Gachugu v Karaine & 3 others (Civil Application 208 of 2020)
[2022] KECA 1411 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1411 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 208 OF 2020

PM GACHOKA, JA

DECEMBER 16, 2022

BETWEEN

ESTHER GATHONI GACHUGU ..... APPLICANT

AND

NIXON SUNTE KARAINE ..... 1ST RESPONDENT

MORRIS KAROKIA KARAINE ..... 2ND RESPONDENT

EPHRAIM KAINGI MBUTHIA ..... 3RD RESPONDENT

RUTH NJAMBI WAWERU ..... 4TH RESPONDENT

(Being an application for extension of time to file notice of appeal and record of appeal out of time from the judgment and decree of the Environment and Land Court at Kajiado (Christine Ochieng J.) delivered on 20th February 2018. in Environment and Land Court Case No. 360 OF 2017)

RULING

1. Before me is a notice of motion dated July 29, 2020 expressed to be brought under Rules 1(2), 4, 31, 39, 41, 42, 43, 47, 53 and 75 of the *Court of Appeal Rules (2010)*, sections 3(2), 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9 of the Laws of Kenya) and Articles 27 (1), 40, 50 (1) and 159 (2) (a), (b), (d) and (e) of the *Constitution of Kenya* seeking the following orders:

    i. That the Honourable Court be pleased to grant leave to the Intended Appellant/Applicant to appeal out of time against the Judgement and Decree of the Kajiado Environment and Land Court Civil Case No 360 of 2017 (The Honourable Lady Justice Christine Ochieng dated the 20th day of February 2018) and all consequential Rulings and Orders thereto (including the subsequent Ruling and Order of the Court made on the November 18,

2019) and such reasonable time within which to file and serve Notice of Appeal and Record of Appeal.

ii. That the costs of the application do abide the outcome of the intended appeal.

2. Rule 4 of the *Court of Appeal Rules*, which gives the Court discretion to extend time, has been subject of many legal battles, and the principles applicable are now well settled. In this application, the parties are walking on a well-trodden path, so to speak.

3. The discretion to extend time, is given to a single Judge in the first instance, and it is wide and unfettered. However, one has to keep in mind always, that the discretion must be exercised judiciously and upon reasons rather than arbitrarily or capriciously.

4. The principles that guide the exercise of jurisdiction under Rule 4 of the *Court of Appeal Rules* are now well settled by 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; *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* [2018] eKLR and *Athuman Nusura Juma vs Afwa Mohamed Ramathan* CA No 227 of 2015.

5. 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 judiciously 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. More considerations include, 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 a 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.

(xi) The right to a hearing is not only constitutionally entrenched, but also the cornerstone of the rule of law.

6. It is instructive to note that the rules do not set out the number of days that would be considered as inordinate, and therefore each case should be determined on its own facts, as held in the case of *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR in which this Court stated as follows:

> " 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 favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

7. It is important that I give a brief background to this application. The applicant and the 3rd respondent are an estranged wife and husband who lived together from the year 1989 to 2009. In the subsistence of the marriage, they lived together on land parcel No Kajiado /Kaputiei North /415. The applicant alleges that the 3rd respondent unilaterally sold the said property to the 1st and 2nd respondents without her knowledge. Thereafter, civil suit No 360 of 2017 was filed in Kajiado Environment and Land Court seeking among other prayers, an order for specific performance and lifting of a caveat that had been registered against the property by the applicant.

8. Upon hearing the parties, the trial court ordered the applicant, 3rd respondent and 4th respondent to refund to the 1st and 2nd respondent a sum of Kenya Shillings Nine million (Kshs 9,000,000/-) within 90 days together with interest at the rate 21% per annum from January 2014 until payment in full.

9. Aggrieved by the said judgment, the applicant wishes to lodge an appeal and has therefore approached this court for an extension of time to do so. In support of the application, she has sworn a lengthy affidavit that contains the grounds of appeal and the reasons for the delay in filing a notice of appeal and a record of appeal.

10. I need not recite all the grounds that have been cited by the applicant but take the liberty to summarize them as follows: that judgment was delivered on February 20, 2018; that subsequent to that an application for execution was made on November 18, 2019 attaching the matrimonial property for sale by public auction; that she has an arguable appeal; that whereas the trial and submissions were done in Kajiado law courts, the judgment was read in Ngong Law courts without notice.

11. According to the applicant her previous advocates L Maina Irungu & Co advocates were not diligent and did not attend court on the date of delivery of judgment; that her former advocates did not inform her of delivery of the judgment and she only came to know about it when she paid a courtesy call to her former advocates on June 28, 2019 and being dissatisfied, she changed her advocates to the current

advocates on record; Rachuonyo & Rachuonyo advocates who made an urgent application to peruse the file on July 1, 2019, when they were able to get copies of the judgment.

