Kimani v Mbogo & another (Civil Application E369 of 2021)
[2022] KECA 147 (KLR) (18 February 2022) (Ruling)

Neutral citation: [2022] KECA 147 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E369 OF 2021

RN NAMBUYE, JA

FEBRUARY 18, 2022

BETWEEN

JOHN NJENGA KIMANI ..... APPELLANT

AND

SUSAN KINUTHIA MBOGO ..... 1ST RESPONDENT

FRANCIS MBOGO ..... 2ND RESPONDENT

(An application for extension of time for giving of appeal and leave to appeal out of time of the judgment of the Environment and Land Court (L. Komingoi, J.) dated 21st May, 2020 in Milimani ELC No. 330 of 2008)

RULING

1. Before me is a Notice of Motion application undated but whose certificate of urgency is dated 27th September, 2021. It is brought under sections 79G and 95 of the *Civil Procedure Act* and Order XLIX Rule 5 of the *Civil Procedure Rules*. The motion substantively seek prayers as follows:

> " 1. THAT the proposed appellant be granted leave to appeal out of time against the whole judgment of the Hon. Justice L. Komingoi in Nairobi High Court in ELC No. 330 of 2008 delivered on the 21st May, 2020.
>
> 2. .....
>
> 3. THAT the notice of appeal and memorandum of appeal annexed hereto marked as JNK1 and 2 be deemed as duly filed and served.
>
> 4. THAT the costs of this application be provided for."

2. It is supported by grounds on its body, a supporting affidavit sworn by John Njenga Kimani, the applicant, together with annexures thereto, and written submissions dated 16th November, 2021 together with a ruling annexed thereto. It has been opposed by the respondents' grounds of opposition dated 8th February, 2022. It was canvassed through the respective parties rival pleadings, applicant's written submissions and a legal authority, in the absence of advocates for the respective parties pursuant to directions given on the hearing notice served electronically on the parties by the Deputy Registrar of this Court on Thursday, January 27, 2022 at 4.41pm.

3. Supporting the application, the applicant asserts cumulatively on the facts that the judgment was delivered virtually on 21st May, 2020 in his absence. It was not until the 3rd June, 2021 when he accessed a hard copy. Upon appreciation both of the reasoning and the conclusion reached therein by the trial Judge, he made an informed decision to appeal against that judgment. Accessing the court physically to access services proved a challenge due to the lockdown and want of freedom of movement due to the Covid-19 pandemic challenges. He is not technosavy hence his inability to access a copy of the judgment online. He was also misled by his former advocate on record for him that he was the successful party only for him to realize later on upon reading the hard copy of the judgment that he was in fact the losing party. Time for appealing as of right had long lapsed. He pleads that mistakes of his advocate should not be visited on him. He is apprehensive the respondents may execute the decree through an eviction process which if carried out will highly inconvenience and prejudice him and therefore render the appeal nugatory. No prejudice will be suffered by the respondents if the relief sought were granted to him.

4. On the law, the applicant relies on the case of *Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi* Civil Application No. NAI 255 of 1997 (UR) as approved in the case of *Stanley Kaiyongi Mwenda vs. Cyprian Kibai* [2000] eKLR on the prerequisites for granting relief of this nature, and submits that the length of delay in initiating his intended appellate process timeously has been sufficiently and plausibly explained. The grounds of appeal proffered are all arguable with high chances of success. The respondents stand to suffer no prejudice if the relief sought were granted to him. Interests of justice would also demand that he be accorded an opportunity to ventilate himself on the issues intended to be raised by him on appeal.

5. The respondents have filed grounds of opposition contending that the applicant does not reside on land parcel No. Escarpment/Kinari/Block I/1759 (the suit property). It is them who reside on the said suit property and, lastly, that the applicant's application is devoid of merit, incompetent, trivial and an abuse of the court process.

6. My invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited in the heading of the application none of which has application to the exercise of this Court's mandate in an application of this nature. The applicant's failure to date the application and cite correct provisions of law as access provision for the relief sought is not of itself fatal. He will not therefore be sent away from the seat of justice empty handed on account of the above default. The same is curable under the inherent power of the court enshrined in Rule 1(2) of the *Court of Appeal Rules*. 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.

