



**Kamau v Director of Public Prosecutions & 4 others (Civil Application
E382 of 2021) [2022] KECA 412 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 412 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E382 OF 2021
S OLE KANTAI, JA
MARCH 4, 2022**

BETWEEN

BERNARD GACHIE KAMAU APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

JOHN MAINA MBURU 2ND RESPONDENT

LIVINGSTONE WANYOIKE KINYANJUI 3RD RESPONDENT

JOHN GITHINJI MWANGI 4TH RESPONDENT

REPUBLIC 5TH RESPONDENT

*(An Application for leave against the Judgment of the High Court of Kenya at Nairobi
(Mativo, J.) dated 17th January, 2020 in JR. Misc. Application No. 24 of 2018)*

RULING

1. I am asked in the Motion brought under Article 159 of the Constitution of Kenya, 2010, Sections 3A and 3B of the Appellate Jurisdiction Act and rules 4 and 47 of the Court of Appeal Rules to grant an extension of time to file an appeal against the Judgment of the High Court in Judicial Review Miscellaneous Application No. 24 of 2018 within 30 days or within such period as I may deem fit. In grounds in support of the Motion and in a supporting affidavit of the applicant (Bernard Gachie Kamau) it is said that the applicant who was the 3rd interested party in judicial review proceedings only learnt of delivery of Judgment when he chanced upon the decision in Kenya Law website; that the applicant is resident in the United Kingdom and had a lawyer in Kenya with instructions in the matter but the lawyer did not advise the applicant of the goings on in the case or delivery of Judgment



despite repeated requests by the applicant for information; at ground 4 of the grounds in support of the Motion the applicant says:

“The substance of the Judgment identifies inconsistencies that the Applicant wishes to set straight in his intended appeal to this Honourable Court:

- i. Whereas the trial court indicates that he never filed written submission before it, he had filed written submissions.
- ii. The Judgment was delivered without any notice upon the Applicant. He was never issued any such notice or prompted by his lawyers that a Judgment date had been scheduled in the matter.
- iii. Whereas the trial court issues orders that effectively bar the 1st Respondent herein from being charged in any court with respect to his conduct, this stands in conflict with article 157 of the Constitution as well as established principles on the prosecution of criminal proceedings.”

It is further said that the respondents would not suffer prejudice that cannot be compensated but if I disallow the application the applicant will suffer irreparable loss as he would be locked out of the seat of justice. It is further explained that the 2nd respondent (Livingstone Wanyoike Kinyanjui) had in 2018 instituted judicial review proceedings in the High Court challenging his prosecution in a magistrates court where the applicant was an interested party; that he (the applicant) had appointed a law firm to represent him in the matter; that the lawyers had filed a response in the judicial review matter and also written submissions; that despite constant follow ups the lawyers repeatedly told him that Judgment was pending but that in November, 2020 while browsing on the internet on the Kenya Law website he chanced upon Judgment in the said case which showed that it was delivered on 17th January, 2020. He noted that it was indicated in the Judgment that he (the applicant) had not filed written submissions which was erroneous as submissions had been filed on his behalf; that Judgment was delivered without notice to his lawyers on record; there are many cases in court involving the applicant and it was difficult to follow up on their progress.

2. In a replying affidavit the 2nd respondent (Livingstone Wanyoike Kinyanjui) says amongst other things that the instant application was filed 24 months after Judgment had been delivered which delay has not been explained; that Judgment of the High Court was delivered where all issues in contention had been considered; that the submissions which the applicant is stating were not considered by the Judge were in respect of an interlocutory application and I am asked to dismiss the application.
3. I have seen written submissions filed on behalf of the various parties and I have considered them.
4. The principles that apply in an application of this nature are old hat and were well captured in the decision of *Fakir Mohamed v Joseph Mugambi & 2 Others Civil Application No. 332 of 2004* as follows:

“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 (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 the 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 Application No. NAI. 255 of 1997 (ur), *Mwangi v Kenya Airways Limited* [2003] KLR



496, *Major Joseph Mwereri Igweta v Murika Methare & Attorney General* Civil Application No. NAI 8 of 2000 (ur) and *Murai v Wainaina* (No. 4) 1982 KLR 38.”

It is common ground that Judgment of the High Court was delivered on 17th January, 2020. The applicant says that he had lawyers on record for him in the judicial review proceedings and despite constant follow ups the lawyers did not inform him that Judgment had been delivered on that day. I would be prepared to understand a situation where a party to litigation is frustrated by his lawyers who may fail in their duty to properly represent the party and inform him of goings on in the litigation. But what is the situation here?

The applicant says that in November 2020 he chanced by information he saw on the internet that Judgment in his case had been delivered on the said 17th January, 2020. I note that the Motion before me is dated 2nd November, 2021. The applicant has not given any reason why, after finding on the internet in November, 2020 that Judgment in his case had been delivered on 17th January, 2020, he did not take any steps to file an appeal. I agree with the 2nd respondent that there is inordinate unexplained delay in moving the court to extend time. The applicant says that his then lawyers were not served with a notice for Judgment but there is no evidence to confirm that allegation. The applicant has not also satisfied any of the principles identified in the *Fakir Mohammed* (supra) case. Having so failed to satisfy any of those principles I decline to exercise my discretion in his favour. The Motion fails and is dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

