



REPUBLIC OF KENYA



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**Henry v Njuguna & 2 others (Civil Application 52 of 2021)
[2022] KECA 1355 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1355 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 52 OF 2021
GV ODUNGA, JA
DECEMBER 2, 2022**

BETWEEN

MARGARET WANJIRU HENRY APPLICANT

AND

PETER KIRAGU NJUGUNA 1ST RESPONDENT

ROAD TOUCH SERVICES 2ND RESPONDENT

FAIRMONT HOTEL LIMITED 3RD RESPONDENT

(Application for leave to extend time for filing/lodging and service of the Memorandum of Appeal against the Ruling and Decree of the Honourable Lady Justice M. Thande dated 23/03/2018 in Mombasa HCC Matrimonial Cause No. 1 of 2008 (O.S))

RULING

1. Margaret Wanjiru Henry, the Applicant herein, moved this court by a Motion on Notice dated July 9, 2021 and filed on July 12, 2021. That motion was expressed to be brought pursuant to Rule 4 and 42 of the *Court of Appeal Rules*, Section 3A and 3B of the *Appellate Jurisdiction Act* Cap 9 of the Laws of Kenya and Article 159 of the *Constitution, 2010*. The Motion sought extension of time to file/lodge and serve the Memorandum of Appeal and the Record of Appeal filed on December 2, 2019 against the ruling of the Mombasa High Court Matrimonial Cause No 1 of 2018(OS) dated March 23, 2018 and that the already lodged Memorandum and the Record of Appeal be deemed to be timeously filed and served.
2. In support of the application, the Applicant swore an affidavit of even date. According to the deponent, the Hon. Lady Justice Thande dismissed the primary suit herein Mombasa High Court Matrimonial Cause No 1 of 2018 (OS) on March 21, 2018 for want of prosecution though she had already testified and was due for cross-examination. It was averred that though the Certificate of delay was issued on May 19, 2018, the delay in lodging the Memorandum of Appeal and the Record of Appeal, which was



filed on December 2, 2019 when the prescribed time by law had lapsed, was explained on the fact that the Applicant has been in and out of hospital battling severe depression and other ailments which led her not to give adequate instructions to her advocate to pursue an appeal. The Applicant averred that she has an arguable appeal with high chances of success which raises very serious issues of trial hence she should be granted the opportunity to be heard. In her view, while no prejudice will be suffered by the Respondents, she stands to suffer irreparable and substantial loss should her appeal be locked out. It was deposed that she timeously and without delay filed the application immediately she regained her health and strength.

3. In opposition to the application, Peter Kiragu Njuguna and Anthony Mwangi Njuguna, swore replying affidavits on September 9, 2022. According to the deponents, the Applicant misled this court by concealing material facts and claiming that her suit was dismissed for want of prosecution. According to the deponents, the suit was dismissed for the second time not for want of prosecution but because of her failure to obey the court orders of September 6, 2010, requiring her to deposit a sum of Kshs 42,473,395/- in court. According to the deponents, the Applicants averments on ill health are mere averments as no medical evidence has been exhibited to prove the kind and extent of sickness.
4. The deponents deposed that the Applicant has never served the Respondents with a Notice of Appeal hence the Appeal cannot be prosecuted. According to the deponents, though the Applicant filed the Memorandum of Appeal and the Record of Appeal on November 2, 2019 it was not until April 13, 2022 that the same was served following the service of the hearing notice for this application by the Court. According to the deponents, the late service was maliciously and inordinately delayed for 2 years and 5 months with an aim to ambush the Respondents in a short and untimely hearing.
5. According to the deponents, upon dismissal of Mombasa HCC Matrimonial Cause No 1 of 2008(OS) on May 12, 2015, the Applicant instructed the firm of Wambo Muyala & Co. Advocates to represent her throughout in Mombasa ELC No 38 of 2008 till May 12, 2020 when summary judgment was entered in favour of the 3rd Respondent herein against the Applicant. Instead of applying for an extension of time to file the present appeal, the Applicant instructed the firm of Mwangunya & Co. Advocates to file a new suit namely Mombasa ELC No112 of 2020 on September 2, 2020 against the 2nd Respondent herein, a suit which was determined on January 13, 2022. According to the deponents, the Applicant had been in good health and not depressed as she was capable of instructing her advocates to represent her in the said suits.
6. It was averred that though the Memorandum of Appeal is yet to be admitted as part of the record of the court, it has not been annexed as an exhibit in support of the application hence no reference can be made in response to the probability of success of the intended appeal. They have averred that looking at the Record of Appeal, the grounds in the Memorandum of Appeal do not aid the appeal in any way for the reasons that the Applicant does not dispute she, unlawfully in contempt of the court orders, retained all the moneys totalling to Kshs 42, 473, 395/- instead of depositing the said money in court.
7. When this application came up for virtual hearing on November 8, 2022, Learned Counsel, Mr Muyala appeared for the Applicant but there was no appearance for the Respondent. As service of the hearing notice had been effected on the firm on record for the Respondents, the Court directed the matter to proceed. Mr Muyala on his part relied on the Applicant's written submissions and List of authorities dated on April 19, 2022 the Applicant's major ground for the delay being that the Applicant was suffering from severe depression which rendered her inaccessible causing her counsel to be devoid of instructions to file the present application although having filed the Memorandum of Appeal and the Record of Appeal.
8. No submissions were filed on behalf of the Respondents.



9. In support of the Applicant’s submissions, reliance was placed on [Silas Muriithi Nguchu v Joseph Kinyajui Wanjiru](#) [2021] eKLR and [Vishva Stone Suppliers Co. Limited v RSR Stones Limited](#) [2020] eKLR
10. I have considered the application, affidavits in support and in opposition to and the written submissions.
11. The law as regards the principles to be applied by the court when considering an application brought under rule 4 of the [Court of Appeal Rules](#) are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into as guiding principles. These are first the period of the delay must be considered. Secondly, the Court has to consider the reasons for such a delay. Thirdly, the Court would consider whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal. Fourthly, the Court is required to consider if the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.
12. Those principles were restated by Waki, JA in [Fakir Mohamed v Joseph Mugambi & 2 others](#) [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso v Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
13. On its part, the Supreme Court of Kenya in [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others](#), Supreme Court Application No 16 of 2014[2014] eKLR while expressing itself on the matter opined that extension of time is not a right of 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.
14. In this case, the decision appealed against was made on March 23, 2018, some 4 and ½ years ago. A certificate for delay was issued on May 19, 2018. Rule The reason given for this delay is that the Applicant was indisposed. Under Rule 4 of this Court’s Rules, an appellant is required to file the



Memorandum of Appeal and Record of Appeal within 60 days of lodging of the Notice of Appeal. However, the proviso to that Rule provides that:

“where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

15. Therefore, giving the Applicant the maximum latitude, she had 60 days from May 19, 2018 to file the Memorandum of Appeal and the Record of Appeal. The said documents were not filed till December 2, 2019, about a year and half after the Certificate of Delay was issued. This application was itself not made till July 12, 2021, after another delay of one and half years after the filing of the Memorandum of Appeal and Record of Appeal. Clearly, the delay is ordinate.

16. The reason given by the Applicant is that she was indisposed.

However, the Respondents have averred that during the period following the delivery of the decision appealed against, the Applicant kept the Respondents busy in other proceedings. According to the Respondents, this application was only resorted to after all other options hit a dead end. Although the Applicant contends that she was indisposed and was unable to instruct her counsel to take the necessary steps, no medical report has been exhibited in support of this contention. Further, the averments by the Respondents that the Applicant actively participated in other proceedings during the period she alleges to have been indisposed has not been controverted. Apart from that the Applicant averred on oath that the decision she is appealing against arose from the dismissal of her case for want of prosecution notwithstanding the fact that she had partly testified. This averment was however refuted by the Respondents who averred that in fact the order of dismissal was set aside and the Applicant's case was conditionally reinstated and it was in fact non-compliance with the conditions that led to the dismissal of her case. Again, this has not been controverted. Faced with similar circumstances, Shah, JA in *John Kiragu Mwangi v Ndegwa Waigwa Civil*

Application No Nai. 179 of 2000, (UR) while dismissing a

similar application for extension of time held that a delay to file appeal within time, that is sought to be explained away by contrived grounds cannot be bona fide.

17. In this case, the delay in filing the Memorandum of Appeal and the Record of Appeal were clearly inordinate; the delay in regularizing the said filing was inordinate; the reasons advanced for the said delay are not satisfactory; and there was material non-disclosure of the nature of the appeal itself. I appreciate the fact that by the 1984 amendment to Rule 4 of the Court of Appeal Rules, the stricture of “sufficient reason” was removed and therefore a Judge of the Court of Appeal has an unfettered discretion to exercise thereunder. However, as appreciated by Waki, JA in *Shital Bimal Shah & 2 Others v Akiba*

Bank Limited Civil Appeal (Application) No 159 of 2005; [2006] 2 EA 323, this does not mean that the decision should

be made on whim or caprice.

18. Having considered all the above, I find that this is not a proper case for this Court to exercise its discretion in favour of the Applicant.

19. Accordingly, the Motion dated July 9, 2021 fails and is dismissed but with no order as to costs.



20. It is so ordered.

Dated and delivered at Mombasa this 2nd day of December, 2022.

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