7. The threshold for invoking and applying the above Rule have now been crystallized by case law. I take it from *Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR, for holding that "the court's inherent power is a residual intrinsic authority which it may resort to in order to put right that which would otherwise be an injustice".

8. The default is also curable under Article 159(2)(d) of *the Constitution* of Kenya. It provides:

> "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;

The parameters for invocation and application of this Article have also been crystallized by case law. See *Jaldesa Tuke Dabelo vs. IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others vs. IEBC & 3 Others* [2013] eKLR; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others* [2014] eKLR; *Patricia Cherotich Sawe vs. IEBC & 4 Others* [2015]eKLR among numerous others for principles/ propositions, inter alia, that: "the exercise of the jurisdiction under Article 159 of *the Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice save that Article 159(2)(d) of *the Constitution* is not a panacea for all procedural ills. Secondly, that the principle unclutches the court from being subservient to procedural technicalities."

9. I therefore, invoke the above curative provisions and substitute the provisions of law erroneously cited by the applicant as access provisions for the relief sought with Rule 4 of the Court of Appeal Rules which was the proper provision to cite for the relief sought. It provides:

> "4. 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 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."

10. The principles that guide the exercise of this Court's jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations of this court and as crystallized by the Supreme Court.

11. I take it from the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ.) decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR inwhich these were restated as follows:-

> "(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
>
> (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
>
> (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
>
> (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
>
> (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
>
> (6) Whether the application has been brought without undue delay; and

(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time."

12. From the above, the factors I am enjoined to take into consideration in determining the application under consideration are first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.

13. Starting with the delay, it is evident from the record that the judgment was delivered on 31st May, 2020. The certificate of urgency in support of the undated application is dated 27th September, 2021. I adopt the date on the certificate of urgency as the date of the application. From the date of the delivery of the judgment on 31st May, 2020 to the date of the application is a period of one year, four (4) months and eight (8) days.

14. In *Mwende Muthoni vs. Mama Day Nursery and Primary School*, Nyeri C.A No. 4 of 2014 (UR), extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in *Aviation Cargo Support Limited vs. St. Marks Freight Services Limited* [2014] eKLR, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

15. Applying the threshold in the above referred to case law to the uncontroverted position herein, it is my finding that the length of delay under interrogation herein is not so long as that which was the subject in the *Mama Day Nursery School case (supra)* that led to the Court therein declining relief to the applicant therein, but slightly longer than the length of delay involved in the *Aviation Cargo case (supra)* which also resulted in the Court declining to exercise its discretion in favour of the applicant therein for the reasons given therein. The applicant's success on this ingredient/element alone is not sufficient to warrant granting him the relief sought. It is not a standalone prerequisite. It has to be considered in conjunction with the other prerequisites forming the threshold for granting a relief of this nature. The above reasoning now leads me to interrogate the next ingredient namely, the reasons for the delay.

16. The reasons advanced for the delay are as already highlighted above which I find not only reasonable but also plausible. My reason for holding the above view is that, issue of lockdown and restrictions on movements within the country, shutting down judicial services and or turning to online platforms for delivery of judicial service are matters within the public domain, especially when these were never controverted by the respondents.

17. As for the arguability of the intended appeal, there is a draft memorandum of appeal containing three (3) grounds of appeal. In law an arguable ground of appeal is not one that must necessarily succeed but one that is bona fide and would not only call for a response from the opposite party but also warrant the court's interrogation. See *Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank* [2020] eKLR. I have perused the intended grounds of appeal in the draft memorandum of appeal annexed to the supporting affidavit by the applicant. In my view, these satisfy the threshold for arguability of the intended appeal notwithstanding its ultimate outcome. Secondly, no number of grounds is required to satisfy this ingredient. Herein three (3) are intended to be proffered. This ingredient is therefore satisfied notwithstanding that it is usually a mere "possibility".

18. On prejudice likely to be suffered by the opposite party, none has been put forth by the respondents who have explicitly stated in their grounds of opposition that it is them who are on the land.

19. The upshot of the above assessment and reasoning is that the application has merit. It is allowed on the following terms:

    1. The applicant has fourteen (14) days from the date of the delivery of the ruling to file and serve a notice of appeal.

    2. The applicant has sixty (60) days from the date of the lodging of the notice of appeal to file and serve the record of appeal.

    3. Costs of the application to abide the outcome of the intended appeal.

    4. Thereafter parties to proceed according to law.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR