



Swafia Abdalla (aka Swaleh Mahdi) & another v Temo & 6 others (Civil Appeal (Application) E004 of 2021) [2022] KECA 136 (KLR) (18 February 2022) (Ruling)

Neutral citation: [2022] KECA 136 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E004 OF 2021
JW LESSIT, JA
FEBRUARY 18, 2022**

BETWEEN

SWAFIA ABDALLA (AKA SWALEH MAHDI) 1ST APPLICANT

**FATUMA SWALEH MAHDI (AS ADMINISTRATORS OF THE ESTATE OF
SWALEH MAHDI (DECD) 2ND APPLICANT**

AND

BAHATI TEMO 1ST RESPONDENT

WILLIAM MJAPE 2ND RESPONDENT

STEPHEN KAHINDI MWADZANI 3RD RESPONDENT

CHARLES CHARO 4TH RESPONDENT

JONSON KOYA 5TH RESPONDENT

KESI MJAPE 6TH RESPONDENT

ROBERT LUGO 7TH RESPONDENT

(Being an application for extension of time for the Applicants to move the court to strike out Notice and Record of Appeal filed by the Respondents against the ruling of Hon. Justice Yano of the Environment and Land Court delivered on 11th April 2018) in (High Court Civil Case No. 155 of 1993(O.S.))

RULING

1. The application before me has been brought pursuant to Rule 4, 41, 46, 47 and 53 of the *Court of Appeal Rules* and Section 3A and 3B of the *Appellate Jurisdiction Act*. It seeks that time to move the court to strike out the joint notice of appeal dated 4th June, 2019 and filed on 7th June 2019, and the



record of appeal filed on 27th June 2019 be extended ex-debito justitiae, and to have the application filed alongside this application to be deemed to be duly filed. Secondly, it seeks appropriate directions on the hearing of the application to strike out the joint notice of appeal alongside the reference in Mombasa CA Civil Application No. 5 of 2019 be given.

2. The background of the application is that the seven Respondents to the instant application were on the 28th May 2019 granted leave to file a notice of appeal and record of appeal within 10 and 30 days respectively. Four of the seven Respondents filed a joint notice of appeal, but did not name the remaining three Respondents, either as respondents or appellants. The other three Respondents are yet to file any notice or record of appeal. The Applicants wish to have the filed Notice of Appeal and Record of Appeal struck out. The Applicants contend that they waited for the three remaining Respondents to file their notices and records of appeal, thus the delay. They further contend that leave to extend time is not necessary any way as the Applicant could still bring the application as not all the Respondents who obtained the order of the court by a single judge, at any stage including at the time the said Respondents apply for extension of time to comply with single judge's order.
3. The application is opposed. The 1st, 2nd, 6th and 7th Respondents (herein after the Respondents) opposed the application on the grounds that the Applicants have not explained the reason for the delay of over twenty months in bringing this application. They contend that the intended appeal is against an eviction order and therefore the Respondents will suffer great prejudice if the application is allowed, as the Applicants has had sufficient time to move the court.
4. I have considered the application before me, the grounds on the face of the application, the affidavits for and against the application, as well as the submissions filed by both learned counsels to the parties. Before I get to the determination of the application I wish to address an objection raised by learned counsel for the Applicant. Mr. Kimani urged that Mr. Lewa, learned counsel for the Respondents had not filed any submissions in this application as he was relying on submissions that were filed in CA No E12 of 2021. With due respect, it is clear that the submissions relied on by the Respondents counsel was file in this case. The objection cannot stand.
5. This is an application pursuant to Rule 4 of this courts rules. Rule 4 provides as follows:

“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 or 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.”
6. The Supreme Court set the principles that guide the applicable threshold for an application for extension of time in its decision in Mombasa County Government Vs Kenya Ferry Services & others as follows:

“[25] Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:



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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]

[26] Further, in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, this Court emphasized the need for the Applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the Court. On the issue of delay occasioned by typed proceedings, we stated as follows:

“[24] a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.” [emphasis added]

7. I am well guided. As stated in the Supreme Court case, 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. The applicant who seeks the court to exercise its discretion in his favour must meet the threshold as set out in the cited case (and there are numerous such decisions).
8. The court has considered the length of the delay involved. The notice of appeal was filed on 4th June 2019, while the record of appeal was filed on 27th June 2019. The application should have been filed within 60 days from date of filing. This was not done. The Applicants then took 20 months to file this application. As to the reasons for the delay, the Applicants stated that the delay was occasioned as they waited for the three remaining Respondents who had not filed their notices and records of appeal to do so. The Applicant concluded by contending that in any case the application for leave to extend time was not necessary.
9. As to the prejudice the Respondents stood to suffer if the application was allowed, this was contested with the Applicants contending there would be none, while the Respondents claimed they stood to be evicted if the appeal was eventually struck down.
10. The Applicants needed to give reasons for the delay to the satisfaction of the court. They should have explained the cause for the delay which should be reasonable and plausible. In addition, if there were any extenuating circumstances that can enable the court exercise its discretion in favour of the Applicants should also have been disclosed. Having considered the length of the delay involved and the Applicants explanation for the delay I find that the Applicants did not satisfy the required threshold for the exercise of discretion in their favour.



11. In the result, the Notice of Motion application dated 11th January, 2021 is dismissed in its entirety, with costs to the 1st, 2nd, 6th and 7th Respondents.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2022

JESSIE LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

