Shelly Beach Hotel & another v Ngugi (Civil Application 91 of 2019) [2022] KECA 1053 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KECA 1053 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION 91 OF 2019

JW LESSIT, JA

OCTOBER 7, 2022

BETWEEN

SHELLY BEACH HOTEL ..... 1ST APPLICANT

KENINGSTON INTERNATIONAL LIMITED ..... 2ND APPLICANT

AND

KEPETER MURUGI NGUGI ..... RESPONDENT

(An application for directions to file and serve memorandum and record of appeal out of time against the judgement of the High Court at Mombasa (P.J. Otieno, J) delivered on 24th January 2019 in HCCC No. 306 of 2001)

RULING

1. The applicants Shelly Beach Hotel and Kensington International Limited have by an application dated December 3, 2021 sought two orders.

    i. That the court be pleased to give directions on this application on the grounds that;

    ii. The applicants were granted leave to appeal out of time against the whole of the judgment of the Hon. Justice P.J Otieno, delivered on January 24, 2019 at Mombasa on April 3, 2020, which ruling was never served on us or notice of delivering the same and the 45 days granted had since lapsed."(sic)

2. The orders sought are premised on Rule 3, 4, 5 (b), 42, 43, 49, 82, 87 and 91 of the retired *Rules* of this Court, 2010; now Rules 3, 4, 5(b), 44, 45, 51, 84, 89 and 93 respectively of the COA *Rules* 2022. [Hereinafter the Rules]. Of all these Rules cited in support of the application, only Rule 4 which provides for extension of time limited by the Rules or order of the court on application to the Court is directly relevant to this application. The rest are procedural or administrative.

3. The grounds on the face of the application, and reiterated in the applicants' supporting affidavit and written submissions are that the applicants lodged a notice of appeal in this Court on 6th February 2019. They then filed an application to appeal out of time on 8th October 2019, which was heard by a single judge of this court, who allowed it. In a ruling dated 3rd April 2020 the applicants were granted 45 days within which to file their intended appeal. The applicants' contention is that they were never served with notice of the delivery of the ruling and so they did not attend court on the day it was delivered.

4. The application is supported by an affidavit sworn by Collins Stephen Ford, the Director of the 2nd applicant. It is deposed in that affidavit that although the ruling of this Court was delivered on 3rd April 2020, it was at the time of the Covid-19 pandemic and at a time that all courts and offices remained closed. That no notice of delivery of ruling was served upon the applicants and as a result they did not attend court. That the applicants were advised by their advocate on record that his office resumed normal operations in July of the same year (2020), and that they continued to visit the registry to find out if the ruling was ready to be delivered, only to be told that the same was delivered on 3rd April 2020. That the applicants have written severally to the Court seeking for directions since the 45 days ordered for the filing of the appeal had lapsed. Further that the delay occasioned is not inordinate or so great as to be inexcusable.

5. The applicant relied on the decisions in *Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others* (2014)eKLR and *Vishva Stone Suppliers Company Limited v. RSR Stone (2006) Limited*(2020) eKLR on the discretionary power of this Court under Rule 4 of its Rules and urged this Court to confirm its first ruling by extending its discretion for the applicants to file their record out of time with costs in the cause.

6. The application was heard virtually on the June 13, 2022. Learned counsel Mr. Hayanga, was present for the applicants, while learned counsel Mr. Chabala was present for the respondent. The argument maintained by the applicants in both their oral highlights and in the written submissions was that the ruling of this Court in question was delivered in their absence and it only came to their attention on July 20, 2020 that the same was delivered on April 3, 2020. That that was at the time Covid-19 pandemic interrupted the court procedures. Counsel urged that the delay was inadvertent and should not therefore be visited upon the applicants. Counsel relied on *Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission & Others*, Application No. 16 of 2014 and *Vishva Stone Suppliers Company Limited v. RSR Stone (2006) Limited*, Civil Application No. 55 of 2020 were cited to invoke the vast powers of the Court's discretion in granting the orders sought.

7. Mr. Chabala for the respondent opposed the application and contended that time was indeed extended and that it was incumbent upon the applicants to be vigilant in the circumstances. Counsel submitted that the applicants were guilty of laches and should not be allowed to reap from their indolence. That after being granted an extension of time, the respondent argued that the applicants slept on their right to appeal only to file the present application as an afterthought 563 days after the lapse of leave granted. Mr. Chabala urged that the pandemic was not a good enough reason to clear the applicants of their indolence. It was thus submitted that the delay of 20 months or 563 days is inordinate and the same ought to be rendered inexcusable by this Court. Further, that the applicants failed to provide any valid reasons for the delay to warrant this Court to exercise discretion in their favour. The respondent further submitted that it stands to suffer prejudice in terms of time and extra cost of litigation in the event the instant application is allowed.

8. I have considered the application, the affidavit sworn in support of the application, the submissions of both parties and cases relied upon. It is apparent from the record and is not disputed that this Court granted the applicants leave to file and serve their memorandum and record of appeal within

45 days from the date of delivery of the ruling. That application was not opposed, and indeed what the respondent submitted then was that the applicants were within time to file their appeal and that their application was in the circumstances premature. The ruling was delivered on April 3, 2020. The Court expressed itself thus in the said ruling:

> " I am satisfied that this is a proper case for the exercise of the court's discretion in favour of the applicants. The notice of appeal was filed and served within the prescribed timelines. The delay involved in instituting the appeal in accordance with Rule 82 of the Rules of the Court is not inordinate. Indeed, counsel for the respondent takes the view, if I understood him correctly, that the application was unnecessary as the applicants obtained a certificate of delay and were within time to institute the memorandum and record of appeal when the present application was filed. There is no suggestion that the respondent will suffer any prejudice if time for instituting the appeal is extended.
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> In the result, I allow prayer 1 of the application dated 8th October 2019. The applicants shall file and serve the memorandum and record of appeal within 45 days from the date of delivery of this Ruling. The costs of the application shall be in the appeal."

9. The applicants have now returned to this court, after failing to comply with the time lines set by the court as to the filing of its memorandum and record of appeal. I noted that in the instant application what the applicants are seeking are directions. They argue that they did not receive any notice from the Court regarding delivery of the above ruling. By invoking Rule 4 of the Rules, what the applicants are in effect asking for is extension of time to lodge the two records afore stated. Under Rule 4 of the Rules, it is provided that:

> " 4. The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

10. The court has power to extend time limited either by the Rules or by any decision of the Court or of a superior court on terms. The extension sought therefore is on the time limited by this Court's in its ruling of 3rd April, 2020.

11. The Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No. 16 of 2014[2014] eKLR set down the principles courts should bear in mind while considering applications for extension of time. That extension of time is not a right to a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

12. Similarly, in *Daphne Parry v. Murray Alexander Carson* [1963] EA 546 it was observed that: -

> " ...though the provision for extension of time requiring 'sufficient reason' should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being

led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

13. The Supreme Court of India in Civil Appeal 1467 Of 2011 *Parimal v. Veena Bharti* (2011) further observed that:

> " Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently ..."

14. The applicants plead that covd-19 pandemic was the reason they were locked out of court and failed to get communication of the date of the ruling. They urge that the ruling was initially scheduled for February 27, 2020, but that on that day nothing happened. That is not disputed. They urge that due to closure of the Court as a result of the covid-19 pandemic, the Courts were closed to the public, which included litigants. The respondent admits that indeed covid-19 affected the operations of the courts but urged that the delay cannot be justifiable on account of the pandemic, for being inordinate.

15. I think that it is a matter of public notoriety that the covid-19 hit the world, and that by February 2020, operations in all courts in the country were reduced by a huge percentage. Most communications and contacts between the courts and litigants went digital and virtual. We are yet to resume operations at the level we did in 2019, and before the pandemic hit us.

16. What is for consideration is the period for the delay, having found that indeed covid-19 pandemic affected courts to date. The length of the delay is the next consideration. It is argued by the applicants that they had no notice of the date of the delivery of the ruling, and that they only realised on July 20, 2020 that the ruling was delivered on April 3, 2020. The current application was filed on December 3, 2021. That means that it took the applicants 1 year 4 months to file the instant application from the date they claim they became aware that the ruling had been delivered; and I year 7 months from the date of the delivery of the ruling.

17. Whether time is computed from the date of the actual delivery of the impugned ruling, or from the date the applicants claim they became aware of its existence, the number of days involved either way are many. The Rule requires that such an application should be filed without delay. 1 year 4 or 7 months cannot be said to have been filed without delay. Furthermore, the delay is inordinate and inexcusable for reason the applicants slept on their rights for a further period of more than one year from the time they became aware of the ruling. I find that the delay cannot be explained away on account of covid-19 pandemic in the circumstances.

18. I find that the applicants are undeserving of the exercise of the court's discretion sought, with the result that the application dated 3rd December, 2021 has no merit and is accordingly dismissed with costs to the respondent.

19. Those are my orders.

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

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR