Ahmed v Khator & 3 others (Civil Appeal (Application) E018 of 2020) [2023] KECA 965 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 965 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E018 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

JULY 28, 2023

BETWEEN

IDHA MARIE AHMED ..... APPELLANT

AND

ABRACADABRARISHARD ABDULREHMAN KHATOR AKA RISHAD ABDULREHMAN KHATOR ..... 1ST RESPONDENT

ALI BWANA BWANAADI (AS ADMINISTRATORS OF THE ESTATE OF TIMA AND FATUMA CHILDREN OF ALI BASHIR DECEASED) ... 2ND RESPONDENT

THE REGISTRAR, COAST ..... 3RD RESPONDENT

THE HON ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being a reference application arising from a decision by Hon. Lady Justice Lesiit dated 3rd December 2021 declining to extend time to file an application to strike out the appeal from the Judgement dated the 22nd October 2019 by Hon Lady Justice A. Omollo and delivered on 28th October 2019 by Hon Justice C. Yano at Mombasa in ELC Case no 23 of 2013.)

RULING

1. In a ruling dated 3rd December, 2021, the Learned Single Judge of this Court (Hon. Lady Justice Lesiit, JA) dismissed the applicant's notice of motion dated February 17, 2021. The applicant is the 1st respondent in the appeal while the respondent in this reference is the appellant. In this ruling we shall refer to the Applicant as the Respondent while the Respondent shall be referred to as the Appellant. By the said motion, the respondent sought that time to move the court to strike out this appeal be extended so that the application that seeks to strike out the appeal which application was filed alongside the instant application is deemed to have been filed within time.

2. In dismissing the said application, the learned single judge found that the notice of appeal was filed on November 1, 2019 and that contrary to the allegation by the respondent that he was unaware of the notice of appeal until 29th January, 2021, service was effected on his advocates within the prescribed time and that the letter which the advocates wrote to the Appellant's advocates informing him that he was no longer acting for the Respondent came later in January, 2020. However, time started running on 18th November, 2019 and that by the time the application was filed in February, 2021, it was three months later, yet the application ought to have been brought within 30 days of service of the Notice of Appeal.

3. As regards the explanation for the 60 days delay, the Learned Judge found that apart from starting on the wrong footing by denying service of the Notice, a denial which was disproved, there was no explanation for the delay of two months which the Learned Single Judge found to have been inordinate. She accordingly, found no merit in the application and dismissed it.

4. The Respondent being aggrieved by the said decision preferred a reference to the full bench of the Court *vide* the letter dated 7th December, 2021. We heard the reference vide the Court's virtual platform on 22nd March, 2023 during which Learned Counsel Mr S. M. Kimani appeared for the Respondent while Mr Benjamin Njoroge appeared for the Appellant and held brief for Mr Makuti for the 2nd and 3rd Respondents in the appeal. Both counsels relied on their written submissions which they highlighted before us.

5. According to the respondent, the decision of the learned single judge is neither correct nor convincing and that the exercise of discretion was based on the wrong premise. It was contended that the appellant will not suffer any prejudice if the application is admitted to hearing since the delay from the time of service of the record of appeal is not inordinate.

6. According to the Respondent, the impugned court's ruling lacks clarity. First, while it is not disputed the notice of appeal was served on 18th November, 2019, it was contended that it was certainly not filed on 1st November, 2019 hence the holding in paragraph 12 on this issue is incorrect. To the Respondent, the notice of appeal was dated 13th November, 2019 and was filed on 14th November, 2019. While it was not disputed that service of the notice of appeal on the Respondent's counsel was on 18th November, 2019 as found by the learned judge, it was clarified that the application for which an order to extend time was made was not about the notice of appeal but rather, the record of appeal filed on 30th October, 2020.

7. It was therefore submitted that in exercising the court's unfettered discretion, the Learned Single Judge proceeded on the wrong premise. Accordingly, it was contended, the Learned Single Judge considered irrelevant dates and timelines, and referred to irrelevant events, in reckoning time, not to mention that the thread of thought in the court's decision erroneously suggests that the parallel application for which an extension of time was sought was to strike out the notice of appeal, and not the record of appeal.

8. It was therefore submitted that time for filing an application for extension of time did not start running from 18th November, 2021 for the reason that the application for which an extension of time was sought, is not targeting the notice of appeal but rather the appeal. The Respondent could not move the court before knowing of the existence of the record of appeal, and the misstep(s) which could entitle him to seek a remedy before this court under rule 84 of this Court's *Rules*. Reckoning of time, it was submitted, ordinarily starts from the date of service of notice or record of appeal, or the earliest time when an applicant otherwise learns of the existence of a record of appeal. Only after getting such knowledge (i.e., on 29.1.2021), could the Respondent move this Court as he did. However, seeing that time for complying with *rule* 84 had long passed by the time one of the applicants saw the record of

appeal, and for no fault on their part, the Respondent sought to regularise its application for striking out the appeal.

9. It was submitted that there is no evidence that the record of appeal was served on the persons of the Respondent or his co- administrator, Mr. Ali Bwana, since deceased, earlier than 29th January, 2021, a fact acknowledged by the Appellant. Therefore, it was submitted, the finding of the single judge on all these facts, including that the application which the court ultimately dismissed ought to have been brought within 30 days from 18th November, 2019, was factually incorrect, and her refusal to extend time portends a denial of justice to a layman whose only sin was failure to sufficiently comply with procedural law as to change of advocate, which gaffe was contributed to, wholly or in part, by the advice of his adversary's counsel.

10. According to the Respondent, failure to serve a pleading like a record of appeal at all, or service on a party or a firm of advocates which has been declared a stranger to the proceedings in the court below for non-compliance with order 9 rules 9 and 13 of the *Civil Procedure Rules*, is not a mere technicality. It is an omission with dire consequences. It was submitted that the record of appeal was served on M/S. Hezron Gekonde & Co., Advocates on or about 4.11.2019, long before the record of appeal was lodged and long before the said firm filed the expunged notice of appointment of advocate. It was urged that the Learned Single Judge ought to have noticed the glaring errors on the exhibits filed as evidence of service.

11. On behalf of the Appellant, it was submitted that the Learned Single Judge noted correctly that the Notice of Appeal was filed on 13th November, 2019 and served upon the firm of M/S S. M. Kimani & Company Advocates on 18th November, 2019, within time. What triggered the uncertainty on representation was a letter by M/S S. M. Kimani & Company Advocates, immediately upon receipt of the Notice of Appeal on 19th November, 2019 by which he notified the Appellant's Advocates that he no longer had instructions and informed the Appellant's Advocates to deal directly with his Client (the 1st Respondent) and furnished his Client's postal address and telephone contacts, a letter which has never been recanted nor withdrawn.

12. It was explained that this action triggered the 1st Respondent filing a Notice to Act in Person and finally appointing M/S Hezron Gekonde & Company Advocates to act on his behalf and file a Notice of Change of Advocates, actions which were taken before the Superior Court below, and not in this Appeal. According to the Appellant, without duly or formally notifying the Appellant's Counsel, M/S S. M. Kimani Company Advocates sometime along the way became seized of instructions once more, but did not file a Notice of Address of Service, a requirement of Rule 79(1) of the *Rules* of the Court of Appeal, as correctly noted by the Learned Single Judge. However, out of abundant caution, the Appellant filed and served the Record of Appeal upon M/S Hezron Gekonde & Company Advocates, on 4th November, 2020 and not 4th November, 2019 as previously indicated. Having been filed on time, service was done with caution, not with contempt, but to inform the 1st Respondent of the filing of the same.

13. It was further explained that at the time of service of the Record of Appeal, M/S S.M. Kimani & Company Advocates had not assumed instructions in this Appeal or the Superior Court below, or at least overtly shown the intention to do so. It was noted that the Respondent does not argue that he is not in receipt of the Record of Appeal as he did collect it from the said Advocates and avers to collecting the Record of Appeal on 29th January, 2020 from M/S Hezron Gekonde & Company Advocates. Instead he argues it was served at the wrong Advocate, without owning up to his failure or role of his Counsel that led to such state of affairs.

