Kenya Medical Supplies Agency v Frederichs (Civil Appeal (Application) E703 of 2021) [2022] KECA 1020 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KECA 1020 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E703 OF 2021

W KARANJA, JA

SEPTEMBER 23, 2022

BETWEEN

KENYA MEDICAL SUPPLIES AGENCY ..... APPLICANT

AND

FRANZ FREDERICHS ..... RESPONDENT

(Being an application for extension of time and or leave to serve a Record of Appeal out of time in an Appeal from the Judgment of the High Court of Kenya at Nairobi (F. Tuiyott, J.) delivered on 5th July, 2019 in HCCC No. Comm. 38 of 2013)

RULING

1. This is an application made under Rule 4 of the Rules of this Court in which the applicant seeks in the first instance, leave to serve a record of appeal on the respondent out of time. In the event the leave sought is granted, the applicant prays that the Record of appeal served upon the respondent on March 18, 2022 be deemed as having been duly served within time or with leave of the Court.

2. The application is premised on the grounds on its face and supported by the affidavit sworn by Eric Mutua, an Advocate of the High Court of Kenya on May 30, 2022. The gist of the averments in the grounds as well as in the affidavit is that the appellant's counsel initially served the Record of appeal on the respondent by email on December 6, 2021 but that the email was not delivered and they did not realise that the record had not been served until March 15, 2022 when they noticed that the said email was among others which had not been delivered due to a technical error with the servers of the internet provider the applicant's counsel's office was using.

3. Upon realising the error, they printed a copy of the voluminous record and served it on counsel for the respondent on March 18, 2022. The applicant deposes that the delay was not deliberate; the same is not inordinate and they remedied the same without delay.

4. There are several annexures to the said affidavit but what concerns me at this point is the annexure marked A – 4 which is the computer report showing that the email together with the attachments was sent to the respondents on December 6, 2021 at 3:40 pm but the same had not been delivered and it had been sent back to the sender. There is a certificate of electronic record, prepared by counsel for the applicant attesting to the authenticity of the "mailer-demon" email. The applicant, deposes that there will be no prejudice visited on the respondent and entreats the Court to allow the application.

5. The application is opposed through the respondent's affidavit dated June 29, 2022 in which he deposes that the "mailer-demon" email cannot be authentic on some technical grounds he has given. He has annexed a report prepared by one George Manyinge Marti in which he renders his technical opinion and goes on to conclude that the mailer demon email in question is implausible. There is also a supplementary affidavit filed by the respondent on June 29, 2022, whose contents I have duly noted. Parties also filed submissions and lists of authorities in support of their respective positions in the matter.

6. I have considered the application, the rival affidavits and the relevant law. I find it worth mentioning that the respondent has in his supplementary affidavit and submissions urged the Court to strike out the record of appeal but all I can say is that an application to strike out a notice of appeal or even a record of appeal cannot be urged through a replying affidavit or even submissions but through a properly filed motion under the relevant Court of Appeal Rules. Further, as a single Judge, I lack jurisdiction to entertain an application to strike out a Notice of Appeal or the appeal itself.

7. Having said so, I will confine myself to the application for enlargement of time to serve the said record of appeal. The principles that guide the Court's exercise of jurisdiction under the Rule 4 of the Court of Appeal Rules are well settled through numerous enunciations in case law both binding and persuasive, some of which are *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2E A 231, *Fakir Mohamed vs. Joseph Mugambi & 2 Others* [2005] eKLR; *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees* [2020] eKLR.

8. The principles distilled from the above case law may be enumerated, inter alia, as follows: -

   (i) The mandate under Rule 4 is discretionary, unfettered and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.

   (ii) Orders under Rule 4 of the *Court of Appeal Rules* should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.

   (iii) The discretion under Rule 4 of the *Court of Appeal Rules* must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see Githere vs. Ndiriri.

   (iv) As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court.

(v) The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.

(vi) 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 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;

(vii) Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word "possibly";

(viii) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised."

9. It is not disputed that the Notice of Appeal was filed and served on time.

10. The issue here is service of the record of appeal. How long was the delay involved in this matter? Even assuming that the disputed email, with the record of appeal had not been sent on December 6, 2021 as averred by the applicant, the delay involved was only 3 months. Can that delay be said to be inordinate? I do not think so. I must say that I do not believe that counsel for the applicant would make a false deposition to the effect that they actually dispatched the record vide email if they had not done so. He had no reason to lie given that he could have admitted the 3 months delay and tried to persuade the Court that the delay was not inordinate. My finding is that the delay in service of the record of appeal was not inordinate and the explanation given is plausible.

11. I also note that having realised that the record had not been served, the applicant's counsel moved with expedition to remedy the situation by serving a hard copy on the respondent albeit out of time. The applicant deserves to have his day in Court to be heard on appeal. Having resolved the first two requirements in the applicant's favour, I need not consider the other guidelines enumerated above. The application has merit and I allow it with costs in the appeal. As the record has already been served on counsel for the respondent, I order that the record already served on the respondent be deemed as duly served.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR