



Ngunjiri v Mbugua & another (Civil Application 25 of 2020 (UR 17 of 2020) of 2020) [2021] KECA 22 (KLR) (23 September 2021) (Ruling)

Neutral citation: [2021] KECA 22 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 25 OF 2020 (UR 17 OF 2020) OF 2020
KI LAIBUTA, JA
SEPTEMBER 23, 2021**

BETWEEN

JOHN MUTHEE NGUNJIRI APPLICANT

AND

DANIEL NJOROGE MBUGUA 1ST RESPONDENT

USHA MORJARIA 2ND RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal and Record of Appeal out of time, from the Judgment and Decree of Justice W. Ouko, dated 31st January, 2012 in Nakuru High Court Civil Case No. 212 of 2004)

RULING

Background

1. In his Notice of Motion dated 6th March 2020 made under Rules 23, 4, and 82 of the [Court of Appeal Rules](#), the Applicant, John Muthee Ngunjiri /T/A Tango Auctioneers and General Merchant, seeks extension of time pursuant to Rule 4 to (a) file and serve a Notice of Appeal; and (b) file a record of appeal, out of time. He also seeks costs of the application. The intended appeal is from the judgment and decree of the Hon. Justice W. Ouko delivered on 31st January 2012 in Nakuru HCCC No. 212 of 2004. The application has been duly served on the 2nd Respondent, Usha Morjaria, who is the surviving decree holder/respondent, and who has filed a replying affidavit sworn on 4th July 2020. The 1st Respondent died on 17th April 2008 during the pendency of the suit in the superior court.
2. The application is supported by the Applicant's affidavit sworn on 6th March 2020, and is made on 16 grounds set out on the face of the Motion, which I need not recite here, save to observe that they contain the Applicant's explanation for the delay in lodging his intended appeal. A summary of those grounds would suffice to guide the exercise of my discretion in determination of the application. Briefly stated, the grounds are that –



- (a) the subject matter of the intended appeal is the judgment and decree of the superior court delivered on 31st January 2012 in which the Applicant was adjudged to pay to the 1st Respondent a sum of Kshs 1,544,108 together with costs and interest;
 - (b) the Applicant instructed his counsel, M/s. Nancy W. Njoroge and Co., to institute an appeal from the whole of the judgment and decree of the superior court;
 - (c) counsel for the Applicant requested for certified copies of the proceedings on 4th February 2012 and filed a Notice of Appeal on 14th February 2012, which was served on counsel for the 2nd Respondent;
 - (d) the proceedings were supplied to the Applicant's counsel on record on or about 19th June 2012 and a Certificate of Delay issued on 19th November 2012, but counsel did not take steps to file the record of appeal;
 - (e) according to the Applicant, he only became aware of his counsel's default on 20th February 2020 when the matter came up for hearing of the 2nd Respondent's application for orders that the Appellant be deemed to have withdrawn his Notice of Appeal;
 - (f) the Notice of Appeal was withdrawn with the consent of the parties on 20th February 2020;
 - (g) counsel for the Applicant have since filed a fresh Notice of Appeal on 27th February 2020, in respect of which the Applicant implores this Court to consider as duly filed;
 - (h) the Applicant's intended appeal has a high chance of success.
3. Annexed to the Applicant's supporting affidavit is a draft Memorandum of Appeal setting out five grounds on which the intended appeal is founded, and which may be summed up in one sentence: that the superior court erred in law and in fact in upholding the 2nd Respondent's claim against the Applicant for wrongful execution. He blames his counsel for the delay in lodging the record of appeal despite having obtained certified copies of the proceedings and judgement in on 19th June 2012.
 4. In his replying affidavit sworn on 4th July 2020, the 2nd Respondent states that –
 - (a) the Applicant's counsel on record in the superior court continued to represent him, including in the 2nd Respondent's application dated 4th March 2017 and filed in this Court for orders that the appellant be deemed to have withdrawn his Notice of Appeal; and
 - (b) the 2nd Respondent's application was determined by consent of the parties on 20th February 2020, whereupon the Applicant's Notice of Motion was deemed as withdrawn.
 5. The 2nd Respondent contends that the Applicant's Motion does not merit the orders sought and should be dismissed with costs.

Submissions by Counsel

6. In their written submissions dated 12th July 2021 and made in support of the Applicant's application, counsel for the Applicant, M/s. Mirugi Kariuki & Co. Advocates, rely on the authority of *Fahim Yasin Twaba v Timami Issa Abdalla and 2 others* [2015] eKLR and *Fakir Mohammed v Joseph Mugambi and 2 others*. No submissions have been made on behalf of the 2nd Respondent.
7. Counsel's submissions are largely dedicated to the reasons for delay in filing the Notice of Appeal and record of appeal. They also address the grounds on which the intended appeal is founded, as set out in the draft Memorandum, and urge the Court to exercise its unfettered discretion under Rules 4 of the



Court of Appeal Rules. They urge me to extend time within which to file the Applicant's fresh Notice of Appeal and Record of Appeal.

Determination

8. I agree with counsel for the Applicant. Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to 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 on such terms as it thinks just.
9. Counsel has invited me to consider the decision of the Supreme Court in *Fahim Yasin Twaha v Timami Issa Abdalla and 2 others* [2015] eKLR where the Court observed that "... as regards extension of time, this Court has already laid down certain guiding principles."
10. Affirming its decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others*, the Court held that "it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant."
11. In its decision, the Supreme Court observed:

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

 1. equitable remedy that is only available to a deserving party, at the discretion of the Court;
 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay; and
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
12. In addition to the foregoing, I have considered the decision in *Potbiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others* [2005] eKLR where the Court, at p.733, called to mind the criteria



applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* [1984] KLR p591 where this Court stated:

"As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:

(a) that there is merit in his appeal;

(b) that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and

(c) that the delay has not been inordinate."

13. Rule 75(1) and (2) of the Court of Appeal Rules requires "any person who desires to appeal to the Court" to "... give notice in writing within 14 days of the date of the decision against which it is desired to appeal." Rule 77(1) requires that the Notice be served on the Respondent within 7 days next following.
14. Even though the Applicant had initially filed and served his Notice of Appeal in accordance with Rules 75(1) and (2) and 77(1), the same Notice was deemed as withdrawn with the consent of the parties on 20th February 2020. Consequently, his renewed desire to lodge a fresh Notice of Appeal as sought in this application is, in my considered view, an afterthought that cannot be entertained in exercise of this Court's unfettered discretion. The application before me comes more than nine years after the judgment and decree of the superior court given in favour of the 2nd Respondent, and during which the Applicant enjoyed stay of execution of the decree. What has recently woken him up to the renewed action is not for me to judge. What is clear to my mind is that the delay in instituting his appeal and filing his record of appeal is inordinate.
15. The Applicant's attempt to explain the delay by blaming counsel with whom, according to him, he had fallen out, is not persuasive. He glosses over the reasons for disagreement with his counsel without much to offer by way of evidence that he had taken any meaningful steps to pursue his course of appeal for more than eight years. Yet, that same counsel represented him up until the withdrawal of his Notice of Appeal by consent on 20th February 2020. His attempted explanation for the delay does not, in my view, hold water.
16. That leaves me with the issue as to whether the intended appeal is arguable with the possibility of success. With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. I am not satisfied that the grounds set out on the face of the Applicant's draft Memorandum of Appeal point to a reasonable conclusion that the intended appeal is arguable. While I have no jurisdiction to scrutinise the possible merits or demerits of the intended appeal, suffice it to observe that the impugned judgment and decree of the superior court turned on a claim for wrongful execution that could not have been reasonably excused by allegations that the judgment debtor was acting on instructions. On that account, I am not persuaded that the intended appeal is arguable.
17. By so determining, I am guided by this Court's decision in *Athuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2015 (Unreported), where the Court observed:

"This Court has been careful to ensure that whether the intended appeal has merits or not 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”.

18. On the authority of *Muchungi Kiragu v James Muchungi Kiragu and another*, I am of the considered view that allowing time for the Applicant to renew his desire to pursue the intended appeal so many years after the judgment and decree of the superior court, and after withdrawal of his initial notice, would unduly prejudice the 2nd Respondent, who has been deprived of the fruits of his judgment for so long a time. In Muchungi’s case, the Court had this to say:

“ This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”

19. Having carefully considered the contents of the Applicant’s Notice of Motion, the Applicant’s supporting affidavit, his draft Memorandum of Appeal, the 2nd Respondent’s affidavit in reply, and the written submissions of counsel for the Applicant, I find that the Applicant’s Notice of Motion dated 6th March 2020 fails on all counts, and the same is hereby dismissed with costs to the 2nd Respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