12. The applicant further states that she is currently suffering the consequences of execution of the decree and the consequential orders, as a result of the mistake and lack of diligence of her former advocates; that she is of advanced age and modest financial ability; and that she has ably explained the delay in filing this application.

13. On the part of the respondents, no reply or submissions had been filed on the date of the hearing, that is December 5, 2022. However, the advocates sent an email to the court registry on December 6, 2022 indicating that they had learnt that the application was due for hearing on December 5, 2022 and that they noted that the hearing notice was sent by the court registry to the wrong email address. In the email, the advocates sought time to file their responses and submissions.

14. I then directed, that the respondents were at liberty to file their responses and submissions within three days, as the application was scheduled for ruling on December 16, 2022. Subsequently, the 1st respondent filed his replying affidavit on December 7, 2022, and submissions on behalf of the 1st and 2nd respondents were filed on the same day.

15. The 1st and 2nd respondents in response to the applications state as follows: that the delay of almost two years before the filing of the application is not explained; the alleged mistake on the part of the applicant's previous advocates is a mere excuse; that the current advocates were appointed in July 2019 and the instant application was filed on 20th July 2020 and that the delay of more than one year is not explained by the current advocates.

16. I have carefully considered the arguments by the parties and it is important that I summarize the salient facts that arise as follows: Judgment was delivered by the trial court on the February 20, 2018; the instant application for extension of time was filed on July 29, 2020; in her affidavit, the applicant states that she learnt of the judgment on June 28, 2019 when she visited her previous advocates; that the applicant changed advocates on July 1, 2019 to the current advocates; that the applicant is old and due to Covid 19 pandemic it was difficult for her to raise money to lodge the appeal, that the appeal has high chances of success and that the delay is not inordinate.

17. Having carefully considered the application, the rival affidavits, and the written submissions by the parties, the question that I need to answer is: has the applicant established good grounds or reasons for the exercise of discretion to extend the time? As already stated, Rule 4 does not set out the principles that a Judge should consider when exercising the discretion to extend or refuse to extend time. The courts have over the years developed the guiding principles which a Judge should consider in exercising the discretion to extend time or not. It must be appreciated that no case is on all fours with another, and each will be determined by its own circumstances.

18. The applicant in her sworn affidavit, states that she became aware of the judgment when she visited her previous advocates on June 28, 2019 and that she appointed the advocates now on record on July 1, 2019. It is noteworthy, that judgment was delivered by the trial court on February 20, 2018 and this application for an extension of time was filed on July 29, 2020. The question that is glaring and still begging for answer is; if the current advocates were appointed on July 1, 2019 and they immediately perused the court filed and filed an application for stay, why did it take them another one year to file this application?

19. I note that the delay between the date of delivery of judgment on February 20, 2018 to June 2019 is blamed on the previous advocates. Parties must be aware that a case belongs to them at all times, and a mere allegation that their advocates were negligent is not enough. A party who is vigilant about his

or her case must demonstrate that they were cautious and keen to pursue the case. Each case will be treated under its own circumstances.

20. I also note that there is no explanation at all, why the current advocates on record took another year to file this application. The applicant in the supporting affidavit, depones in paragraph 13, that she instructed the current advocates on July 1, 2019, yet this application was filed on July 29, 2020. The delay of more than one year is also not explained.

21. It is therefore my finding that the delay of over two years in filing this application is not properly explained and the feeble reasons for the conduct of the previous advocates, the age of the applicant, and the outbreak of Covid 19 are not convincing at all. If the current advocates had taken swift action to file the application for an extension of time, probably one may be tempted to have mercy on the applicant. Whereas I am sympathetic with the applicant, the exercise of discretion is not an act of mercy; it is a judicious action that must be based on cogent reasons.

22. As regards the chances of the intended appeal, it is not my role to pronounce the merits of the appeal and I leave that to the bench that will hear and determine the appeal. As this Court held in *Athuman Nusura Juma vs Afwa Mohamed Ramadhan* CA No 227 of 2015:

> " This Court has been careful to ensure that whether the intended appeal has merits or not it is not an issue determined with finality by a single Judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly"

I have looked at the memorandum of appeal and I can only say that it raises arguable ground that may succeed and no more.

23. On the issue of prejudice, that will be caused if I extend time, I am called upon to balance the conflicting interests of the parties. In this case, the applicant is seeking a prayer for extension of time to file the notice and record of appeal out of time. On the other hand, it is deponed by the 1st respondent that the intended appeal has been overtaken by events as the property which is the subject of the intended appeal has already been sold in a public auction. If that was the only reason advanced by the respondents, I would have dismissed the same but as already held, a delay of over two years before applying for the extension of time is inordinate and inexcusable.

24. In view of the foregoing, I am satisfied that the applicant has not met the parameters for the exercise of my discretion. Accordingly, I dismiss the notice of motion dated July 29, 2020 with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR