Kenya National Highways Authority v Mugeki (Civil Appeal 168 of 2017) [2023] KECA 1620 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 1620 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 168 OF 2017

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

JUNE 9, 2023

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPELLANT

AND

PETER NJIRU MUGEKI ..... RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Embu (F. Muchemi, J.) dated 5th November 2017 in Embu Civil Appeal No. 16 of 2017)

JUDGMENT

1. In Siakago CMCC No. 55 of 2015 the respondent, Peter Njiru Mugeki sued the appellant, Kenya National Highways Authority who had in April 2015 marked his houses built on Stall TOL. No. 32 at Mutugu for demolition on the ground that they had been erected on the road reserve of Embu – Kanyonyo Road. The respondent had a temporary occupation licence over the stall which had been issued by the County Council of Mbeere. The suit was brought to permanently restrain the appellant or its agents from demolishing the houses or interfering with the respondent's peaceful enjoyment of the property. The shops he had erected were giving him rental income. His case was that the appellant had not notified him when he was constructing the shops that he was encroaching on the road reserve.

2. The appellant's defence was that it was the statutory body under the *Roads Act* 2007 that was in control of road reserves in its jurisdiction, and that whoever wanted to construct anything on its road reserve had to seek its authorisation and permission, and that the respondent had not sought such authority or permission before constructing the houses. Lastly, that the County Council of Mbeere had no authority to issue the licence it had purportedly issued to the respondent.

3. The Principal Magistrate's Court heard the parties. It found that indeed the respondent had erected his houses on the road reserve; that the appellant had the statutory mandate to manage and control the reserve; that its authority had not been sought beforehand; but that the respondent had a temporary

occupation licence granted by the County Council of Mbeere under the *Local Government Act*, and that –

> "it's possible that, County Council of Mbeere then and KeNHA or Ministry of Roads entered into any agreement for it to use the land in question because it was not immediately required for the purposes meant for it.....What the County Government did then and what the County Government of Embu is doing now by levying charges and rates is very constitutional and within the spirit of devolution, and within the key function of County Government under section 5 of the *County Government Act*... "

4. The court found that the appellant had been selective in targeting his houses when the road reserve had other structures in respect of which notices for demolition had not been issued. For all these reasons, the appellant was permanently restrained from demolishing the respondent's structures until such time as there will be sufficient proof that the respondent had encroached and/or that there will be need for road expansion or construction.

5. The appellant was aggrieved by the judgment which was delivered on 21st July 2016. However, nothing happened until 18th January 2017 when it filed before the High Court an application for leave to appeal out of time. The explanation for the delay in filing the appeal on time was that there was delay in the typing of proceedings, part of the reason being that the file was not accessible having been kept in the Magistrate's chambers and that there was pressure of work in the station. It appears it took three months for the proceedings to be ready. They were not ready until 29th November 2016. It took two months, after the receipt of proceedings, for the application to be filed. The High Court dismissed the application with costs. It found that there was unexplained delay on the part of the appellant, and therefore leave to appeal out of time would not be granted. On the three months taken before proceedings were obtained, the High Court observed that the appellant had not annexed the letter written to the lower court seeking them and had not shown evidence of reminder. It observed that the appellant's advocate had sworn that there was delay because the file had been kept by the magistrate and the appellant had sworn that there was pressure of work. The High Court saw a contradiction in the explanation. Even if there was explanation regarding the three months, the High Court noted that the further delay of two months before seeking leave had not been sufficiently explained. Lastly, the High Court perused the grounds of the proposed appeal and noted that it did not have high chances of success. One reason being that the County Government that had allocated the stall had not been joined as a party to the proceedings.

6. The appellant was not satisfied with the ruling and filed the appeal subject of this judgment. M/s Ndirangu prosecuted the appeal which was opposed by Mr Ombachi for the respondent. Both filed written submissions. During oral hearing Mr. Ombachi relied on his written submissions but M/s Ndirangu highlighted hers.

7. The grounds of appeal as stated by the appellant were as follows:-

> " 1). The learned judge erred in law and in fact in finding that the delay in filing the appeal and in filing the application for extension of time within which to file an appeal was inordinate. The period of delay which the learned Judge calculated at five (5) months was not inordinate in the circumstances.
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> 2. The learned judge erred in law and in fact in failing to give credit to the period taken to prepare typed proceedings being three (3) months in calculating the period for delay despite the certificate of delay being produced in evidence. The

learned judge therefore erred in fact and in law in failing to find that the period of delay was only two (2) months which was not inordinate.

3. The learned judge failed in law and in fact in failing to find that the reasons advanced by the appellant for the delay which was the fact that the file was in the magistrate's chambers were uncontroverted and reasonable in the circumstances.

4. That the learned judge erred in law and in fact in visiting the mistakes of the counsel for the appellant for failing to present letter requesting for typed proceedings as part of the evidence, yet the certificate of delay corroborated the date of the request for proceedings.

5. The learned judge erred in law and in fact in giving her opinion on the merits of the appeal before considering the appeal in its totality. The learned judge further erred in law and in fact in locking out a litigant who is clearly interested in the litigation and by so doing the application for extension of time and in affording parties an opportunity to have their matters determined on merits.

6. The learned judge erred in law and in fact failing to find that the appellant' notice of motion application dated 18th January 2017 was merited."

8. Counsel for the appellant submitted that the delay of five months had been explained, and that, in any case, it was not inordinate. Reference was made to the decision of this court in *Andrew Kiplagat Chemaringo –v- Paul Kipkorir Kibet* [2018]eKLR in which it was observed that –

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

9. Counsel submitted that before the High Court was the certificate of delay, showing that there was delay by the subordinate court in preparing the proceedings. As for the finding by the High Court that there was no letter annexed to show that there had been a request for proceedings, counsel faulted this by pointing out that the certificate of delay indicated that:-

> " Counsel for the Defendant applied for rectified copies of proceedings on 4th August 2016 but due to pressure of work in our typing pool same were supplied on 24th November 2016."

Regarding the time of two months taken between the receipt of proceedings and the filing of the application before the High Court, counsel referred to the decision in *Vishva Stone Supplies Company Limited –v- RSR Stone [2006] Limited* [2020]eKLR and *Aviation Cargo Support Limited –v- St. Mark Freight Services Limited* [2014]eKLR and urged us not to visit on the appellant the mistakes of its advocates.

10. The High Court noted in its ruling that:-

> " Without pre-empting the intended appeal, I am not convinced that the appeal has high chances of success."

Counsel for the appellant submitted that all her client had to show was that the appeal was arguable. In the instant case, the subordinate court having found that the suit property was under the mandate

of the appellant and that it had not authorised the respondent to build on it, and there having been no evidence of any understanding between the appellant and the County Government to allow the respondent on the property, there were sufficient arguable reasons to allow the appellant to appeal the decision that had permanently restrained it from evicting the respondent from the road reserve. Reliance was placed on the decision of *Athuman Nusura Juma –v- Afwa Mohamed Ramadhan* C.A. No. 227 of 2015 in which it was reiterated that when dealing with the application to extend time to appeal the consideration should be whether the intended appeal will possibly succeed.

11. In response, counsel for the respondent submitted that the appeal lacked merit, the explanation of five (5) months delay was not satisfactory, and that the learned judge had exercised her discretion in declining to grant extension of time to appeal. Counsel made reference to the decision in *Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi*, Civil Application No. NAI 255 of 1997 wherein it was stated as follows:-

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

Counsel concluded that the appellant had failed to demonstrate the existence of any sufficient reasons or give satisfactory explanation for the delay in filing the appeal.

12. We have considered the ruling subject of the appeal, the grounds contained in the Memorandum of Appeal and the rival submissions by counsel. The learned judge exercised her discretion and declined to grant extension of time to appeal. In the case of *Mbogo & Another –v- Shah* [1968]EA 93, 96 it was held that:

> "An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite misdirected himself or acted on matters which it should not have acted upon or failed to take into law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

13. Section 79G of the *Civil Procedure Act* provides that –

> "Every appeal from a Subordinate court to the High court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time".

14. It is common ground that the appellant did not appeal the decision within the provided 30 days. The judgment was delivered on 21st July 2016. On 4th August 2016, before the lapse of the 30 days, the appellant's counsel wrote to the court for a certified copy of proceedings. The proceedings were not made available until 24th November 2016. They could not be availed earlier owing to pressure of work on the part of the typing pool. This period of three months has an explanation contained in the

certificate of delay. After this period, it took the appellant up to 18th January 2017, a period of just under two months to apply to the High Court for extension of time. What explanation did the appellant have for the delay between 24th November 2016 and 18th January 2017? And was that delay inordinate?

15. The delay was blamed on the counsel then on record, and the new counsel asked that the mistake of the counsel should not be visited on the appellant. We have anxiously considered the explanation but also bearing in mind that, in our view, the delay was not inordinate. We consider that, sometimes, even the best lawyers will miss a timeline. It is not every delay that will deny an appellant the constitutional right to appeal a decision that has aggrieved him.

16. But more important, the facts of the case, as outlined in the foregoing, would indicate that the appellant's intended appeal has arguable grounds that should receive attention. We find that the learned Judge erred in observing that the intended appeal did not have high chances of success. She set the bar too high, for an application of this kind, and in so doing wrongly exercised her discretion to decline to grant the application for extension of time.

17. We have also asked ourselves what prejudice the respondent will suffer if the application is allowed. He is in possession of the property and continues to do business with it, although it was common ground that the property was under the law supposed to be managed by the appellant who had not authorised construction thereon. This raises a public interest consideration (*Nicholas Kiptoo Arap Korir Salat – v- IEBC & 7 Others*. Supreme Court Application No. 16 of 2014), in that the respondent has built on road reserve without the authority of the appellant. The appellant sought to demolish the structures, and the respondent said that he had a licence from the County Government to remain thereon. He will not leave until the appellant can show that it is ready to utilise the road reserve. It is in the public interest that the dispute be determined on merit by the High Court.

18. In conclusion, we allow the appeal. We set aside the orders of the High Court dismissing the request to extend time to the appellant to appeal. We direct the appellant to file and serve the appeal within 14 days.

19. Given the facts of the case, we do not grant the appellant the costs of the appeal.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE 2023.

J. MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR