Muhia v Thuku (Civil Application E255 of 2023)
[2023] KECA 1273 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KECA 1273 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E255 OF 2023

PM GACHOKA, JA

OCTOBER 27, 2023

BETWEEN

SIMON THUO MUHIA ..... APPELLANT

AND

DAVID THUKU ..... RESPONDENT

(Being an Application to file an appeal out of time)

RULING

1. Before me is an application expressed to be brought under Article 48 of the *Constitution* of Kenya, Section 79G, 3A of the *Civil Procedure Act*, Order 43, Order 50 Rule 6 of the *Civil Procedure Rules*, provisions of law which have no application to litigation procedures in processes undertaken before this Court. The correct provision which ought to have been cited by the applicant as an access provision for the relief sought should have been Rule 4 of the *Court of Appeal Rules*.

2. The above default on the part of the applicant will not however per se disentitle the applicant the right to have their application considered on its own merits. The default is curable in law not only under the inherent power of the Court and the overriding objective principle of the Court but also under the now crystallized non-technicality principle in the delivery of justice enshrined in Article 159(2)(d) of the *Constitution*.

3. Rule 1(2) of the *Court of Appeal Rules*, 2010 enshrines the courts inherent power. It provides:1(2) nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The principles that guide the Court on the invocation and application of this Rule have been crystalized by case law. See *Equity Bank Limited vs. West Link Mbo Limited* [2013] eKLR; and *Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell* [2013] eKLR wherein this Court and the Supreme Court of Kenya variously stated, inter alia, that: inherent power is the authority

possessed by a court implicitly without its being derived from *the Constitution* or statute; and second, that inherent power is an endowment to the court such to enable it regulate its internal conduct, and ensure that its mode or discharge of duty is conscionable, fair and just.

4. Sections 3A and 3B of the *Appellate Jurisdiction Act* on the other hand, enshrines the Court's overriding objective principle that enables the Court to achieve fair, just, speedy, proportional, time and cost-saving disposal of cases before it. Secondly, it emboldens the Court to be guided by a broad sense of justice and fairness. Thirdly, it gives the Court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective. The parameters for invocation and application of this principle have also been crystallized by case law. See *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited* Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008); and *Kariuki Network Limited & Another vs. Daly & Figgis Advocates* Civil Application No. Nai 293 of 2009.

5. The non-technicality principle in Article 159(2)(d) of *the Constitution* of Kenya, 2010 provides:

> " 159
>
> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles
>
> d. Justice shall be administered without undue regard to procedural technicalities."

6. On the strength of the above, I will consider the application under the principles that the Court has developed over time, in regard to Rule 4 of the Court of Appeal Rules. Being satisfied that I am now properly seized of the matter, I proceed to pronounce myself thereon on its' merits. The application, substantively seeks leave of the Court to be granted, to file an appeal out of time.

7. The application is premised on the grounds that the appellant filed a notice of preliminary objection dated 15th August 2021, challenging the jurisdiction of the High Court to hear and determine Civil Case No. 92 of 2017 (O.S) which was filed by the respondent claiming that the appellant, who was his advocate acting for him in various transactions, had illegally withheld his documents and refused to give them back; that when the preliminary objection came up for hearing, the trial Judge ordered that the parties file written submissions.

8. The appellant's arguments in those submissions were that this was a dispute that arose from an advocate-client relationship and hence should be heard by the Advocates Disciplinary Tribunal and that the cause of action raised by the respondent, amounted to professional misconduct by an advocate against a client and therefore the right forum to hear and determine the case was the Advocates Disciplinary Tribunal.

9. Further grounds are that the judge delivered a ruling on 23rd February 2023 dismissing the preliminary objection and ordered the case to proceed; that counsel for the appellant got ill and was consequently off duty for several months; that upon return to the office in May 2023, counsel for the appellant extracted the ruling and found that the judge had misconceived most of the issues at hand and concluded it was necessary to appeal and immediately embarked on preparing the instant appeal.

10. According to the appellant the delay in filing the appeal was occasioned by the appellant's counsel being sick and for several months as his office remained closed; that there has not been an unreasonable delay since the ruling was delivered on 23rd February 2023 which translated to a 60 days delay; that the delay has not been inordinate or intentional and was not meant to obstruct/and or derail justice for

any party; that no prejudice will be suffered by the respondent if this application is allowed but the appellant stands to suffer some irreparable harm if the same is not granted.

11. The application is supported by the affidavit of the applicant in which he reiterates the grounds on the face of the application. There is no response from the respondent. The applicant has filed written submissions. He reiterates the averments in the supporting affidavits and asserts that the Court should exercise its' discretion in his favour.

12. I have considered the application, the affidavit in support and the written submissions. It is not in dispute that the ruling, the applicant intends to challenge was delivered on 23rd February 2023 and the application was filed on 15th May 2023. It is incumbent on the applicant to give cogent reasons for the delay. The supporting affidavit by the applicant indicates that his advocate was sick and was in and out of hospital. In paragraph 16 of the affidavit, the applicant states that the advocate "was sick occasionally being and out of hospital for several months within which period his office remained closed". Save for that bare statement, there are no medical records to support the fact that the advocate was sick and that his office was closed. The least the applicant could have done is to annex a medical report and evidence of closure of the office. It is noteworthy that the advocate has not sworn an affidavit to support that allegation.

13. The discretion that I am called upon to exercise in the determination of this application is provided for under Rule 4 of the *Court of Appeal Rules* as follows:

> " The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

14. In *Leo Sila Mutiso vs. Hellen Wangari Mwangi* [1999] 2 EA 231 this Court set out the principles that guide this Court in such an application 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."

15. In *Fakir Mohammed vs. Joseph Mugambi & 2 others* (2005) eKLR, this Court found that the factors that the court can take into consideration are discretionary and non-exhaustive:

> " The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it 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, (possible) 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 factor."

16. Further, in *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees*, Civil Application No. 190 of 2019 this Court expounded that:

> "Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."

17. Although there is no maximum or minimum period of delay set out under the law, the reason(s) for the delay must be plausible. To this effect, this Court in *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR stated:

> "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."

18. I also note that the applicant or his advocate did not write a letter applying for proceedings. Had the applicant or his advocate written such a letter and copied it to the respondent in accordance with Rule 84 of the *Court of Appeal Rules*, it would demonstrate a positive action and desire to institute an appeal.

19. In view of the foregoing, I am not satisfied that the applicant has advanced any reasonable grounds that deserve the discretion of this Court being exercised in his favour. Accordingly, I dismiss the application with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

M. GACHOKA CIARB, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR*