Pamwhite Limited v Karomo & another (Suing as the Chairman and Secretary, respectively of the New Nyali Residents Association) & 4 others (Civil Application E084 of 2022) [2023] KECA 645 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KECA 645 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E084 OF 2022

GV ODUNGA, JA

JUNE 9, 2023

BETWEEN

PAMWHITE LIMITED ..... APPLICANT

AND

BENSON KAROMO AND HUBERT SEINFERT (SUING AS THE CHAIRMAN AND SECRETARY, RESPECTIVELY OF THE NEW NYALI RESIDENTS ASSOCIATION) ..... 1ST RESPONDENT

IDEAL LOCATIONS LIMITED ..... 2ND RESPONDENT

KIRKE LIMITED ..... 3RD RESPONDENT

CONRAD PROPERTIES ..... 4TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA ..... 5TH RESPONDENT

(Being an Application for extension of time to file and serve Notice of Appeal against the ruling of Honourable L. L. Naikuni (J) dated 18th July, 2022 delivered in Mombasa in the Environment and Land Case No. 219 of 2022)

RULING

1. By a Motion on Notice expressed to be brought pursuant to Rules 4 and 41 of the *Court of Appeal Rules, 2010* and dated November 14, 2022 the Applicant herein seeks extension of time for filing and serving a Notice of Appeal. In the alternative it seeks that the Notice of Appeal filed and/or lodged in Court on the October 21, 2022 and November 3, 2022, respectively be deemed as properly filed with leave of the Court.

2. The Motion is supported by an affidavit sworn by Pamela Auma Ogola, the Applicant's director on November 14, 2022.

3. According to the Applicant, although the ruling, the subject of this appeal was scheduled for delivery on May 26, 2022, the same was instead delivered on July 18, 2022 without notice to parties or their advocates and that it was not until October 6, 2022 that the parties became aware of the same when the matter was cause listed for pre-trial directions. According to the Applicant, a certified copy of the ruling was availed on November 8, 2022 and upon its perusal, the Applicant filed and/or lodged a Notice of Appeal on October 21, 2022 and November 3, 2022 respectively and requested for typed certified copies of the proceedings vide its letter dated October 21, 2022.

4. It was averred that on November 8, 2022 the Applicant was supplied with not only the impugned ruling but also certified copies of the proceedings which, upon perusal established that there was no prior notice of delivery of the ruling, neither was the ruling made known to the parties till the pre0trial day, on October 6, 2022.

5. It was the Applicant's case that having filed the Notice of Appeal out of time it is now necessary that it seeks the orders sought in this application. In her view, the reasons for the delay in filing/lodging the said Notice are excusable and/or sufficiently explained as the same was not caused by the Applicant. It was averred that the application was timeously filed as the copies of the proceedings and ruling were availed to the Applicant on November 8, 2022. According to the Applicant, the application is not prejudicial to the Respondents and it has an arguable appeal hence it is in the interest of justice that the application be allowed.

6. In opposing the Motion, the 1st to 4th Respondents relied on the affidavit sworn by their advocate, Willis Oluga, on March 30, 2023. It was disclosed that the Applicant's initial advocate was the firm of Mathew Nyabena & Company Advocates before the Applica t changed advocates to the firm of NO Sumba & Company Advocates and finally to its current advocates, Kenga & Company Advocates. It averred that a ruling notice was served by the Court upon N. O. Sumba Advocates who were on record as at July 18, 2022 when r the impugned ruling was delivered vide the notice dated July 5, 2022.

7. It was noted that though the Applicant became aware of the ruling on October 6, 2022, this application was filed on 14th November, 2022, an unexplained delay of over one month the time. The Respondents lamented that they will suffer immense prejudice due to the delay in the determination of this suit hence the necessity to explain any delay.

8. In a rejoinder, vide a supplementary affidavit sworn on March 31, 2023 by the same deponent, averred that the replying affidavit confirmed that its advocates on record were never served with the notice of ruling. According to the deponent, the firm of Kenga & Company Advocates were engaged by the Applicants on June 6, 2022 who filed and served their notice of change of advocates and served the same upon the 1st to 4th Respondents' advocates the same day. It was her view that the new advocates ought to have been served with the ruling notice of July 5, 2022. However, assuming there was a human error on the part of the Court, it was averred that the notice ought to have been served on the firm of N. O. Sumba & Company Advocates.

9. It was therefore averred that it was misleading on the part of the Respondents to allege that the Applicant's advocates were served with the ruling notice of July 5, 2022.

10. The application was heard before me on May 3, 2023 vide the Court's virtual platform. Learned Counsel Mr Kenga appeared for the Applicant while Mr Oluga Willis appeared for the 1st to the 4th Respondents.

11. On behalf of the Applicant the averments in the supporting affidavit were reiterated and as regards the competency of the application, it was contended that since the main relief being sought is that of extension of time to file the Notice of Appeal and that the deeming prayer was just in the alternative.

12. On behalf of the Respondents, the averments in the replying affidavit were reiterated and based on *Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*, it was submitted that leave cannot be granted where the documents whose extension to be filed is sought has already been filed. According to the Respondent an applicant for extension of time must first seek leave and only after the same is granted should the documents in question be filed otherwise the documents is a nullity and leave cannot be granted to deem the same as duly filed.

13. It was further submitted that based on the same decision, the Applicant has not fulfilled the conditions necessary for extension of time to be granted since the ruling Notice was served on her then Applicant's advocates on record, N. O. Sumba & Company Advocates and even after becoming aware of the ruling, the Applicant did not move the Court immediately.

14. Based on the foregoing, this Court was urged to dismiss the application with costs.

15. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon.

16. The first objection taken by the Respondents is that the orders sought cannot be granted since the Applicant has already filed a Notice of Appeal. Therefore, she cannot seek to be granted extension of tie to file another Notice of Appeal. Secondly, the prayer seeking the deeming of the said Notice of Appeal duly filed cannot be granted as the Court cannot deem a documents irregularly filed as having been duly filed. This submission is based on the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR. In that case, the said Court held that:

> "where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence.
>
> Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record."

17. The danger, in my respectful view, of one filing a documents and seeking that it be legitimised by being deemed as properly filed is that such applications tend to tie the Court's hands since the Court is then left with very little option considering that the document has already been filed and there is no application seeking that it be expunged from the record or struck out. I must however appreciate

that there may be situations where a wording of a legal provision permits such deeming. For example, 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 good and sufficient cause for not filing the appeal in time.

18. This provision was interpreted in *Mugo & Others v Wanjiru & Anor* [1970] EA 482 where it was held that:

> " Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused."

19. I therefore agree, as I am bound to do, that where timelines are prescribed and the law requires that an Applicant seeks extension of time to file a document not filed within the prescribed time, it would be an abuse of the process to file the documents and then seek to have the same regularised. In the case before me, the Applicant however seeks to have its notice, which was irregularly filed, deemed as properly filed. Based on the decision of the Supreme Court cited above, such a course is unacceptable. However, there is an alternative prayer for extension of time within which to have the said Notice filed. The Respondent submits that the prayer cannot be granted since the Applicant has filed a Notice of Appeal, albeit irregularly. The Supreme Court however stated that a document filed out of time is a nullity and of no legal consequences. That being the position, this Court cannot treat the said document as an existing Notice of Appeal and cannot, based on its existence, find that "another" Notice of Appeal cannot be filed as there is no Notice of Appeal in the first place. It is in this light that I understood the position taken by the Supreme Court in the above case when it held that:

> " Having struck out Petition No 10 of 2014 as filed, the document which formed the Petition is hereby admitted as a draft intended Petition of appeal annexed to this application which is only presented to this Court for perusal. The same may be filed as the intended appeal when and if extension of time is granted."

20. Therefore, though a nullity, the said Notice of Appeal may be treated as a draft Notice of Appeal for the purposes of this application. Taking cue from the Supreme Court, the said document shall be treated as a draft Notice of Appeal.

21. 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. 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.

22. 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 vMurika M'Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38."

23. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, (supra) 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.

24. 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.

25. In this case, the Applicant's ground for seeking extension is that the notice of delivery of the ruling intended to be challenged was never given to the Applicant. Order 21 rule 1 of the *Civil Procedure Rules* provides that:

> In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.
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> Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

26. That notification is required whether the decision to be made is a ruling or judgement is not in doubt. It therefore follows that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to a sufficient reason for the purposes of enlargement of time to appeal if the applicant moves the Court for regularisation of his position

expeditiously. See Kwach, JA in *Zacky Hinga v Lawrence Nthiani Nzioki & Another* Civil Application No Nai. 359 of 1996. In fact, this Court held in *Ngoso General Contractors Ltd. v Jacob Gichunge* Civil Appeal No 248 of 2001 [2005] 1 KLR 737 that:

> " The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection...The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant's right of appeal was grossly compromised...An order was made by the Magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which *the Constitution* safeguards."

27. Similarly, in *Leonola Nerima Karani v William Wanyama Ndege* Civil Application No Nai. 21 of 2007, it was held that:

> " Since there is no indication that the judgement of the Superior Court was delivered with notice to the parties or their advocates which would be a serious breach of the rules, it would follow that the breach threw the litigation timetable off balance and the advocates on record for the applicant at the time cannot be blamed for filing the notice of appeal and the letter bespeaking copies of the proceedings and judgement when they did."

28. In Kisumu *Paper Mills Ltd v National Bank of Kenya Ltd & 2 Others* Kisumu HCCC No 413 of 2001, it was held that:

> " A party not invited to a date when an important and essential determination is made against him is usually not afforded an opportunity on its case...The court as a matter of obligation was required to issue and serve a notice on all the parties to the suit and the advocate for the applicants ought to have been given an opportunity to be present so that he could represent his client's interest including applying for leave to appeal as it is not the business of an advocate to keep checking with a Judge or a magistrate about the delivery of a particular judgement as rulings and judgements of the Court must ordinarily and as a matter of good practice be delivered on the due date and if not delivered parties must be sufficiently and adequately notified of the date of delivery by issuing a notice...The practice, procedure and regulation of the Court where a Judgement/ruling is not delivered on its due date is to notify all parties involved and their respective advocates and the notice is issued in accordance with the rules of proper service which must be in tandem with the requirement in the Civil Procedure otherwise there would be a serious breach of procedure amounting to a denial of the right to be heard...As a matter of protocol and good advocacy, an advocate is obligated to inform an absent advocate immediately of the delivery of the Judgement/ruling."

29. The Applicant contends that the firm of Kenga & Company Advocates were engaged on June 6, 2022 who filed and served their notice of change of advocates and served the same upon the 1st to 4th Respondents' advocates the same day, hence the new advocates ought to have been served with the

ruling notice of July 5, 2022. The 1st to 4th Respondents have however annexed a copy of the notice issued on July 5, 2022 for the delivery of the ruling on July 18, 2022 to show that the notice was actually delivered. From the documents annexed to the replying affidavit, it is clear that there was a notice of change of advocates filed on June 5, 2022 notifying the Court that the Applicant had withdrawn instructions from M/s N. O. Sumba & Company Advocates and instructed the firm of Kenga & Company Advocates. I therefore agree with the applicant that since the notice of ruling was issued after its new advocates had come on record, the same ought to have been served upon Kenga & Company Advocates. Since there is no evidence that this was done, I find that the Applicant was not notified of the ruling date

30. According to the Applicant, it was not until October 6, 2022 that the parties became aware of the same when the matter was cause listed for pre-trial directions. This application was however not filed till November 14, 2022, slightly more than a month later. It is true that an applicant for extension of time is required to explain the reasons for the delay in taking a step in the proceedings. Regarding delay, it was appreciated in the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor* [2014] eKLR that:

> " Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

31. It is however appreciated that the broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See *Philip Chemwolo & Another v Augustine Kubende* [1986] KLR 492; (1982-88) KAR 103.

32. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the Respondents contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage 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.

33. In my view a delay of slightly more than a moth in these circumstances cannot be the basis of denying an applicant the opportunity of exercising her right to appeal.

34. In the premises, I allow the Notice of Motion on Notice dated November 14, 2022 and I extend time for filing and serving a Notice of Appeal against the ruling delivered on July 18, 2022 by Naikuni, J in ELC No 219 of 2020. The costs of this application are awarded to the 1st to 4th Respondents.

35. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE, 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