Kenya Airports Authority v Kahia & another (Civil Application E079 of 2023) [2023] KECA 1549 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KECA 1549 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E079 OF 2023

GV ODUNGA, JA

DECEMBER 8, 2023

BETWEEN

KENYA AIRPORTS AUTHORITY ..... APPLICANT

AND

OSMAN AHMED KAHIA ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

(Being an Application for stay of execution and leave to file and serve Notice of Appeal out of time and that the already filed and served Notice of Appeal be deemed as having been duly filed and served on time in respect of an Intended Appeal against the Judgment of the Environment and Land Court at Mombasa (L.L Naikuni J.) delivered on 30th May, 2023 in ELC Petition No. 13 of 2022)

RULING

1. Osman Ahmed Kahia, the 1st respondent herein (petitioner) instituted Mombasa ELC Petition No 13 of 2022 against the applicant and the 2nd respondent. The 1st respondent pleaded that he was the registered owner as a lessee from the Government for a term of 99 years from July 1, 2001 of parcel of land situated in Mombasa Municipality in Mombasa District known as Title No CR 68272 LR No 5145/VI/MN measuring 1.180 ha as delineated on Land Survey Plan No 391472(suit property). According to the 1st respondent, the applicant and the 2nd respondent had not lawfully acquired the suit property. He contended that without any notification, compensation and/or his consent, the applicant in April/May, 2020 caused the digging/excavation of trenches and laying pipeline on the suit property in contravention of articles 10, 27 and 40 of the *Constitution, 2010*. He prayed for an order of compensation or removal of the installed pipelines from the suit property and the applicant to be restrained from trespassing and usage of pipelines.

2. In response, through her replying affidavit sworn on June 17, 2022, Margaret Munene, the applicant's acting corporation secretary *inter alia* averred that the suit was incompetent and fatally defective for not adhering to section 33(1) of the *Kenya Airport Act* No 3 of 1991 as the 1st respondent never engaged the applicant in negotiations and thereafter in arbitration if negotiations failed before filing the suit. She averred that the suit property was landlocked and the applicant's subsurface drainage pipes were already in existence. She averred that the suit property had been unlawfully acquired by the 1st respondent hence the provisions of article 40 of the *Constitution* would not apply.

3. On May 30, 2023, L L Naikuni J found that the applicant's actions amounted to acts of trespass and in breach of the provisions of articles 10, 27, 40 and 47 of the *Constitution, 2010*. The learned judge ordered that the 1st respondent be compensated in respect of the suit property at a market value of Kes 291,500,000/- within 180 days from the date of the Judgment. In the alternative, the applicant was directed to remove the installed pipelines within the said 180 days and compensate the 1st respondent with Kes 5 Million per month with interest at court rates of 14% pa effective from 30th April, 2020 till payment in full.

4. Aggrieved, the applicant intends to appeal in this court but it was not able to file it notice of appeal within the timelines prescribed under rule 77(2) of *Court of Appeal Rules, 2022*. The applicant's application dated September 5, 2023 therefore seeks an order for extension of time to file a notice of appeal out of time and the notice of appeal filed and served on August 23, 2023 be deemed as having been filed and served on time. Although the application on the face of it also sought an order of stay of execution of the judgment and all subsequent orders pending the hearing and determination of this application and the intended appeal, that prayer was rightly abandoned for the reason that a single judge of this Court has no jurisdiction to grant such a prayer.

5. Margaret Munene, the applicant's acting corporation secretary, deposed that the judgment was not delivered on April 12, 2023, the date it was initially due for delivery and the advice from the court registry was that it would be delivered on notice. However, no notice was sent to the applicant or its advocates and they were all unaware of the delivery thereof. She averred that on August 21, 2023, upon being served with the demand notice by the 1st respondent, the applicant learnt that the judgement had been delivered on May 30, 2023 allowing all the prayers in the petition verbatim and further that a monetary award in favour of the 1st respondent was made against the applicant in the sum of Kshs. 291,500, 000/-

6. According to the deponent, the notice of appeal was filed on August 23, 2023 together with the letter requesting for typed proceedings and judgment out of time and without leave of the court in contravention of rule 77(2) of *CAR, 2022*; and that the applicant has an arguable appeal with high chances of success which will be rendered nugatory if the orders sought are not granted; that the delay, which is neither inordinate nor deliberate, is excusable having been occasioned by a factor beyond its control.

7. In response, through his replying affidavit sworn on September 29, 2023, the 1st respondent avers the omnibus application is premature, incompetent and bad in law and should be dismissed. He avers that the Notice of delivery of judgment was dispatched to the advocates on May 23, 2023 via their respective email addresses; that the email address used for applicant's advocates is the same used by the advocates before this court hence the allegations that the delay was occasioned by non-service of the judgment notice is incorrect and false to warrant the exercise of this court's discretion in its favour; that there is no dispute that he is the registered owner of the suit property and upon compensation his rights to the suit property shall have been extinguished in favour of the applicant hence the appeal shall not be

rendered nugatory; and that since the applicant is constructively in full occupation of the suit property having installed the pipelines, it will not suffer not irreparable loss.

8. This application was heard by me through this court's virtual platform on December 11, 2023 on which day learned counsel, Mr. Okeyo, held brief for Mr Wachanga for the applicant while learned counsel, Ms Ondieki held brief for Mr Mogaka for the 1st respondent. There was no appearance for the 2nd respondent notwithstanding that it was duly notified of the hearing date

9. It was submitted on behalf of the applicant that there is nothing on record to show that the superior court either notified the parties prior to or after the delivery of the judgment hence the delay in filing the notice of appeal was not due to the negligence, laxity or indolence on the part of the applicant; that the delay of 2 months from the judgement date was not inordinate and but is excusable in the circumstances. Reliance is placed on *Fakir Mohamed v Joseph Mugambi & 2 others* (2005) eKLR, *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and *Lemanken Arata v Harum Meita Mei Lempaka & 2 others* eKLR and *Patricia Cherotich Sawe v IEBC & 4 others* [2015] eKLR.

10. During the hearing Ms Ondieki informed me that the 1st respondent was entirely relying on the said replying affidavit. However, Mr Okeyo reiterated that the purported notice of judgement delivery date did not reach the applicant's advocates

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

12. 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.

13. 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."

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

15. In *Leo Sila Mutiso v 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.

16. 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 its 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.

17. 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 v 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."

18. Similarly, in *Leonola Nerima Karani v 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."

19. In *Kisumu Paper Mills Ltd v 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."

20. In this case the respondent has opposed the application on the ground that the parties were duly notified of the delivery date via email. It is however, not in dispute that the judgement was delivered on a date other than the one it was initially scheduled for delivery.

21. 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 v NIC Bank Limited & ano*r [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."

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

23. 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.

24. In the premises, I allow the Motion dated September 5, 2023 and extend time for filing the Notice of Appeal filed on August 23, 2023 with such period as would validate the said notice of appeal.

25. The costs of this application are awarded to the respondent.

26. It is so ordered.

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

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR