



REPUBLIC OF KENYA



KENYA LAW
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**Ngatu v Mpinda & 3 others (Civil Application 83 of 2019)
[2021] KECA 84 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 84 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 83 OF 2019
RN NAMBUYE, JA
OCTOBER 22, 2021**

BETWEEN

JOSHUA NGATU APPLICANT

AND

JANE MPINDA 1ST RESPONDENT

REHEMA RAIBUNI 2ND RESPONDENT

MARY ALIMBA RAIBUNI 3RD RESPONDENT

SALPRO KENYA LIMITED 4TH RESPONDENT

(Being an application for stay of the Ruling of the High Court of Kenya (Lucy N. Mbugua, J.) dated 13th November, 2019 in Meru ELC Case No. 15 of 2018)

RULING

1. Before me is a notice of motion dated 3rd June, 2019 substantively brought under Rule 4 of the [Court of Appeal Rules](#), and all other enabling provisions of the law.
2. It seeks prayers as follows:
 - “2.THAT the applicant be granted leave to appeal out of time against the whole ruling entered herein on 20th February, 2019 by Hon. Lucy N. Mbugua, Judge in the Environment and Land Case No. 15 of 2018 and all consequential orders.
 3. THAT the memorandum of appeal annexed hereto be deemed as duly filed.**
 - 4.THAT costs of the application be in the cause.”
3. It is supported by grounds on its body, a supporting affidavit of Joshua Ngatu with annexures thereto, written submissions dated 25th February, 2021 and legal authorities cited in the written submissions.



4. It has been opposed by replying affidavits sworn by the 1st respondent on behalf of himself and the 2nd and 3rd respondents on 4th July, 2019; and that of Ashok Kumar Hariya describing himself as a Director of the 4th respondent sworn and dated at Meru on 3rd July, 2019 and written submissions filed by the 1st, 2nd and 3rd respondents dated 13th September, 2021. The application was canvassed through rival pleadings and submissions in the absence of learned counsel for the respective parties and without oral highlighting.
5. Supporting the application, it is the cumulative submission of the applicant that he was a party to the proceedings that were conducted in the High Court of Kenya at Meru in the Environment and Land Court (ELC) in ELC Cause No. 15 of 2018 before L. N. Mbugua, J. The said proceedings gave rise to the intended impugned ruling delivered on 20th February, 2019. It is the applicant's position that he did not have the benefit of counsel during the said proceedings. On 22nd February, 2019 he applied for a certified copy of the ruling to enable him appraise the contents and make an informed position on the same. It was not until the 18th April, 2019 that a copy of the intended impugned ruling was supplied to him. He sought wise counsel from an advocate who advised him that time prescribed in the Court of Appeal Rules for initiating an appellate process as of right had lapsed hence the necessity for him to file the application under consideration dated 3rd June, 2019 seeking the exercise of the court's discretion in his favour to resuscitate his intended appellate process.
6. It is also the applicant's position that the delay in seeking the court's intervention to validate his intended appellate process is not inordinate. It has also been sufficiently explained. According to him he has also advanced a reasonable and plausible explanation for the delay in seeking the court's intervention which should be sustained.
7. It is also the applicant's position that the intended appeal is not only arguable but also has high chances of success.
8. In support of this proposition the applicant relies on the annexed draft memorandum of appeal intending to raise seven (7) grounds of appeal. He intends to fault the trial Judge for erring both in law and in fact in: failing to appreciate the import of Article 159 of the Constitution and therefore erroneously waived the ultimate purpose to the detriment of the applicant, striking out the applicant's application by improperly invoking the doctrine of laches, failing to appreciate that action based on fraud can be granted an extension of time under section 26 of the *Limitation of Actions Act*, failing to appreciate that the applicant was not a party in ELC Case No. 132 of 2007 (O.S), failing to appreciate that for a matter to be res judicata, the matter must have been alleged by one party and either denied or admitted expressly or impliedly by the other in a former suit being ELC Case No. 13 of 2007 (O.S), failing to capture the test of res judicata as spelt out in section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya and, lastly, that the findings of the learned Judge are unsupportable in law or on the basis of the evidence adduced. He also adds that no prejudice will be suffered by the respondents if the relief sought were granted.
9. To buttress the above submission, the applicant relies on the Supreme Court decision in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013] eKLR* on the threshold for granting relief for extension of time.
10. The 1st, 2nd and 3rd respondents' cumulative opposition to the application is that indeed they were parties to the proceedings in Meru ELC No. 15 of 2018 dismissed with costs on 20th February, 2019 by L. N. Mbugua, J. They are also privy to the fact that on the very day the intended impugned ruling was delivered, the applicant sought stay of execution which was declined for the reason that there was no positive order capable of being stayed. Subsequent to the above order, the applicant on 3rd July, 2019



filed a formal application for stay which was similarly declined by the same Judge on 13th November, 2019.

11. On the application under consideration the 1st, 2nd and 3rd respondents position is that they agree the applicant did not have services of an advocate during the hearing of the application giving rise to the intended impugned ruling but contend that the applicant only has himself to blame for that situation as he was accorded an opportunity to engage the services of a lawyer but failed to do so as correctly observed by the Judge in the intended impugned ruling.
12. They are strangers to applicant's contention that he only managed to access a copy of the intended impugned ruling on 18th April, 2019. According to them the said ruling was ready and available for collection within a week after its delivery, the very timeframe within which they obtained a copy for themselves a week after the delivery of the said ruling. They are also aware that the applicant's advocate filed a notice of appeal against the intended impugned ruling on 18th April, 2019 way out of time and without leave of the court hence the same is incompetent. Neither was it ever served on them within the timelines stipulated in the Rules for service of such a process on the opposite party notwithstanding its aforesaid incompetence.
13. It is also their assertion that the reasons given in the supporting affidavits as reasons for delay do not, according to them demonstrate sufficient cause for the delay to persuade the court to exercise its discretion to grant the relief sought. The application is also not only incompetent but also vexatious and an abuse of the due process of the court as it was presented close to eight (8) months after the delivery of the intended impugned ruling. It is also their position that the applicant is guilty of indolence and does not therefore deserve the order sought.
14. They also urge that he should not be allowed to use failure to access a typed copy of the ruling and the proceedings as a scape goat for his inordinate delay as no basis has been shown for the failure to access these timeously, hence the court is being taken for granted. Further, that what they have alluded to above is a clear demonstration that the applicant has not come to equity with clean hands and is therefore undeserving of the court's exercise of its discretion in his favour.
15. It is also these respondents' assertion that as beneficiaries of the intended impugned order, they are also entitled to enjoy the fruits of the orders granted in their favour especially when it was sufficiently demonstrated before the trial court that the applicant's conduct of frequently engaging them in court processes had made them incur losses. It therefore follows that granting the applicant the relief sought will highly prejudice them.
16. The respondents take on the intended appeal is that it is neither arguable nor does it have any chances of success. To them, the applicant is a dishonest litigant who has abused the due process of the court to their detriment. The intended appellate process will serve no useful purpose. Neither will it promote the cause of justice as between them. Instead, it will clog the justice system thereby amputating the efficiency and efficacy of the administration of justice. Lastly, they reiterate that the intended appeal has no chances of success as the Judge delivered a well-researched, reasoned and balanced ruling unassailable on appeal. It is their plea that litigation herein should come to an end as they reiterate the application is unmerited and ought to be dismissed with costs to them.
17. To buttress the above submission, the 1st, 2nd and 3rd respondents rely on the case of the *County Government of Mombasa vs. Kooba Kenya Limited [2019] eKLR* as approved in the case of *Abdul Azizi Ngoma vs. Mungai Mathayo [1976] Kenya LR 61, 62* on the threshold for the exercise of the court's mandate under Rule 4 of the Court of Appeal Rules to extend time within which to comply with the timelines set in the said Rules.



18. The 4th respondent's position on the other hand is that it is aware that the appellate mandate of this Court is invoked by the timeous filing of a notice of appeal which according to Rule 75(2) of the Court of Appeal Rules ought to have been filed by the applicant within fourteen (14) days from 20th February, 2019 that is on or before 7th March, 2019. It therefore follows that the notice of appeal filed on 26th April, 2019 was incompetently filed out of time and without leave of the court. Neither was it served on them pursuant to the prerequisites in Rule 77(1). The applicant's application is therefore a nonstarter.
19. The 4th respondent appreciates that the position taken above is sufficient to dispose of the applicant's application, however, without prejudice to the foregoing, the 4th respondent's position is also that the applicant's notice of motion under consideration made 102 days after the ruling sought to be impugned is unsustainable as the applicant is guilty of inordinate delay. Granting the relief sought in the circumstances will greatly prejudice the 4th respondent and therefore an affront against the interests of equity, justice and fair play.
20. It is also the 4th respondent's position that the intended appeal is neither arguable nor does it have any chances of success. According to the 4th respondent a cursory look at the Judge's well researched and reasoned ruling reveals that the suit in the High Court was not only res judicata, statute barred, an abuse of the court process but the applicant was also guilty of laches. Granting the relief sought will not serve any ends of justice to the respective parties herein and prayed for the application to be dismissed with costs.
21. My invitation to intervene on behalf of the applicant has been invoked under Rule 4 of the Court of Appeal Rules, which provides as follows:

“ 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.”
22. The principles that guide the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled by numerous enunciations of this court and as crystallized by the Supreme Court.
23. I take it from the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ.) decision in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [supra] in which these were restated as follows:-
 - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 2. A party who seeks for 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. Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
 5. Whether there will be any prejudice suffered by the respondent of the extension is granted.
 6. Whether the application has been brought without undue delay; and



7. Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
24. 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 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.
25. Starting with the delay, it is not in dispute that the intended impugned ruling was delivered on 20th February, 2019, while the application under consideration is dated 23rd June, 2019 a period of three (3) months and about sixteen (16) days. Whereas from 18th April, 2019 when applicant was allegedly supplied with the intended impugned ruling to 3rd June, 2019, is a period of one (1) month and seventeen (17) days.
26. In *George Mwendu Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)*, extension of time was declined on 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 time was 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.
27. Applying the above threshold to the uncontroverted 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. It is also not longer than the length involved in the Aviation Cargo case (supra) which also resulted in the Court declining to exercise its discretion in favour of the applicant therein.
28. The reason advanced for the delay in accessing the same is also plausible as the 1st, 2nd and 3rd respondents have not exhibited any document from the court’s registry to demonstrate that the impugned ruling was available for collection a week after its delivery. The applicant’s assertion is therefore sustained.
29. As for arguability of the intended appeal, there is a draft memorandum of appeal. In law an arguable ground of appeal is not one that must necessarily succeed but one that is bona fide and would not only call for a response from the opposite party but also warrant the court’s interrogation. See *Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank [2020] eKLR*. The grounds annexed by the applicant in my view, satisfy the threshold for arguability of the intended appeal notwithstanding its ultimate outcome.
30. As for prejudice to be suffered by the opposite party, the respondents have raised issue of incurring losses as a result of numerous litigation the applicant has engaged them in and the right to enjoy the fruits of the ruling granted in their favour which in my view have to be weighed and balanced against the nontechnicality principle in Article 159 of the Constitution and the right to be heard.
31. The constitutional nontechnicality principle is enshrined in Article 159(2)(d) of the *Constitution of Kenya, 2010*. It provides:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles -



d. Justice shall be administered without undue regard to procedural technicalities;

32. The principles that guide the court in the exercise of its mandate under the above provision have also been crystallized by case law. 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.

33. As for the right to be heard, 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 Tanzanian case 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.

34. In light of the above crystallized positions, I am of the view that the circumstances prevailing herein do not operate to warrant curtailing the applicant's intended appellate right especially after ruling above that the intended appeal is arguable. Second, his assertion that he accessed the intended impugned ruling for purposes of forming an informed position on his intended appellate right is plausible for reasons given above. It is, therefore, only fair and just that the issues intended to be raised on appeal be interrogated on their merit in the interest of justice to both parties especially when it is now crystallized that the right to be heard can only be curtailed in very exceptional circumstances. None of which have been demonstrated to exist herein.

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

1. The applicant has fourteen (14) days from the date of the delivery of the ruling to file and serve a notice of appeal.
2. The applicant has sixty (60) days from the date of the lodging of the notice of appeal to file and serve the record of appeal.
3. Costs of the application to abide the outcome of the intended appeal.
4. Thereafter parties to proceed according to law.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed



DEPUTY REGISTRAR

