



Sasah General Merchants Limited v Christian Children's Fund & 2 others (Civil Appeal (Application) E035 of 2022) [2022] KECA 694 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 694 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E035 OF 2022**

M NGUGI, JA

JULY 22, 2022

BETWEEN

SASAH GENERAL MERCHANTS LIMITED APPLICANT

AND

CHRISTIAN CHILDREN'S FUND 1ST RESPONDENT

AGENTA A.GUYA (SUED AS THE CHAIRPERSON OF ST. FRANCIS CHILD & FAMILY) 2ND RESPONDENT

ROSE WARINGA (SUED AS THE TEAM LEADER OF ST. FRANCIS CHILD & FAMILY PROGRAMME ALIAS ST FRANCIS FAMILY HELPER PROJECT) 3RD RESPONDENT

(Being an application for extension of time for filing the Record of Appeal arising from the judgment and decree of the High Court of Kenya at Kisumu (F.A. Ochieng J) dated 29th May 2019 in High Court Civil Case No. 20 of 2009)

RULING

1. The applicant has lodged the present application dated March 8, 2022 under the provisions of Rule 4 of the *Court of Appeal Rules*, 2010, sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap.9 Laws of Kenya, and Article 159 of the *Constitution* of Kenya, 2010. It prays that the time within which the appeal and the record of appeal in the matter were to be filed be extended on such terms as this Court may deem just, and that its appeal be deemed to have been filed and served within time. It also prays that the costs of the application be provided for.
2. The grounds on which the application is based are set out on the face of the application and in the affidavit sworn by the applicant's learned Counsel, Mr. David Otieno, on March 8, 2022. It is averred on behalf of the applicant that the suit before the High Court related to a dispute over a construction contract that the parties had entered into. The applicant claimed from the respondents a sum of



- Kshs.15, 821,912.42 being the value of the work that it did, but which it claimed it was not paid. The trial court dismissed its claim.
3. The applicant was dissatisfied with the decision of the trial court and it instructed its advocates on record to pursue an appeal against it. The applicant's advocates had therefore filed and served a notice of appeal and had also requested for the proceedings by way of a letter dated May 30, 2019 which was delivered to the High Court on May 31, 2019 and copied to Counsel for the respondents.
 4. Counsel for the applicant had, on November 12, 2021, received a letter dated November 4, 2021 notifying him that the proceedings were ready for collection upon payment of Kshs.2.400. The applicant's Counsel had, upon receipt of the letter, paid the amount and collected the proceedings. Counsel for the applicant avers that they could not proceed to lodge the appeal immediately as they had not received a certified copy of delay from the Deputy Registrar of the High Court, and they did not receive it until December 6, 2021.
 5. According to the applicant, the appeal should have been filed 60 days from November 12, 2021, which took the deadline to February 4, 2022 as the Christmas recess that ran from December 21, 2021 to January 13, 2022 is not included in the computation of time.
 6. Mr. Otieno avers, however, that they did not file the appeal as his firm had closed for rest for the Christmas holidays on 17th December 2021 and did not resume until January 17, 2022. That he had got so involved in the management of the law firm and was so overwhelmed with administrative work in the office and the many submissions to be done that he overlooked to prepare and lodge the record of appeal in time. He had, however, prepared the record of appeal upon realizing that it was late and sent it to the court for assessment of court filing fees and filing on 16th February 2022. He had received an invoice on February 17, 2022 and had written to the client requesting for the amount but had not received a response until February 25, 2022 when his client returned to Kisumu from his rural area. He had thereafter filed the present application after assessment of the cost of the appeal and the security for costs. The delay in filing the application was due to the oversight of the applicant's Counsel, and the applicant should not be punished for the mistake of Counsel.
 7. The application is opposed by the 1st respondent. In an affidavit sworn by Alice Anukur, its Country Director, on 6th June, 2022, it is averred that since 2019 when the impugned judgment was delivered, a lot has happened. Among such occurrences are the fact that the 1st respondent has terminated its donor contract with Kisumu Development Programme which organization took over operations of St. Francis Child and Family. According to the 1st respondent, even if the application is allowed, it will not affect the 1st respondent in any way as it has no ties with the 2nd and 3rd respondents as from November 22, 2021.
 8. The 1st respondent further contends that the applicant's appeal does not raise any triable issues and has no chances of success as the decision of the trial court was well reasoned.
 9. Regarding the issue of prejudice, it is averred that the 1st respondent will be prejudiced should the application be allowed as it will be dragged back to court yet the High Court exonerated the respondents from the impugned contract. The 1st respondents avers that it is unfair for the applicant to pursue the instant appeal yet he was fully paid under the impugned contract in excess of what was supposed to be paid.
 10. In the submission in support of the application, the applicant submits that its conduct shows that it was always interested in pursuing its appeal and has offered an explanation for the delay. It maintains that the respondents will not be prejudiced in any manner as no application under Rule 84 to strike out the appeal has been filed. It will, however, be prejudiced if it is denied a chance to prosecute



the appeal. The applicant relies on the case of *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR in which the Court stated that the right to be heard is a vital natural and constitutional right that will only be taken away in the clearest of cases.

11. In submissions in response, the 1st respondent notes, regarding the length of delay, that the applicant argues that the 60 days stopped being counted during the Court vacation that commenced on December 21, 2021 and ended on January 13, 2022 meaning that the 60 days lapsed on February 4, 2022. It contends that even if the Court was on vacation, nothing stopped the applicant from filing the application and the appeal under the vacation rules. The 1st respondent notes that the present application was filed on 16th February 2022 a period of over one (1) month after the lapse of the 60 days window. In its view, the delay is inexcusable and has not been well justified by the applicant. It is its submission, further, that the reasons for delay as explained by the applicant's counsel are flimsy; noting that the applicant's advocates' firm is a fairly big firm with partners and associates and it is difficult to understand how overwhelmed they were with work that they forgot to file the subject documents well over a month after vacation was over.
12. As to whether the appeal is arguable, the 1st respondent submits that the appeal does not have any chances of success as the applicant has not raised any new grounds that were not canvassed before the High Court. It submits, finally, that it severed all its ties with the other respondents on 22nd November 2021. It will therefore be greatly prejudiced by this appeal since it is being dragged into a warfare that it is a stranger to.
13. The application before me seeks the exercise of discretion to extend time under Rule 4 of the 2010 *Court of Appeal Rules*. The principles on which this Court will exercise discretion in favour of an applicant for extension of time were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA. These are the length of the delay, the reason for the delay, the degree of prejudice to the respondents if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted.
14. The applicant's advocates concede in the affidavit sworn by David Otieno that there was a delay in filing the applicant's appeal. They had lodged and served the notice of appeal and requested for the proceedings on time, the latter by way of a letter dated 30th May 2019 which was also copied to the respondents' advocates. They had been informed by a letter received on 12th November 2021 that the proceedings were ready. They did not receive the certificate of delay until December 6, 2021.
15. The applicant avers that it should have filed its record of appeal by February 4, 2022. This is after taking into account the period between December 21, 2021 and January 13, 2022 which is excluded from the computation of time.
16. The present application for extension of time was filed on March 8, 2022. This is slightly over a month from the date when the record of appeal should have been filed. There was thus a delay of over 30 days in filing the record of appeal. Is this delay inordinate and inexcusable, and are the reasons given for it plausible?
17. The applicant's advocate assumes blame for the delay in filing the record of appeal, averring that he was so busy with the management of his law firm and overwhelmed by other legal matters that he overlooked to prepare and lodge the record of appeal in this matter in time. Is that a plausible and acceptable reason, for the delay? It is expected, I think, that Counsel on record for a party will give due attention to all the matters that they have been instructed to deal with. Whether it is the filing of submissions in one matter, or a record of appeal as in this case, it cannot be a proper reason to argue that



one was too busy with office management or other clients' matters to recall that they had responsibility for other clients' matters when they readily concede that they had full instructions to act.

18. I note, however, that the applicant's advocates had filed a notice of appeal and had applied for the proceedings in time. They had also collected the proceedings once they were ready, and had also obtained the certificate of delay. What they failed to do, and blame on an oversight due to a busy schedule on their part, is to file the record of appeal in time.
19. Rule 4 and the principles in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (supra) call for the exercise of the Court's discretion in determining whether or not to extend time. Having considered the length of the delay in this matter, which I do not consider to be inordinate, and notwithstanding that I am not fully satisfied that the busy schedule of the applicant's advocates is a good reason for the delay, I will exercise discretion and grant the applicant leave to file the record of appeal out of time.
20. The 1st respondent has made various arguments about the possibility of success of the appellant's appeal, as well as the fact that it has ceased to have any associations with the 2nd and 3rd respondents. Those, however, are not matters that this Court can properly consider at this stage.
21. The upshot of my findings above is that the application dated March 8, 2022 is allowed. The record of appeal filed with this application is deemed as duly filed and served.
22. The 1st respondent shall have the costs of this application.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JULY, 2022

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

