Ogumbo v Kyambo & another (Civil Application E402 of 2021)
[2022] KECA 464 (KLR) (18 March 2022) (Ruling)

Neutral citation: [2022] KECA 464 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E402 OF 2021

KI LAIBUTA, JA

MARCH 18, 2022

BETWEEN

HANNINGTONE OLOO OGUMBO ..... APPLICANT

AND

ALBERT MAKAU KYAMBO ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

(Being an application for extension of time to file a notice of appeal and appeal from the Judgment and Decree of the Environment and Land Court at Machakos (O. Angote, J.) delivered on 16th July 2021in Machakos ELC No. 46 of 2019)

RULING

1. Before me is a Notice of Motion dated 17th November 2021 made under Rule 4 of the Court of Appeal Rules in which the Applicant (Hannington Oloo Ogumbo) seeks: extension of time to file a notice of appeal from the judgment and decree of the ELC at Machakos given on 16th July 2021; that the time for filing the appeal be extended; and that the costs of this application be in the cause. The intended appeal is from the judgment of the Machakos ELC (O. Angote, J.) delivered on 16th July 2021 in ELC Cause No. 46 of 2019.

2. The Motion is supported by the applicant's affidavit sworn on 17th November 2021 and is made on 9 grounds set out on the face of the Motion, namely: that the applicant failed to file his Notice of Appeal within the prescribed time due to failure on the part of the ELC to notify him or his advocates of the delivery of the judgment; that the impugned judgment was delivered on 16th July 2021 in the absence of the applicant's advocates; that the applicant called the court on the same day when the matter was not listed and was informed that the judgment would be delivered on notice; that judgment was delivered on 16th July 2021 without notice to the applicant or his advocates on record; that the applicant only became aware of the judgment on 18th August 2021 when he called to inquire; that the time for filing

his Notice of Appeal had expired as at 18th August 2021; that the applicant's intended appeal has merits and high chances of success; that the respondents stand to suffer no prejudice if time to file the intended appeal is extended; and that it is in the interest of justice that this Honourable Court do grant the orders sought. He prays that the same be allowed.

3. The applicant's supporting affidavit merely restates the grounds aforesaid, but adds that his advocates wrote to the court on 26th August 2021 protesting the delivery of the impugned judgment without notice; that when he called on 16th July 2021, he was informed that the trial Judge had been transferred; and that the advocates also requested for certified copies of the proceedings and decree to enable them prepare for the intended appeal.

4. In response, the 1st respondent has filed a replying affidavit sworn on 9th March 2022 in which he states inter alia: that the impugned judgment was not ready for delivery as scheduled on 4th June 2021; that delivery was adjourned to 16th July 2021 when it was delivered virtually; that the applicant's advocates were not present on the virtual platform; that contrary to the applicant's allegations, the trial judge had not been transferred by the time he delivered the judgment, but that he was still at the ELC in Machakos; that the date for delivery of the judgment was taken in court virtually in the presence of both counsel and, accordingly, counsel for the applicant had notice of that date; that the reasons given by the applicant for the delay in filing his notice of appeal are frivolous and not sufficient to merit the Court's discretion as sought; that the applicant took 3 months to file the present application, which amounts to inordinate delay; that the protest letter dated 26th August 2021 alluded to by the applicant was not stamped as received in the registry of the superior court; and that the applicant has no arguable appeal with the probability of success. He prays that the application be dismissed with costs.

5. Rule 4 of the *Court of Appeal Rules* gives the Court unfettered discretion to

> " ... 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 ...," on such terms as it thinks just.

6. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi [1999] 2 EA p231* set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that "the decision whether or not to extend time is discretional. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted."

7. The case of *Fakir Mohammed v Joseph Mugambi and two others [2005] eKLR* lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. In principle, the discretion is unfettered. In its celebrated decision, the Court observed:

> " The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it 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, 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."

8. The Applicant's prayer for extension of time to file an appeal is dependent on my findings on the following factors:

   (a) whether the intended appeal is arguable with a possibility of success;

   (b) the length of the delay, and whether such delay is inordinate;

   (c) the reasons for the delay in filing the intended appeal; and

   (d) whether the Respondent would be unduly prejudiced by extension of time as sought.

9. It is noteworthy that the only documents that accompany the applicant's

   Motion are copies of the impugned judgment and decree, the protest letter of 26th August 2021 and the undated draft memorandum of appeal. The record before me does not contain a Notice of Appeal on which the applicant's Motion may be predicated.

10. Learned counsel for the applicant (M/s. Ochanda Onguru & Co. Advocates) have not filed any written submissions or list of authorities in support of the Applicant's application. On their part, learned counsel for the 1st respondent (M/s. Alphonce Mutinda & Co. Advocates) filed their written submissions, list and bundle of authorities dated 9th March 2022 in opposition to the applicant's Motion. They ask that the same be dismissed with costs to the 1st respondent.

11. Having carefully considered the applicant's Motion, the grounds on which it is made, the facts deposed in the applicant's supporting affidavit, the issues raised in the 1st respondent's replying affidavit, and the written submissions of learned counsel for the 1st respondent, I find that the applicant's Motion stands or falls on the following pertinent issues:

    (a) whether, in the absence of a Notice of Appeal, the applicant's Motion is properly before the Court to merit the discretionary orders sought; and

    (b) if the answer to (a) is in the negative, whether the applicant has taken meaningful steps to regularise the record.

12. Rule 75(2) of this Court's Rules mandates a party desirous of an appeal from a superior court to this Court to lodge a Notice of Appeal within 14 days of the date of the impugned decision. However, this mandatory period may be extended for good reason with leave of the Court on application under Rule 4. The only question falling to be determined on this score is whether there is an application before me to extend time to lodge a Notice of Appeal, or to admit the Notice of Appeal lodged out of time, and thereafter direct that the Notice lodged out of time be deemed as duly lodged.

13. Addressing itself to the mandatory requirement to file and serve a notice of appeal, the Supreme Court in *University of Eldoret and another v Hosea Sitienei and three others [2020] eKLR* observed at para 36:

> " The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal."

14. On the authority of the University of Eldoret and Sitienei case, it is true to say that, in the absence of a notice of appeal properly on record, the applicant herein is yet to express its intention to appeal. Citing the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and*

Boundaries Commission and 7 others [2014] eKLR, this Court had this to say in *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission and 2 others [2018] eKLR*:

> " A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite."

15. In so far as a proper Notice is a jurisdictional pre-requisite, nothing flows from a defective or non-existent notice to invoke this Court's jurisdiction to grant orders sought pursuant to Rule 4 or any other Rule. In effect, its hands are tied, so to speak. I so hold cognisant of the general principle that it is only in exceptional circumstances that this Court would raise its hand to slam shut the door to justice on the face of a litigant despite the *constitutional* guarantee of access to justice as enshrined in Article 48.

16. In addition to the foregoing, I must also add that the jurisdictional pre-requisite for a notice of appeal is not merely a technicality of procedure curable by invoking the provisions of Article 159(2) (d) of the Constitution, which mandates courts to administer justice without undue regard to technicalities of procedure. In this regard, the cases of *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 others, are a constant reminder that Article 159(2) (d) is not a panacea for all procedural ills even though "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 ...." It matters not that the overriding objectives set out in sections 3A and 3B of the Appellate Jurisdiction Act (Cap. 9) confer powers on this Court to dispense justice with greater latitude (see *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli v Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008) (Unreported*).

17. Having found that there is no notice of appeal properly on record, I find and hold that I have no jurisdiction to determine the applicant's Motion or grant any of the orders sought. In the circumstances, I need not address myself to the remaining issues that would ordinarily fall to be determined in similar applications and, accordingly, down my tools.

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

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR