application did not participate in the proceedings, the Applicant could have opted to seek the said directions. The Applicant did not do so. Since the Applicant did not do so, nothing prevents him from seeking leave to have service effected on the said Respondents by way of substituted mode or outside Kenya. To my mind it matters not that the High Court gave the Applicant leave to service by the said mode and it does not matter that he failed to do so. He is still required to effect service when he moves this Court notwithstanding the difficulties that faced him before the High Court.



23. I therefore find that the Applicant is properly within his right to move this Court as he did.
24. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon. Since the applicant not only seeks leave to serve the Respondents through substituted mode and/or out of Kenya, it is necessary to consider 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. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether 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. Waki, JA in *Fakir Mohamed v Joseph Mugambi & 2 others* [2005] eKLR addressed himself on this issue 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.*”

25. In *Leo Sila Mutiso v 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.
26. The Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR has had an occasion to express itself on the matter and 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.
27. In this case, the factual averments are not disputed. The Respondent has taken issues with the fact of the delay and the fact that a similar application was made before the High Court. It is further contended



that the Court would be acting in vain if it granted the orders in light of the history of this matter. It is for Applicant to ensure that he complies once the orders sought are issued. There was no allegation of prejudice to the Respondent if the orders sought are granted since the grant of the same does not affect the Applicant in any way.

28. 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 not merely that the order will inevitably lead to some delay but also 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 therefore 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.
29. 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. Accordingly, I extend time for service of the Notice of Appeal on the 3rd to 7th Respondents with a period of 30 days from the date of this order. I further direct that service upon the 3rd Respondent shall be by way of advertisement in a local daily newspaper with national circulation while that on the 4th, 5th and 7th Respondents be by way of service outside Kenya as provided under Order 5 of the Civil Procedure Rules.
30. The costs of this application are awarded to the 1st and 2nd respondents.
31. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY, 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

