Said v Shume (Civil Appeal (Application) 152 of 2019)
[2022] KECA 1063 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KECA 1063 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL (APPLICATION) 152 OF 2019

JW LESSIT, JA

OCTOBER 7, 2022

BETWEEN

HUSSEIN ABDALLA SAID ..... APPLICANT

AND

YAWA CHOME SHUME ..... RESPONDENT

(An application for extension of time to serve a notice and record of appeal against the judgment and decree of the Environment and Land Court at Malindi delivered by Olola, J, on 26th June 2019 in ELC Case No. 52 of 2010)

RULING

1. The application before the Court is dated 10th March, 2022 brought pursuant to, Sections 3A & 3B of the *Appellate Jurisdiction Act*; Rule 4 of the *Court of Appeal Rules* and Article 50 and 159 (2) (d) of *the Constitution*. It seeks an order to enlarge time within which to serve the Notice of Appeal and Record of Appeal lodged in this appeal on the 1st July 2019 and 22nd November 2019 respectively, and that they be deemed to have been duly served.

2. The application is supported by the affidavit sworn by the applicant, and grounds on the face of the application. In brief the applicant contends that the judgment in the case was delivered on 26th June 2019, and that the applicant immediately instructed counsel to file the appeal, but that unfortunately he fell victim of unprofessional conduct by two advocates he instructed in succession. That as a consequence he was not aware that the Notice and Record of Appeal, both which had been filed in time were not served as prescribed by the law. He contends that it was not until the respondent filed an application to this Court dated 16th September 2020, seeking to strike out the applicant's record of appeal for failing to serve the Notice of Appeal and Record of Appeal within the prescribed timeline, that he became aware of the default. He averred that due to the delay in obtaining the typed proceedings from the trial court, the applicant was only able to lodge his intended appeal on 22nd November 2019.

He contends further that the appeal has high chances of success as it raises fundamental issues which ought to be heard and determined.

3. The application was heard virtually on the 14th June 2022, with Mr. Ahmed learned counsel for the applicant and Mr. Mkomba learned counsel for the respondent present. Each relied on their written submissions and list of authorities, which they highlighted briefly.

4. Mr. Ahmed urged that the failure to serve the Notice and Record of Appeal, both which were filed on time, was mistake of counsel, which he urged ought not to be visited on the applicant, and for that proposition relied on the decision in *Phillip Chepmwolo & Another v. Augustine Kubede* (1982-88) KLR 103 at 1040; and on *Belinda Muras & 6 Others v. Amos Wainaina* (1978) KLR for the proposition that " a mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel." He urged that the appeal should be heard and determined on merit and not denied on a technicality. He relied on *Nicholas Kiptoo Arap Korir Salat V. Independent Electoral and Boundaries Commission & 6 Others* (2013) eKLR for proposition that emphasis should be on substantive justice overriding technicalities, and that the general trend following the enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act* and Article 159 of *the Constitution* was for courts to strive to sustain rather than to strike out pleadings on purely technical grounds.

5. Mr. Mkomba on his part submitted that the present application is a non- starter since what the applicant explicitly seeks is to breathe life into pleadings that were struck out by this Court in its ruling delivered on the 4th February 2022. Counsel urged that in its ruling this Court observed that no order for extension of time to file these pleadings under Rule 4 of the Court's Rules had been sought. That once struck out. the Record and Notice of Appeal cannot then be reinstated to the record without effectively reviewing or setting aside the order of 4th February 2022. It was further contended that entertaining the issue of mistake would go against the principle of estoppel.

6. The respondent submitted that the instant application comes after a month of this Court's decision given on 4th February 2022 and therefore falls short of the equitable relief of extension of time since the applicant had demonstrated no cogent reason for the delay to serve the pleadings for more than three (3) years of filing his appeal and should therefore be dismissed with costs.

7. I have considered the application before Court, as well as the submissions of counsel to the parties and the cases relied upon. The applicant seeks an order to enlarge time within which to serve the Notice of Appeal and Record of Appeal. It is apparent that the instant application was necessitated by the ruling of this Court dated 4th February 2022, made in response to an application to strike out the record of appeal filed by the respondent dated 14th September, 2020. I have had occasion to read the said ruling, which is annexed to the supporting affidavit sworn by the applicant. In that ruling this Court struck out the Record of Appeal for failure on the applicant's part to serve the record of appeal upon the respondent.

8. There are ample authorities which have ruled on the question whether an appellant whose record of appeal has been struck out before being heard can approach the court for extension of time. In the case of *Robinson & Others v Muthami*, Civil Application No NAI 187 of 1997 (78/97 UR), Bosire, Ag JA stated:

> " I have no doubt in my mind that an appellant whose appeal has been struck out for being incompetent has the right to move a court for extension of time to lodge a competent appeal. (See, *Ngoni Matengo Co-operative Marketing Union Ltd V Osman* [1959] E.A. 577,

Elizabeth Kamene Ndolo v George Matata Ndolo, (Civil Application No NAI 104 of 1995 – unreported)."

9. Bosire Ag. JA quoted with his own approval what was stated in the case of *Ngoni Matengo Co-operative Marketing Union Ltd v Osman* [1959] E.A. 577:

> " But to leave no room for doubt I reiterate that filing of a fresh notice of appeal after a record of appeal has been struck out is a matter of abundant caution simply because the appellant's intention to appeal does not stand withdrawn."

10. I am alert to the fact that what the applicant is seeking is an extension of time to serve the same notice and record of appeal upon the respondent which were struck out by this court. The respondent's counsel has urged that what the applicant is seeking is to breathe life into pleadings that were struck out by this Court. I agree with the respondent. The effect of the action to strike out is to do away with it. In other words, the record of appeal is no longer in existence, and thus there is nothing to extend,

11. What the applicant should have done is to file an application seeking leave to bring a fresh application seeking leave to file fresh Notice and Record of Appeal. That is what this court has ruled in the above cases of Robinson & Others vMuthami, supra, and Ngoni Matengo Co-operative Marketing Union Ltd, supra.

12. Having carefully considered this application, I have come to the conclusion that this application is incompetent for trying to revive what does not exist. In the result I strike out the application with costs to the respondent.

13. Those are my orders.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF OCTOBER, 2022

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR