**Macharia & another v Githinji (Civil Application 127 of 2020)**
**[2021] KECA 99 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 99 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPLICATION 127 OF 2020**

**RN NAMBUYE, JA**

**OCTOBER 22, 2021**

**BETWEEN**

**LYDIA NJOKI MACHARIA ..... 1ST APPLICANT**

**MARGARET WANJIKU GITHINJI ..... 2ND APPLICANT**

**AND**

**CATHERINE WAITHERA GITHINJI ..... RESPONDENT**

***(An application for leave to file notice of appeal out of time from the Judgment of the High Court of Kenya (M. T. Matheka, J.) dated 18th January, 2019 in Nyeri HC Succession Cause No. 39 of 2009)***

**RULING**

1 Before me is a notice of motion dated 9th August, 2019 brought under Rule 4 of the Court of Appeal Rules substantively seeking an order that time for filing of the notice of appeal against the judgment of M. T. Matheka, J. dated 18th January, 2019 in the High Court of Kenya at Nyeri Succession Cause No. 39 of 2009 be extended on the ground that the applicant became aware of the said judgment on 23rd may, 2019, together with an attendant order that the costs and incidentals to the application abide the outcome of the intended appeal.

2 It is supported by the supporting affidavit a Lydia Njoki Macharia and Margaret Wanjiku Githinji, together with annexed thereto and the applicants written submissions dated 8th September, 2021 together with case digest annexures to the written submissions.

3. It has been opposed by a replying affidavit sworn by the respondent Catherine Waithera Githinji on 30th September, 2021 and written submissions filed by the same respondent dated the same date together with one legal authority in support thereof.

4. Supporting the application, the applicants cumulatively contend that they were objectors in the Succession Cause No. 39 of 2019 whose judgment was delivered and dated 18th January, 2019 in the absence of both parties and their respective advocates. It was only on 23rd May, 2019 that they learned of the delivery of the judgment both in their absence and that of their advocate. On 24th May, 2019 their advocate wrote to the Deputy Registrar of the court seeking certified copies of both the judgment and proceedings. These were availed to their advocate on 18th and 20th June, 2019 respectively. Their advocate went over the same and advised them accordingly.

5 They were aggrieved and gave instructions for an appeal to be lodged on their behalf. They were advised by their advocate that time for lodging of the intended appellate process as of right had already lapsed hence the filing of the application under consideration. It is against the above background that the applicants contend that the application under consideration is highly meritorious and one which should be allowed in the interest of justice.

6 It is also their position that the delay in seeking the court's intervention to validate the intended appellate process is not inordinate as only 110 days lapsed as from 1st February, 2019 which was the deadline for the lodging of a notice of appeal to the 23rd May, 2019 when they became aware of the judgment delivered in their absence and that of their advocate without any notice to them. The reasons for the delay have also been well articulated above.

7 It is also the applicants position that the intended appeal is not only arguable but also has high chances of success borne out by the content of the draft memorandum of appeal annexed to the application. They intend to argue on appeal that the learned Judge erred both in law and fact in failing to appreciate the substratum of the protests and the history of the matter hence arriving at the wrong conclusion, by wrongly interpreting the intention of the protesters to include the purchasers in the distribution of the deceased's estate hence making an erroneous finding, in holding that the protestors act of supporting the purchaser's interest was intended to prejudice their co-wife and failing to appreciate that the protestors intention was to protect the purchasers who would have stood prejudiced due to the misconduct of the third wife, herself and her house, failed to appreciate that the alleged sale of portions of land out of the deceased's estate was conducted by the third wife and her son, hence a clear indication that the third house had willfully forfeited their share to strangers, failed to appreciate the evidence of the protestors including the documentary evidence hence shifting the blame to the wrong person, erred in appreciating the respondent's evidence as being accurate despite the same not being supported by any documentary evidence or independent witnesses testimonies; and lastly, erred in passing a mode of distribution which was neither proposed by the respondent or the appellants nor supported by law hence arriving at the wrong conclusion.

8 To buttress the above submission, the applicants have cited the case of *Vishva Stone Suppliers Company Limited vs. RSR Stone [2006] Limited* [2020] eKLR in which Nambuye, J.A. confronted with a similar application summarized the principles that guide the court in the exercise of its mandate under Rule 4 of the *Court of Appeal Rules*. Also cited is the case of *Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank* [2020] eKLR in which Musinga, J.A reiterated the threshold for sustaining a plea that there has been no inordinate delay in seeking the court's intervention, the intended appeal is arguable and, lastly, that no prejudice would be occasioned to the opposite party if the relief sought were granted.

9 In rebuttal, the respondent's cumulative opposition is that the matter was mentioned in court on 6th December, 2018 when the court rescheduled the delivery of the judgment to 18th January, 2019. It is also her position that indeed the applicants advocate then on record for them at the time by name, Wagiita was not in court on the 6th December, 2018 when the court rescheduled the date for

the delivery of the judgment to 18th January, 2019 but an advocate by the name Gichuki held their advocate's brief and must have told their advocate of the rescheduled date. It is therefore not correct as contended by the applicants that they and their advocate then on record for them were not aware of the

rescheduled date for the delivery of the judgment, hence her assertion that no plausible explanation has been proferred by the applicants for the delay in initiating their intended appellate process in time.

10 It is also the respondent's position that from the face of the application under consideration, all that the applicants seek from the court is leave to file a notice of appeal which in the respondent's opinion is a clear indication that they have no intention of filing a record of appeal not having sought leave to file the record of appeal out of time as well.

11 On the totality of the above submission, the respondent asserts that no plausible explanation whatsoever has been preferred by the applicants as to why the notice of appeal was not filed within the timelines stipulated in the Rules. It is also her position that the applicants cannot feign lack of knowledge as to when the intended impugned decision was delivered as it was their obligation to follow up on their matter with their advocate to have appraisal update on the status given to them from time to time. Likewise, their contention that they were not able to reach their advocate on phone also holds no water as nothing prevented them from paying a visit to their advocate's offices to find out the progress on the delivery of the judgment.

12 Lastly, that neither have the applicants given sufficient explanation as to why the motion under consideration was filed on 9th August, 2019 a period of three (3) months after the discovery of the status of the judgment which they were aggrieved with hence the respondent's reiteration that no plausible explanation has been given for the delay especially when it is apparent from their supporting facts that they only woke up from their slumber when they realized that the respondent had taken procedural steps to execute the judgment delivered in her favour.

Lastly, that the applicants' application is also a nonstarter for failure to serve upon her a letter bespeaking proceedings which was allegedly applied for on 24th May, 2019.

13 To buttress the totality of the above submissions, the respondent has cited the decision of Gatembu, J.A. in the case of *Sospeter Kiratu Mithiori vs. Benson Mwangi Mithori* [2021] eKLR for the reiteration of the principles crystallized by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [supra] inter alia 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.

14 Second, that a party seeking extension of time has the burden to lay a basis to the satisfaction of the court and that extension of time is a consideration on a case-to-case basis. Third, that a delay should be explained to the satisfaction of the court. Whether there will be prejudice suffered by the respondents if the extension is granted is also another factor to be taken into consideration in addition to other factors such as whether the application is brought without undue delay and, lastly, whether public interest should be a consideration.

15 Also cited by the respondent is the Court of Appeal decision in the case of *County Government of Mombasa vs. Kooba Kenya Limited* [supra] in which this Court [F. Sichale, J.A] declined to exercise the court's discretion in favour of the applicant therein for inter alia for the failure to serve the letter bespeaking proceedings on the opposite party within the timelines stipulated in the Rules, and second that the delay was not explained as there was no explanation for alleged intervening circumstances relied upon by the applicant therein as basis for seeking the court's intervention to enlarge time within which to initiate an appellate process.

16 My invitation to intervene on behalf of the applicant has been invoked under Rule 4 of the Court of Appeal Rules. It provides:

> " 4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court 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."

17 The principles that guide the court in the exercise of the court's mandate under the said Rule now form a well-trodden path. I take it from the position taken in Nambuye, J.A. in the case of *Vishva Stone Suppliers Company Limited vs. RSR Stone [2006] Limited* [supra] in which theapplicable principles were aptly distilled as hereunder:

> (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.
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> (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.
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> (iii) The discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see Githere vs. Ndiriri.
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> (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.
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> (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.
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> (vi) 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 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;
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> (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.

(ix) Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.

(x) An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;

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

18 From the above, the factors I am enjoined to take into consideration in the determination of an application of this nature are first, the length of the delay. Second, reason(s) for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.

19 Starting with the delay, it is not in dispute that the intended impugned judgment was delivered on 18th January, 2019, while the application under consideration is dated 7th August, 2019 a period of six (6) months and about twelve (12) days.

20 In *George Mwende Muthoni vs. Mama Day Nursery and Primary School*, Nyeri C.A No. 4 of 2014 (UR), extension of time was declinedon account of the applicant's failure to explain a delay of twenty (20) months, while in *Aviation Cargo Support Limited vs. St. Marks Freight Services Limited* [2014]eKLR, the relief for extension of timewas declined for the applicant's failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

21 Applying the above threshold to the controverted position herein, it is my finding that the length of delay under interrogation herein is not so long as that which was the subject in the *Mama Day Nursery School* case [supra] that led to the Court declining relief therein but almost same as that which was involved in the *Aviation Cargo Support System* case [supra] hence the need for me to interrogate the reason for the delay to determine if the same is plausible and therefore excusable.

22 The reason given by the applicants is that the judgment was delivered in their absence and that of their advocate which I find plausible. This is because as confirmed by the respondent in her cumulative submission indeed the date for the delivery of the judgment was rescheduled in the absence of the applicants' advocate. Although there has been no deposition from the relevant advocate to confirm the applicants' assertion, I find no reason to doubt the genuineness of their assertion especially when there is nothing on the record to suggest that the advocate who allegedly held brief for their advocate passed on that information to the applicants' advocate. Neither is there any demonstration that any notice for the delivery of the rescheduled judgment was ever issued to the respective parties and their advocates herein notifying them of the readiness for delivery of the rescheduled judgment.

23 On the arguability of the intended appeal, I have borne in mind the issues applicants intend to take on appeal as set out in the draft memorandum of appeal highlighted above. I do not find them frivolous

especially when the substratum of the intended appeal arises from succession proceedings. In law, an arguable appeal is not one that must necessarily succeed but one that warrants the court's intervention and invitation to the opposite party to respond thereto. I have no doubt the issues raised in the draft memorandum of appeal will warrant not only the court's intervention but also the respondent's response thereto. See the case of Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank [supra].

24 As for prejudice to be suffered by the opposite party, should the relief be granted, the respondent says she will suffer prejudice as she was in the process of initiating necessary processes for the execution of the judgment apparently granted in her favour. It is therefore imperative for me to weigh the prejudice the respondent stands to suffer should the relief be granted in light of the now crystallized nontechnicality constitutional principle as well as the right to be heard which is also now constitutionally entrenched.

25 On the nontechnicality constitutional principle, I take it from the cases of *Jaldesa Tuke Dabelo vs. IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others vs. IEBC & 3 Others* [2013] eKLR; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others* [2014] eKLR; *Patricia Cherotich Sawe vs. IEBC & 4 Others* [2015 ]eKLR for principles/propositions inter alia that: the exercise of the jurisdiction under Article 159 of the *Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice save that Article 159(2)(d) of the Constitution is not a panacea for all procedural ills.

26 As for the right of access to appellate justice, I take it from the case of *Richard Nchapi Leiyagu vs. IEBC & 2 Others* [2013] eKLR; *Mbaki & Others vs. Macharia & Another [2005] 2EA 206*; and the Tanzaniancase of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; in which it was variously held inter alia that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.

27 In light of the above crystallized positions, I am of the view that the circumstances prevailing herein do not operate to warrant curtailing the applicants intended appellate right especially after ruling above that the intended appeal is arguable. It is, therefore, only fair and just that the issues intended to be raised on appeal be interrogated on merit in the interest of justice to both parties.

28 The upshot of the above assessment and reasoning is that the application has merit. It is allowed on the following terms:

1) The applicants have fourteen (14) days from the date of delivery of the ruling to file and serve a notice of appeal.

2) The applicants have sixty (60) from the date of filing of the notice of appeal to the file a record of appeal.

3) Costs of the application to abide the outcome of he intended appeal.

4) Thereafter parties to proceed according to law.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.**

**R. N. NAMBUYE**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a*

*True copy of the original*

**DEPUTY REGISTRAR**