Faraj v Awadh (Civil Application E014 of 2023)
[2023] KECA 1487 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KECA 1487 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E014 OF 2023

GV ODUNGA, JA

DECEMBER 8, 2023

BETWEEN

ANISA ABEID FARAJ ..... APPELLANT

AND

KHALID AHMED AWADH ..... RESPONDENT

(Application for extension of time to file Notice of Appeal in accordance with Rule 4 of the Court of Appeal Rules, 2010 and all other enabling provisions of the Law which appeal is from the Judgment of the Trial Court (N.A Matheka, J) delivered on 25th October, 2022 in ELC No. 198 of 2014)

RULING

1. Kahlid Ahmed Awadh, the Respondent instituted Mombasa ELC Case No. 198 of 2014 against the Applicant contending that he was the registered owner of Title No. C.R 43603 being subdivision No. 10328(Orig. No. 805/27) sec 1/MN (Suit Land) together with the house constructed thereon having purchased the same from Salama Breik. He pleaded that the Applicant had since November, 2013 trespassed on the suit land by collecting rent from his tenants. He sought for vacant possession, an injunction restraining the Applicant from trespassing on the suit land, general damages for trespass and costs of and incidental to the suit. In her defence, the Applicant pleaded that the alleged sale of subdivision was null and void as the suit land was at all material times part of the estate of Ahmed Hamda Ahmed (Deceased) and Salama Breik had not obtained a grant of representation to the estate to entitle him to sell and pass proper title.

2. On 25th October, 2022, N. MathekaJ. found that fraud had not been pleaded or particularized or proved to establish that the Respondent was a party to any fraud or illegality. According to the Learned Judge, the Respondent was bona fide purchaser for value having bought the suit land from Salama Breik hence not part of the estate of the said deceased. The Learned Judge declined to award damages

for trespass for not being proved but held that that the Respondent had proved his case on a balance of probabilities.

3. Aggrieved, the Applicant lodged a Notice of Appeal dated 2nd March, 2023 to appeal in this Court. By her application dated 2nd March, 2023, the Applicant seeks an order for leave to have the same admitted out of time and there be a stay of execution of the judgment delivered on 25th October, 2022 in Mombasa ELC No. 198 of 2014 pending the hearing and determination of his application. The only relief that this Court, sitting as a single Judge, may competently grant is the first prayer.

4. The Applicant avers that she had instructed the firm of Kamoti Omollo & Company Advocates to represent her in the primary suit; that regrettably the said firm of advocates failed to dispense its duty of client care and access important information on the proceedings before the trial court to her detriment but she has since now appointed Bosire Nyariki & Company Advocates as her advocates; that upon perusal of the trial court record, the new advocates informed her that the previous advocates did not attend court on 27th September, 2022 when the suit was called out in court for purposes of fixing a judgment date; that no notice was served upon her or her previous advocates on judgment date; that none of the parties attended court 25th October, 2022 when judgment was delivered and by the time he instructed the new advocate, time within which to appeal had lapsed; that the delay in instructing new advocates was occasioned by her failure to know the judgment date and the mistake of her previous advocates; that the delay is not inordinate and inexcusable; that the Respondent has threatened with execution at any moment and if stay is not granted, the appeal shall be rendered nugatory and she will suffer substantial and irrecoverable loss hence in the interest of justice and fair play the orders are granted; and that she is ready and willing to furnish any security as this Court may direct.

5. In response, Abdalla Abeid Salim Abadi, donee of a Power of Attorney of the Respondent avers that the application is defective for being drawn and filed by a firm of advocates who have come on record without the consent of the previous firm of advocates and/or an order of the court after delivery of the judgment; that the Applicant has a duty to follow up with his advocates but has not demonstrated having done so; that the Applicant has not elaborated how and when he became aware of the judgment and that the application has been filed after the Respondent had already extracted the decree; that execution of the judgment has not commenced as costs have not been taxed; and that he has been deprived of use and enjoyment of his land from November, 2013.

6. I heard this application on 4th December, 2023 via this Court's virtual platform when Learned Counsel, Mr. Mutiokoh held brief for Mr. Bosire for the Applicant while there was no appearance for the Respond net despite due service on his advocate. However, the Respondent had filed his submissions.

7. The Applicant reiterated that neither herself nor her advocates was informed of the date of the delivery of the decision sought to be appealed against and that in any case mistake of counsel ought not to be visited on the client. She relied on the case of *CFC Stanbic Bank Limited v John Githaiga & Another* [2013] eKLR. It was submitted that the appeal is arguable as that the Applicant risks being evicted from the land she has lived in since time immemorial. The Applicant asserted that the intended appeal seeks to ascertain the real ownership of the suit land in question hence no prejudice will be suffered by the Respondent. According to the Applicant, she has established a sufficient cause on why the Notice of Appeal should be admitted out of time and stay of execution to be granted against the judgment.

8. The Respondent submitted that the failure by the previous advocates was not a mistake but inaction which is not sufficient reason for court to exercise discretion. According to the Respondent, paragraph 4 of Applicant's affidavit clearly describes the inaction which is equal to professional negligence which cannot be mistaken with a mistake of an advocate but a refusal to act. Reliance is placed on *Itute Ingu & Another v Isumael Mwakavi Mwaenwa* [1994]eKLR that court must examine the nature or quality

of the mistake or mistakes. According to the Respondent, the Applicant was not diligent to follow up with her advocates or the court on case progress; that it is unreasonable to blame previous counsel without demonstrating the steps taken by the Applicant to show she did not condone or collude in the delay; that the failure to dispense with the duty client care could only be averred by the previous advocate hence lack of an affidavit from the advocate deprives the court of proper basis for the exercise of court's discretion. Reliance was placed on *Motor ways Kenya Limited v Kenya Engineering Workers Union* [2018] eKLR. According to the Respondent, the Applicant has failed to demonstrate that the appeal is arguable and has not established the irreparable loss she will suffer as no evidence has been placed before the court. The Respondent submitted that the application lacks merit and does not meet the threshold for granting leave to appeal out of time. The Respondent urged court to dismiss the application with costs.

9. I have considered the material placed before me in this application.

10. 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.

11. Those principles were restated by Waki, JA in *Fakir Mohamed vs. 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 vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M'Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38."

12. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. 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.

13. In *Leo Sila Mutiso vs. 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.

14. In this case, the Applicant's ground for seeking extension is that the notice of delivery of the decision intended to be challenged was never given to the Applicant or her Advocate. 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.
>
> 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.

15. 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 vs. Lawrence Nthiani Nzioki & Another* Civil Application No. Nai. 359 of 1996. In fact, this Court held in *Ngoso General Contractors Ltd. vs. 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."

16. Similarly, in *Leonola Nerima Karani vs. 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."

17. In *Kisumu Paper Mills Ltd vs. 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."

18. The Respondent has not disputed the factual averment that the said decision was delivered without notice.

19. 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 vs. 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."

20. 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 vs. Augustine Kubende* [1986] KLR 492; (1982-88) KAR 103.

21. 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 vs. Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.

22. In the premises, I allow the Notice of Motion on Notice dated 2nd March, 2023 and extend the time to the Applicant to lodge the Notice of Appeal dated 2nd March, 2023 with such period as would validate the said Notice of Appeal.

23. The costs of this application are awarded to the Respondent.

24. It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 8TH DAY OF DECEMBER, 2023.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify this to be a true copy of the original

Signed

DEPUTY REGISTRAR