Kisumu Yacht Club Registered Trustees v County Government of Kisumu & another (Civil Application E002 of 2022) [2022] KECA 1149 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1149 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E002 OF 2022

PO KIAGE, K M'INOTI & M NGUGI, JJA

OCTOBER 21, 2022

BETWEEN

KISUMU YACHT CLUB REGISTERED TRUSTEES ..... APPLICANT

AND

COUNTY GOVERNMENT OF KISUMU ..... 1ST RESPONDENT

CITY MANAGER, COUNTY GOVERNMENT OF KISUMU 2ND RESPONDENT

(An application to strike out a notice of appeal dated 29th November 2021 from the judgment of the Environment and Land Court at Kisumu (Ombwayo, J.) dated 19th November, 2021 in ELC Appeal No. 47 of 2019)

RULING

1. By a notice of motion dated January 6, 2022, Kisumu Yacht Club Registered Trustees, the applicant, seeks to strike out the respondents' notice of appeal dated November 29, 2021 which was filed at the Environment and Land Court on December 7, 2021.

2. The motion is supported by an affidavit sworn by Chris Maganga, the applicant's advocate. He deposed that the judgment which the respondent intended to appeal against was delivered by Justice Ombwayo on November 19, 2021. The respondent filed the notice of appeal on December 7, 2021, which was outside of the 14-day period required by rule 75 (2) of the *Court of Appeal Rules* (rules). Thereafter, the respondents were required to serve the notice on the applicant within 7 days of its filing as provided for in rule 77(1) of the *rules*. However, service was effected via email on December 16, 2021, 9 days after it was lodged. Consequently, the notice of appeal as filed and served out of time is fatally defective, incompetent and invalid.

3. The applicant believes that the delay was caused by the lethargy and inertia of the respondents. Moreover, as at the time of filing this application, the respondents had not made an application for leave to file and serve the notice of appeal out of time which is a testament to their indolence suggesting

a lack of interest to regularize the apparent error. We were urged to allow this application and strike out the notice of appeal with costs.

4. In response, the respondents acknowledged that the notice of appeal was indeed filed and served out of time. They attributed this regrettable occurrence to their advocate's clerk, who was new at the time and therefore was not well-versed with the office filing system. He had difficulty in tracing the file and thus did not work on it on time. The respondents watered down their mistake and claimed that it could happen to anyone and therefore should not be the reason the respondents are denied justice. We were urged to find that this unfortunate oversight, which according to them was a mere procedural technicality, can be cured by article 159 (2) (d) of the *Constitution*.

5. We have considered this application and the submissions proffered by the parties. It is unfortunate that the respondents consider the filing and service of a notice of appeal out of time as a mere technicality even after this court has pronounced itself repeatedly and consistently to the contrary. The notice is not just a document to be served on parties pursuant to the dictates of the *rules*. It serves an important purpose, which is to alert the other parties that the case has not been concluded and that the same has been escalated to another level. This is crucial as it gives the served parties ample time to prepare for another fight by way of gathering resources or for purposes of mental preparation. See *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others [2016] eKLR*.

6. The importance of the notice has been captured in the architecture of our rules where it occupies a central foundation place without which there can be no appeal. It is a jurisdictional document. See *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR*.

7. The jurisdiction of this court to entertain appeals is hinged on the timely filing and service of documents within the time stipulated by the *rules* or as extended on application. So grave are the consequences of non-compliance with the requirements as to time that they cannot be cured by the provisions of article 159 (2) (d) of the *Constitution*. See *Patrick Kiruja Kithinji v Victor Mugira Marete [2015] eKLR*. This invariably decimates the respondents' assertion that the mistake is curable under article 159 (2) (d). The respondents cannot hide behind the *Constitution* hoping that the court will turn a blind eye to their lethargy or indolence. This position was well captured by Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* (supra) which was cited with approval by the Supreme Court (Ibrahim & Njoki, SCJJ) in its ruling in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR*;

> "I am not in the least persuaded that article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

8. As stated by the applicant the respondents were in clear violation of rule 75 (2) and rule 77(1). The respondents did not proffer any reasonable explanation for the delay and have deliberately passed over the opportunity of resuscitating the notice by way of a rule 4 application to seek for extension of time. We find that the indolence of the respondents led to their failure to adhere to the prerequisite timelines and this leads to one inevitable end as per the mandatory terms of rule 84, which is the striking out of the notice of appeal. We echo the view of this court in *Martin Kabaya v David Mungania Kiambi Nyeri Civil Application 12 of 2015*;

> "The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the judiciary bears as backlog."

9. Accordingly, this application succeeds and the notice of appeal dated November 29, 2021 is struck out with costs to the applicant.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 2022.

P O KIAGE

.....

JUDGE OF APPEAL

K M'INOTI

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR