



**Carla v Marelli & 2 others (Civil Appeal (Application) E019 of 2022)
[2023] KECA 1385 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1385 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E019 OF 2022
GV ODUNGA, JA
NOVEMBER 24, 2023**

BETWEEN

RONCAROLO CARLA APPLICANT

AND

FABIO MARELLI 1ST RESPONDENT

SONGHAI INVESTMENTS LTD 2ND RESPONDENT

MOHAMMED ESSAK BACHANI 3RD RESPONDENT

(Being an Application for extension of time to file and serve an Appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Malindi by J.O Olola J dated 27th May, 2020 in Malindi Environment and Land Court Civil Case No 61 of 2009)

RULING

1. Roncarolo Carla, the applicant herein by an amended notice of motion dated June 26, 2023 seeks leave to file and serve the Notice of Appeal and Record of Appeal out of time against J O Olola J judgment delivered on May 27, 2020 in Malindi ELC Civil Case No 61 of 2009. The application is supported by the affidavit of the applicant, the appointed administrator and personal representative of the estate of Rossi Renata (Deceased) sworn on October 5, 2022.
2. The applicant averred that she was unaware of the delivery and/or existence of the impugned judgment until sometime late in July 2020 when she visited the court registry and was given a copy of the judgment but time to file an appeal had already lapsed; that her advocates, the firm of M/s Ochangu Kemunto & Associates Advocates who were aware of the existence of the judgment willingly concealed such information and advised her of their unwillingness to proceed with any further instructions in the matter and asked her to hand over the same to any other advocate of her choice; that she instructed M/s Katsoleh & Company Advocates who filed the notice of motion dated July 21, 2020 and later amended on November 25, 2021 seeking stay of execution of the judgment pending appeal; that the



notice of appeal dated August 4, 2020 and lodged on August 5, 2020 by the said firm was not valid as it was not filed within 14 days as require under rule 75(2) of *Court of Appeal Rules*; that the amended notice of motion was also filed without a valid notice of change of advocates and without leave of the court as required under order 9 of the *Civil Procedure Rules, 2010*; and that *vide* a ruling delivered on August 18, 2022 the court opined that the notice of appeal and the application were invalid for having been filed by advocates who were not properly on record.

3. According to the applicant, though the period to file the notice of appeal was exceeded by over 2 years and 4 months, the delay was occasioned by the mistakes and missteps of his previous advocates who never communicated to her about the delivery of the judgment. She averred that her new advocates have obtained a consent from his previous advocates and the same has been adopted as an order of the court; that she is ready to lodge the notice of appeal and the record of appeal if extension is granted; that there is sufficient cause for this application to be allowed; that the intended appeal is arguable with overwhelming chances of success as it raises serious issues of law which amongst others seek to examine whether the Court had the power and discretion to vary the respondent's counterclaim and enter judgment on pleaded issue; and that if leave is not granted, she stands to suffer substantial and irreparable loss and prejudice.
4. I heard the application on the court's virtual platform on November 1, 2023 during which learned counsel, Mr Evans Kazungu appeared for the applicant while Mr Vincent Omollo appeared for the respondent. Both counsel relied on their written submissions.
5. On behalf of the applicant the averments in the supporting affidavit were repeated and it was averred that the advocates' mistake of the failure to inform and advice the applicant of the delivery of the impugned judgment and subsequent failure to seek leave are excusable mistakes. The applicant asserted that she is an aged lady of poor health hence the failure to grant the orders sought herein would be prejudicial to her and not the respondent. The court was urged to allow the application. In support of the application, the applicant relied on *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR and *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR.
6. On behalf of the respondent, it was submitted that by the time the application dated July 21, 2020 filed by the firm of Katsoleh & Co Advocates was made, the applicant was aware of the impugned judgment and had evinced an intention to appeal. According to the respondent, there has been a delay of more than 2 years since the applicant filed a notice of appeal dated August 5, 2020 which delay, it was contended, is inordinate, contumelious and no reasonable explanation has been given for the delay. Reliance is placed on the principles enunciated in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR for the submission that there is unreasonable delay of 2 years to file the application and that no reasonable explanation has been offered by the applicant. According to the respondent, to re-open the litigation after a lapse of more than 2 years is prejudicial to him. The respondent urged the court to dismiss the application with costs.
7. I have considered the application, affidavits in support and in opposition to and the written submissions.
8. 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 factors that the court would look into as guiding principles. These are, first, the period of the delay



must be considered. Second, the court has to consider the reasons for such a delay. Thirdly, the court would consider whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal. Fourthly, the court is required to consider if 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. This Court also considers the overriding objective set out in sections 3A and 3B of the Appellate Jurisdiction Act.

9. 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 v Murika*

M’Ethare & Attorney General Civil Appl NAI 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”

10. On its part, the supreme court of Kenya in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No 16 of 2014[2014] eKLR 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.
11. In this case, the decision appealed against was made on May 27, 2020, slightly more than 3 years ago. According to the applicant she was unaware of the judgement till July, 2020 by which time the period for filing the Notice of Appeal had lapsed. It was her case that her erstwhile advocates concealed from her the fact that the judgement had been delivered. When she became aware of the decision she apparently filed a notice of appeal and sought stay of execution. However, that application was disallowed on August 18, 2022 on the ground that Notice of Appeal dated August 4, 2020 and lodged on August 5, 2020 was not valid as it was not filed within 14 days as require under rule 75(2) of Court of Appeal Rules. In addition, it was found that the amended notice of motion was also filed without a valid Notice of Change of Advocates and without leave of the court as required under order 9 of the Civil Procedure Rules, 2010; and that *vide* a ruling delivered on August 18, 2022 the court opined that the notice of appeal and the application were invalid for having been field by advocates who were not properly on record.
12. At the hearing of this application I sought from counsel for the applicant the fate of the earlier notice of appeal dated August 4, 2020 and learned counsel informed me that the said notice of appeal was found to be invalid by the superior court. While there is no evidence that the said Notice of Appeal has been properly removed from the record, this court in Joseph Kamau Musa & 4 others v Ereri Company Ltd & 3 others Civil Application No Nai 156 of 1999 hearing a reference from the decision of a single



judge of this court found that if there is no valid notice of appeal in existence there is nothing to prevent the filing of another one by the applicants.

13. However, in this case, the applicant knew way back in July, 2020 that she was out of time in filing the notice of appeal. She did not take any action either before this court or before the court below to regularise her position. The fact that she applied for stay was not a reason for her not to simultaneously seek to regularise the position of the notice of appeal. As a result of inaction on her part, there has been an inordinate delay of over 2 years in filing this application. There is no explanation as to why she never sought to have time extended to enable her file the notice of appeal out of time within reasonable period. This is a case of pure inaction and as was held by Waki, JA in *Kagai Kimomori Watatwa v Ngatia Kareko* Civil Application No Nai 77 of 2005, only *bona fide* mistakes qualify for pardon and not pure inaction.
14. In the premises, it is clear that the delay in filing the notice of appeal and the record of appeal was clearly inordinate; the delay in regularizing the said filing was inordinate; and there are no satisfactory reasons advanced for the said delay. I appreciate the fact that by the 1984 amendment to rule 4 of the *Court of Appeal Rules*, the stricture of “sufficient reason” was removed and therefore a Judge of the Court of Appeal has an unfettered discretion to exercise thereunder. However, as appreciated by Waki, JA in *Shital Bimal Shah & 2 others v Akiba Bank Limited* Civil Appeal (Application) No 159 of 2005 [2006] 2 EA 323, this does not mean that the decision should be made on whim or caprice. The court does not act on sympathy and as was held by the Supreme Court in *Daniel Kimani Njibia v Francis Mwangi & another* [2015] eKLR:

“Even as the Court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a court of law and not mercy. It is also bound by the law and more so the *Constitution* which binds all.”

15. We appreciate that we are sworn to do justice but justice must be administered in accordance with the law. See *Mehrunnissa v Mohamed Parvez* [1976-1985] EA 289; [1981] KLR 547.
16. The applicant has not disclosed whose mistake it was that no application was made for extension of time since July, 2020 when she became aware of the judgement. With regard to the responsibility of the litigant to follow up their case,

Waki, JA had this to say in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

17. Having considered all the above, I find that this is not a proper case for this court to exercise its discretion in favour of the Applicant.
18. Accordingly, the Motion dated June 26, 2023 fails and is dismissed with costs.
19. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

G. V. ODUNGA

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JUDGE OF APPEAL



I certify that this is the true copy of the original

DEPUTY REGISTRAR