14. It was therefore argued that the Respondent does not argue that he has not been served with the Record of Appeal, as indeed he is seized of it. Even if he had not been served, it was contended that justice would be served not by entertaining an application for striking out, but by ordering service of the Record of Appeal under Rule 90(2) of the *Court of Appeal Rules*, 2010, as the Respondent's Counsel was yet to file a Notice of Address of Service. We were urged to distinguish this case from one where Counsel for the Respondent has correctly filed a Notice of Address of service, thus placing himself on record and the Appellant completely ignores the same or to serve the Record of Appeal upon him at the address provided on the record.

15. To the Respondents, the Learned Single Judge, correctly reckoned the calculation of the Thirty (30) days under Rule 84 of the *Court of Appeal Rule* 2010. In the Respondents' view, this Appeal is no longer facing the guillotine or the chopping board and should be directed to full hearing.

16. It was submitted that the Learned Single Judge correctly addressed the correct principles governing the exercise of the discretion by this Court under Rule 4 of the *Civil Procedure Act*, 2010 (sic) and that the Respondent has not demonstrated that the decision of the Learned Single Judge is unlawful, illegal or plainly wrong. Since the discretion exercised by the Learned Single Judge was unfettered and exercised on behalf of the Full Court, we were urged to be hesitant to substitute our discretion with that of the Learned Single Judge.

17. To the Appellant, the overriding principle governing this Court is to hear matters expeditiously, especially main Appeals and reliance was placed on *Norah Chelangat v Chelangat Nases Njakai & 2 others* [2021] eKLR on the need to lean towards hearing Appeals on merit and avoid technical objections that do not fast track the process of hearing and disposal of Appeals.

    In this case it was argued that the Respondent has not demonstrated any prejudice that he suffers or will suffer if the application for striking out the Record of Appeal, is not allowed.

18. We were urged to dismiss the reference with costs.

Analysis and Determination

19. We have considered the submissions made by the parties in this reference. Rule 57(1)(b) of the *Court of Appeal Rules*, 2022 provides that:

> Where under the proviso to section 5 of the Act, any person, being dissatisfied with the decision of a single judge—
>
> (b) in a civil matter, wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, that person may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.

20. As regards the issues raised by the Applicants, the Learned Single Judge in her decision under challenge found that the Respondent failed to satisfactorily explain the reasons for the delay in making the application to strike out the Appeal. The Learned Single Judge was also not impressed by the conduct of the Respondent and his legal advisors. It is contended that though the application before the Learned Single Judge was seeking extension of time within which to apply for striking out the appeal, the Learned Single Judge, instead of computing time from the date of service of the record of appeal did so from the date of the service of the Notice of Appeal and in so doing wrongly exercised her discretion.

21. It is admitted by the Respondent that the Notice of Appeal was served on 18th November, 2019 on both the Respondent personally and on their advocates on record at that time. However, it is the Appellant's

case that no Notice of Address of Service was filed by the Respondent as required under Rule 79(1)(a) of the 2010 version of the *Rules* of this Court [now Rule 81 of the 2022 *Rules*] which provides that:

> 1. Each person on whom a notice of appeal is served shall— Respondent to give address for service.
>
> a. within fourteen days after service, lodge in the appropriate registry and serve on the intended appellant a notice of a full and sufficient address for service; and
>
> b. within a further fourteen days after service, serve a copy of such notice of address for service on every other person named in the notice of appeal as a person intended to be served.

22. Rule 91(1) of the 2022 version of the *Rules* provides that:

> 1. The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 81.

23. What comes out from these provisions is that a person who, though served with the Notice of Appeal, fails to furnish the address for service is thereby disentitled from being served with the Record of Appeal. Accordingly, the Respondents cannot be heard to complain that they were not served with the record of appeal.

24. In this case, according to the Respondents, they have never been served with the Record of Appeal todate. Instead, the same was served on the firm of M/s Hezron Gekonde and Co. Advocates whose notice of change of advocates was expunged by the Environment and Land Court (hereafter referred to as the ELC) on 20th June, 2020. According to the Respondent his current advocates, M/s S. M Kimani only learned of the developments on 29th January, 2021 when the Respondent was turned away with the record from the firm of M/S Hezron Gekonde and Co. Advocates on account of the aforesaid decision of the ELC.

25. In response the Appellant's position was that on 17th January, 2020 the Respondent's advocates informed the Appellant's advocates that instructions had been withdrawn by the Respondent and the Appellant was advised to deal directly with the Respondent henceforth. Upon filing of the Record of Appeal, the same was served on M/S Hezron Gekonde and Co. Advocates who had filed the Notice of Change of Advocates and it was duly received.

26. Assuming that the position taken by the Respondent is correct that he has never been served with the Record of Appeal, under Rule 84 of the 2010 *Court of Appeal Rules*, any person affected by an appeal may apply to strike out Notice of Appeal or Appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. However, the proviso to Rule 84 required such an application to be brought before the expiry of thirty (30) days from the date of service of the Notice of Appeal or Record of Appeal as the case may be. Similar provisions are now found in Rule 86 of the 2022 *Rules*. It is therefore clear that as regards the striking out of the Record of Appeal, time only starts running upon the Respondent being served by the Record of Appeal assuming that the Respondent filed an address of service. Taken literally, the consequence would be that the application seeking extension of time ought to have failed for the additional reason that the Record of Appeal had not been served.

27. We however do not believe that it was intended that a party who has not furnished an address for service and as a result, has not been served with the record of appeal should have a carte blanche when

it comes to applying for striking out of the record. The fact that the Applicant herein sought to have time extended for filing the application is a recognition that he was out of time in filing the application.

28. In dismissing the application, the Learned Single Judge not only took into account the delay, but also considered the conduct of the Respondent and his counsel. So that even if we agree with the Respondent that the computation of time by the Learned Single Judge as regards the Record of Appeal was not correct, the Respondent still has to surmount the task of satisfying us that the Learned Single Judge erred in taking into account the Respondent's conduct.

29. In our understanding, Rule 84 of the 2010 *Court of Appeal Rules*, [now Rule 86 of the 2022 *Rules*], was introduced in the Rules to avoid the filing of applications for striking out appeals very late in the day when the appeal has been pending for years and occasionally even when the appeal itself has been listed for hearing, thereby causing injustice to the Appellants who would have to make a fresh start having been lulled into a false sense of security that no issue would be taken regarding the competency of the Notice of Appeal or Record of Appeal. This was in recognition of the fact that the Court's primary jurisdiction is to hear and determine appeals. The timelines for making applications to strike out the Notice or Record of Appeal are therefore meant to expedite the steps to be taken in the appeals. They should therefore be adhered to scrupulously by the parties.

30. In our view, where a party fails to adhere to the legal requirements such as by furnishing an address for service and thereby disentitles himself to being served with the Record of Appeal, he cannot, when he finds that he is out of time for applying for striking out the Record of Appeal, rely on that very default in order to obtain favourable orders from the Court. In this case, the Respondent, going by his own advocates information, withdrew instructions from the advocate. Instead of taking appropriate steps to properly come on record, he waited until he was prompted by the Appellant's Advocates before regularising his position. The fact that the ELC subsequently found that the manner in which he did so was unprocedural cannot be a basis for blaming the Appellant's Advocates who in any case were not the Respondent's legal advisers. The Respondent created for itself a situation that made it impossible for him to be served with the Record of Appeal and paid for the consequences.

31. The circumstances under which a full bench of this Court interferes with the exercise of discretion by a single Judge are now well settled. This Court in *Kenya Canners Limited v Titus Muiruri Doge* Civil Application No. Nai. 119 of 1996 held that:

> "A reference to the full court is not an appeal although it is in the nature of one and in exercising the discretion under rule 4, the single judge was exercising the power on behalf of the full court and his discretion would not therefore be easily upset except on sound principles and these are that the single judge took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to that issue; or that the decision, looked at in relation to the available evidence and the relevant law is plainly wrong...A breach of any or all of such principles would entitle the full court to interfere and the applicant must satisfy the Court that it ought to do so."

32. The Learned Single Judge found, rightly in our view, that the conduct of the Respondent was inimical to favourable exercise of discretion. Being a judicial exercise, the Learned Single Judge was entitled to take that conduct into account. In the premises, we have not been satisfied that in arriving at her decision, the Learned Single Judge took into account an irrelevant matter which she ought not to have taken into account, or that she failed to take into account a relevant matter which she ought to have taken into account; or that she misapprehended or not properly appreciated some point of law or fact

applicable to that issue; or that the decision, looked at in relation to the available evidence and the relevant law is plainly wrong.

33. We dismiss the reference with costs to the Appellant.

34. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2023

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL