Musanda v Asset Recovery Agency & 3 others (Civil Application E028 of 2021) [2022] KECA 135 (KLR) (18 February 2022) (Ruling)

Neutral citation: [2022] KECA 135 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E028 OF 2021

RN NAMBUYE, JA

FEBRUARY 18, 2022

BETWEEN

ROSE MOMANYI MUSANDA .... APPLICANT

AND

ASSET RECOVERY AGENCY .... 1ST RESPONDENT

MARGARET WAMBUI MUGO .... 2ND RESPONDENT

THOMAS ODHIAMBO KONDUTI .... 3RD RESPONDENT

WILMA SONS COMPANY .... 4TH RESPONDENT

(An application for leave to extend time of file and serve record of appeal out of time against the judgment and decree of the High Court of Kenya (Mumbi Ngugi, J.) dated 21st September, 2020 in Nairobi ACEC Civil Application No. 2 of 2020)

RULING

1. Before me is an application dated 2nd February, 2021 brought under Articles 40 and 48 of *the Constitution* of Kenya (2010), section 95 of the *Civil Procedure Act* (Cap 21) Laws of Kenya, Sections 3B and 4 of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, Rules 4, 12 and 47 of the *Court of Appeal Rules, 2010* and all other enabling provisions of law. The application seeks prayers as follows:

    1. Spent.
    2. Spent.
    3. THAT pending the hearing and determination of this application ex parte, the Honourable court be and is hereby pleased to grant the applicant leave to file the record of appeal out of time.

4. THAT the record of appeal annexed hereto be deemed as duly filed and served.

5. Costs be provided.

6. THAT the Honourable Court do make any such order or further orders as it may deem fair and just in the interest of justice.

2. It is supported by grounds on its body, a supporting affidavit sworn by Rose Monyani Musanda together with annexures thereto, written submissions and legal authorities dated 14th December, 2021. It has been opposed by a replying affidavit sworn on 7th February, 2022 by Fredrick Muriuki, an investigator working with the Asset Recovery Agency, (the 1st respondent), the 1st respondent's written submissions dated the same date and legal authorities.

3. Supporting the application on the facts, the applicant cumulatively asserts that the impugned judgment was delivered on 21st September, 2020. On 28th September, 2020 the applicant instructed the firm of Nelson Ogeto to file an appeal on her behalf. The said firm indeed filed a notice of appeal and the memorandum of appeal on time but failed to file the record of appeal on time. Inaction on the part of her earlier advocate on record for her compelled her to change advocates. She instructed the firm of Musyoki Mogaka currently on record for her to progress her already initiated appellate process. The incoming firm of advocates duly prepared and compiled a record of appeal. They could, however, not file the said record of appeal as time for filing the same as of right had long lapsed. The application under consideration is therefore intended to resuscitate and validate that process. It is also her position that her appeal is not only arguable as according to her, it raises serious points of law that deserves to be canvassed by this Court on appeal. It also has high chances of success. She therefore, pleads that in the interest of justice to all the parties herein, the relief sought should be granted to her. The delay involved herein in seeking the Court's intervention is not also inordinate. It has also been plausibly explained.

4. On the law, the applicant relies on the case of *Karny Zahrya & Another vs. Shalom Levi [2018] eKLR* in which Koome, JA (as she then was) reiterated some of the consideration to be taken into consideration in the determination of an application of this nature as follows:

> " Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single Judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal. In *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan,* CA No 227 of 2015, this Court stated thus, on that issue:
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> "This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly".

5. Also relied upon is the case of *Abdul Azizi Ngoma vs. Mungai Mathayo [1976] KLR 61, 62* for the holding, inter alia, that "the Court's discretion to extend time under Rule 4 only comes into existence after sufficient reason for extending time has been established and it is only then that other consideration such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered;" lastly, the case of Athuman Nusura Juma vs. Afwa Mohammed Ramadhan, CA No. 227 of 2015; in which this Court expressed itself that: "this Court has been careful to ensure that whether the intended appeal has merits is not an issue determined with finality by a single Judge. That is why in virtually all its discretion on the consideration upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly."

6. In opposition to the application, the 1st respondent concedes that the judgment was delivered on 21st September, 2020. On 29th September, 2020, the applicant served them with a letter forwarding what she called "notice of appeal" bearing no stamp or seal of the Registrar of the Superior Court. Neither was there any evidence on it to demonstrate that it had been lodged as was required of it by the Rules. Also enclosed was a memorandum of appeal, notice of change of advocates and notice of appointment of advocates dated 28th September, 2020.

7. In light of the above outlined sequence of events, the 1st respondent argues that in the absence of proof of existence of a validly filed notice of appeal, the record of appeal sought to be validated is impotent and incapable of being admitted.

8. On the law, the 1st respondent submits that the applicant has not satisfied the threshold for granting relief under Rule 4 of the Court of Appeal Rules, failure to satisfactorily explain the delay in not lodging and serving the record of appeal in time, as well as filing and serving the current application.

9. On case law, the 1st respondent relies on the decision in the case of *County Executive vs. Kisumu County Government & 8 Others [2017] eKLR* in which the threshold for granting relief in an application of this nature as crystallized by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR* was fully adopted, none of which favour the applicant's position herein argues the 1st respondent. The 1st respondent has therefore invited this Court to adopt the position taken by this Court in the case of County Government of Mombasa vs. Kooba Kenya Limited [2019] eKLR in which the court declined to exercise its discretion in favour of the applicant therein in circumstances similar to those displayed herein and therefor urges this court to dismiss the applicant's application with costs to them.

10. My invitation to intervene on behalf of the applicant has been invoked under Articles 40 and 48 of *the Constitution* of Kenya, 2010 on protection of the right to property and access to justice, section 95 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, sections 3B and 4 of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, Rules 4, 12 and 47 of the Court of Appeal Rules. Section 95 has no application to the exercise of mandate by the Court of Appeal. Rule 12 donates power to admit documents in an appellate process out of time, Rule 47 donates power to file an application of this nature. Sections 3A and 3B (and not 4)of the *Appellate Jurisdiction Act* enshrines the overriding objective principle. The prerequisites for invocation of this principles have now been crystallized by case law.

11. See *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008)*; and *Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009* in all of which the principles was summarized as one donating power to the court to dispense justice with greater latitude.

12. The substantive provision for accessing the relief sought is under Rule 4 of the Court of Appeal Rules, which provides as follows:

> " 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."

13. The principles that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations in case law both binding and persuasive. I take it from the position taken by the Supreme Court crystalizing the threshold on extension of time within which to comply with a court process (M. K. Ibrahim & S.C. Wanjala SCJJ.) in the case Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others (supra) in which these were crystallized 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.
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> (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
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> (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
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> (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
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> (5) Whether there will be any prejudice suffered by the respondent of the extension is granted.
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> (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."

14. From the above, the factors I am enjoined to take into consideration in the determination of an application of this nature 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.

15. Before I delve into the merits of the applicant's application, satisfaction or otherwise of the above prerequisites, I find it prudent to deal with issue of the competence of the record of appeal intended to be validated. Reason being that if the 1st respondent's objection is sustained then there will be no need for me to delve into the determination as to whether the above prerequisites have been satisfied or otherwise. This is because the 1st respondent has asserted that the notice of appeal on which the application is anchored is defective rendering the application a nonstarter.

16. Judgment was delivered on 20th September, 2020 in favour of the respondents. A notice of appeal was lodged on 28th September, 2020. According to me this was within the timelines stipulated in Rule 75 of the Court of Appeal Rules requiring a notice of appeal to be lodged within fourteen (14) days of the delivery of the decision intended to be appealed against. Also filed alongside the said notice of

appeal is the memorandum of appeal. Both processes are annexed to the supporting affidavit. The 1st respondent has taken issue with the above documents asserting that the copies he was served with had neither the stamp of the court where it was allegedly lodged or the Deputy Registrar's seal.

17. My take on the above 1st respondent's complaint is that so long as these processes are on the record, they cannot be ignored. They provide succor for the application under consideration. The proper cause to have been taken by the 1st respondent, if aggrieved by the presence of these processes on the record, should have been for them to apply and have them struck out. In the absence of such a procedural step being taken by them, the application as laid is proper and warrants a merit determination.

18. The respondent has also raised issue about want of service upon them of the letter bespeaking proceedings. This too is a matter which ought to have been raised formally through an application to accord the applicant an opportunity to respond thereto in order for the court to rule thereon as deemed fit. In the absence of a formal application to that effect for faulting the said processes, the 1st respondent cannot be vindicated on their complaint based solely on their submissions. It is now trite that submissions are not pleadings. I therefore decline to fault the applicant's application on those grounds.

19. Turning back to the prerequisites for granting the relief of this nature, the judgment as already mentioned above was delivered on 20th September, 2020, the notice of appeal filed on 28th September, 2020. The applicant ought to have filed the record of appeal within sixty (60) days of 28th September, 2020 which fell on or about 28th/29th November, 2020. The application under consideration was filed on 2nd February, 2021 a period of about four (4) months and thirteen (13) days from the date of the judgment and about two (2) months and five (5) days from the date the record of appeal ought to have been filed as of right.

20. The parameter I find appropriate to apply in determining as to whether the applicant has satisfied this prerequisite is that set out in the case of *George Mwende Muthoni vs Mama Day Nursery and Primary School, Nyeri CA No. 4 of 2014*, (UR), in which extension of time wasdeclined on account of the applicant's failure to explain a delay of twenty (20) months.

21. The period of delay under consideration herein is much less than that which informed the court declining to grant relief to the applicant in the highlighted case of George Mwende Muthoni vs Mama Day Nursery and Primary School [supra].

22. The applicant's satisfaction of the above prerequisite is not alone sufficient to warrant granting of the relief sought to the applicant. It has to be considered in conjunction with the other prerequisites falling for consideration for granting relief of this nature. The above conclusion now leads me to determine the next prerequisite, namely, the reasons for the delay.

23. On the reasons for the delay, the applicant has laid blame on her advocate then on record for her for his inaction to timeously file the record of appeal.

24. The position in law with regard to circumstances under which the court may either pin or decline to pin responsibility for an advocates mistake or inadvertence on a client have been crystallized by case law enunciated by the court. I take it from *Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd [1987] eKLR*, among numerous others, in which the Court variously declined to visit wrongs of advocates against clients. In the instant application there is sufficient demonstration that there is a notice of appointment filed on 28th September, 2020 the very day on which the notice of appeal was filed. It is this advocate who ought to have filed the record within sixty (60) days of that date.

25. It is appreciated that no evidence was given as to when the change of advocates took place. The applicant has however stated that the advocate left without notice to anybody. I find the explanation

plausible. I therefore find it just and equitable not to pin responsibility for the applicant's advocates inaction on the applicant and use it as basis for declining to exercise the court's discretion in her favour. I find the delay herein sufficiently explained. It is also not inordinate and therefore excusable.

26. On the possible arguability of the appeal, there is a memorandum of appeal already filed. The position in law and which I fully adopt is that 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. The grounds annexed by the applicant in my view, satisfy the threshold for arguability of the intended appeal notwithstanding its ultimate outcome on the one hand and on the other hand that, this required is merely a "possibility".

27. As for prejudice to be suffered by the respondent, none has been alluded to in the 1st respondent's supporting facts. I therefore hold that none will be occasioned.

28. Lastly, also falling for consideration is the right of appeal. I take it from the case of *Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR*; *Mbaki & Others vs. Macharia & Another [2005] 2EA 206*; and theTanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003*; in which it was variously held inter alia that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.

29. Having ruled in favour of the applicant that she is not to blame for the advocate's failure to timeously file the record of appeal, I find it prudent to exercise the Court's discretion in her favour.

30. In the result, I find merit in the applicant's application. It is accordingly allowed. I therefore proceed to make orders as follows:

    1. The applicant, has thirty (30) days from the date of the delivery of the ruling to file and serve the record of appeal.

    2. Costs of the application to abide the outcome of the appeal.

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