



Mwai Kibaki Foundation v Wanjiru & another (Suing as Personal Representatives of David Kihungu Murugi) (Civil Appeal (Application) 265 of 2019) [2023] KECA 1659 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1659 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 265 OF 2019
DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA
DECEMBER 15, 2023**

BETWEEN

MWAI KIBAKI FOUNDATION APPELLANT

AND

ALICE WANJIRU 1ST RESPONDENT

EDWARD MAINA KIBUTU 2ND RESPONDENT

SUING AS PERSONAL REPRESENTATIVES OF DAVID KIHUNGU MURUGI

(Being an application to strike out the Notice of Appeal dated 22nd July 2019 which was filed against the judgment of the High Court at Nairobi (Sergon, J.) delivered on 12th July 2019 in High Court Civil Appeal No. 97 of 2018)

RULING

1. The respondent, vide a Notice of Motion dated 19th July 2021, invokes the provisions of Article 40, 48, 50 (1) and 159 of the Constitution of Kenya, 2010, section 3A and 3B of the Appellate Jurisdiction Act, rule 47, 75, 82, 83 and 84 of the Court of Appeal Rules, 2010, seeking an order to strike out the notice of appeal dated 22nd July 2019 and filed on 24th July 2019 from the decision of the High Court (Sergon, J.) dated 10th December 2019 in High Court Civil Appeal No. 97 of 2018.
2. A brief background to this application is that one David Kihungu Murugi (deceased), was injured by a motor vehicle registration number KAW 039A belonging to the appellant while loading cargo onto a different motor vehicle registration number KBT 022S along the Nairobi-Mombasa Road at Salama Market. Several particulars of negligence were pleaded against the appellant and its driver, one Fatuma Hassan, through a suit filed before the Magistrates' Court at Nairobi, to wit, *CMCC No. 4544 of 2014*. The trial court, vide a judgment dated 25th January 2019, found the appellant and its driver 100% liable



for the accident. The estate of the deceased was awarded general damages of Kshs. 1,710,000/= and special damages of Kshs. 64,700/=.

3. The appellant was dissatisfied with the decision of the trial court and preferred an appeal, to wit, Civil Appeal No. 97 of 2018. The High Court (Sergon, J.) vide a judgment dated 12th July 2019, agreed with the trial court's finding on liability and on general damages. The award on special damages of Kshs. 64,700/= was set aside and substituted with an award of Kshs. 50,000/=.
4. Dissatisfied with the decision of the High Court, the appellant filed a notice of appeal dated 22nd July 2019, evincing its intention to appeal against the entire decision. Thereafter the appellant sought stay of execution of the High Court judgment. This Court (Warsame, Makhandia & Odek, JJ.A.) vide orders made on 10th December 2019 directed as follows: by consent there shall be stay of execution of the judgment and decree dated 12th July 2019 pending the hearing and determination of the intended appeal; the intended appeal be filed and served within the next 90 days; thereafter the appeal be processed and listed for hearing on priority basis; the appellant to pay a sum of Kshs. 300,000/= to the respondent within the next 15 days; and the notice of motion dated 8th August 2019 be and is hereby dispensed with.
5. The gravamen of the application now before us, as evident from the affidavit in support thereof sworn by Alice Wanjiru, is that the appellant failed to institute the intended appeal within the 90 days' period as ordered by this Court. The period was said to have lapsed on or about 10th March 2020. As such, it is contended that no appeal lies before this Court, and the notice of appeal dated 22nd July 2019 should therefore be struck out. For the same reasons, we were urged to vacate and/or set aside the stay orders made on 10th December 2019 so as to allow the respondent enjoy the fruits of her judgment.
6. The application is opposed by the appellant through a replying affidavit sworn by Judith Kibaki, one of its trustees. She deposes that indeed the appellant/respondent filed a notice of appeal dated 22nd July 2019 and requested for certified copies of the typed proceedings and judgment on 5th August 2019. On the timeline of 90 days within which the appellant was supposed to have filed the appeal as directed by this Court, it is deposed that the period was supposed to lapse on 1st April 2020 and not on 10th March 2020 as contended by the respondent. According to the appellant, the period between 21st December 2019 and 13th January 2020 (both days inclusive) when this Court was on Christmas vacation ought not to be taken into account in computing time.
7. As to the reasons for the delay in filing the record of appeal, it is deposed that the High Court registry delayed in availing the certified copies of typed proceedings and judgment despite constant follow ups. Another reason advanced is the Covid-19 pandemic that was registered in the country on 13th March 2020, leading to closure of court stations as per the Government's directive. It is contended that the typed proceedings were certified on 9th March 2020, whereas the judgment was certified on 30th June 2020 and a Certificate of Delay dated 27th July 2020 was issued by the Deputy Registrar of the High Court.
8. The appellant contends that it duly filed the appeal, being Civil Appeal No. E239 of 2020, on 11th August 2020 and served it upon the respondent on the same date. As to whether it is intent on prosecuting its appeal, it contends that contrary to the assertions by the respondent, it is ready and willing to proceed with the appeal as evidenced through its written submissions dated 7th April 2021, which it filed in compliance with the directions given by the Deputy Registrar of this Court on 23rd February 2021. It has also paid the Kshs.300,000 to the respondent as directed.
9. In sum, the appellant contends that it has fully complied with the provisions of rules 82 of the [Court of Appeal Rules, 2010](#) and that an appeal to this Court lies and is properly on record; that the delay in



filing the appeal was not deliberate and/or intentional but was occasioned by circumstances beyond its control; and that by allowing the instant application, this Court will be driving the appellant away from the seat of justice unheard, especially in light of it having complied with the directions given by the Deputy Registrar on the manner in which the appeal is to be disposed of.

10. Both parties have filed their respective written submissions, which we have considered. At the hearing hereof, learned counsel Mrs. Githaiga appeared for the respondent while learned counsel Ms. Mburu appeared for the appellant.
11. As per the Order of this Court dated 10th December 2019, the appellant was supposed to file and serve the record of appeal upon the respondent within 90 days of the said order. That period, according to the respondent, lapsed on or about 10th March 2020. However, the provisions of rule 3 of the Court of Appeal Rules, 2010 provides that the period of the Christmas vacation shall not be reckoned in the computation of time. Therefore, the period between 21st December 2019 and 13th January 2020, both days inclusive, is not to be reckoned in the computation of time. This brings us to 1st April 2020 when the appellant was supposed to have filed and served its record of appeal, which evidently, it had not done.
12. Rule 82 of the *Court's Rules* which relates to the institution of appeals provides as follows:

“ 82

- (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –
 - a. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the Respondent.
- (3)”



13. The reason given by the appellant for not filing and serving the record of appeal within 90 days as ordered by this Court was the delay in the availing of certified copies of typed proceedings and judgment by the High Court. The appellant has annexed to the replying affidavit of Judith Kibaki a copy of a letter dated 5th August 2019, that was addressed to the Deputy Registrar of the High Court requesting to be furnished with a certified copy of the judgment and proceedings for purpose of instituting an appeal. The request was made within 30 days of the date of the decision sought to be appealed from and therefore complies with the provisions of rule 82 of the rules of this Court.
14. The other reason advanced by the appellant for the delay in filing and serving the appeal is the Covid-19 pandemic. It is a matter of public notoriety that following the reporting of the first case of Covid-19 in the country, court operations stopped and/or were scaled down altogether, pursuant to the directive issued by the government and the National Council for the Administration of Justice. This Court takes judicial notice that the Covid-19 pandemic altered the norm as regards the conduct of court and registry functions. Therefore, although the typed proceedings had been certified on 9th March 2020 and before the first reported case of Covid-19 in the country, we are satisfied that the delay in obtaining a certified copy of the judgment was attributable to the Covid-19 pandemic. After certification of the judgment on 30th June 2020, the Deputy Registrar issued a Certificate of Delay dated 27th July 2020. Although the period taken to prepare the proceedings was computed by the Deputy Registrar of the High Court to be from 12th July 2019 to 9th March 2020, a total of 241 days, we are satisfied that for the aforementioned reasons, which were beyond the appellant's control, the latter was not in a position to file and serve the record of appeal.
15. In sum, we are satisfied that the appellant has provided a plausible explanation for the delay in filing and service of the record of appeal. The delay was neither inordinate nor intentional. In any case, the record of appeal was filed and served upon the respondent on 11th August 2020, close to a year before the filing of the application and after directions as to the filing of written submissions.
16. We believe that we have said enough to demonstrate that this application is unmerited. It is accordingly dismissed. The costs of the application shall be in the main appeal.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

