



REPUBLIC OF KENYA



Otwere v Kotecha (Civil Appeal 44 of 2021) [2021] KECA 78 (KLR) (8 October 2021) (Ruling)

Neutral citation: [2021] KECA 78 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 44 OF 2021
F SICHALE, JA
OCTOBER 8, 2021**

BETWEEN

BERTHA NALIAKA OTWERE APPLICANT

AND

RAMESH KOTECHA RESPONDENT

(Being an Application for Extension of Time to file and serve Notice and Record of Appeal against the Order and Ruling of Matheka J dated 21st June 2017.) IN (Kakamega ELC Case No. 274 of 2015)

RULING

1. Before me is a motion dated 11th April 2021, brought pursuant to the provisions of Rule 4 of the *Court of Appeal Rules* 2010, in which Bertha Naliaka Otwere (the applicant herein) seeks the following orders:
 1. Spent,
 2. This honourable Court be pleased to deem the Notice of Appeal dated 21st June 2017, lodged and served on 12th July 2017 as being properly lodged and served on time,
 3. This honourable Court be pleased to extend time for 14 days for the applicant to file and serve the Record of Appeal,
 4. Pending the filing and determination of the appeal, the status quo be maintained,
 5. The costs of this application be provided for,
 6. This honourable Court be pleased to grant any other orders it deems just and expedient.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Bertha Naliaka Otwere (the applicant herein), who deposed *inter alia* that she was the widow of the late Justo Otwere Sabala who had initially instituted the present suit in the High Court, where upon the demise



of her husband, she made an application for substitution which application was allowed on 23rd July 2009 and that considering she was a lay person, she instructed the firm of A.B.L Musiega & Company Advocates to take up the matter sometimes in the year 2010 and that all along the respondent was represented by the firm of J.J Mukavale & Company Advocates until 20th November 2017, when the firm of Samba & Company Advocates came on record for the respondent. That, on 3rd September 2015, the respondent through the firm of Gabriel Fwaya & Company advocates filed an application to dismiss her suit for want of prosecution and the High Court vide a ruling dated 21st June, 2017, subsequently dismissed her suit and that being dissatisfied with the aforesaid ruling, she instructed her then Advocates; A.B. L Musiega & Company Advocates to appeal and the said firm filed a Notice of Appeal dated 21st June, 2017 on 12th July, 2017.

3. She further deposed that unfortunately the said firm of advocates that was then on record for her did not take any steps to pursue the certified proceedings and ruling for purposes of filing and lodging the Record of Appeal on time and that the mistake/ failure to obtain the proceedings on time was wholly attributable to the said firm of advocates and that being a semi illiterate and ailing widow with no legal knowledge, she was all along under the impression that her appeal had been filed and that she believed that she had an arguable appeal for the reasons that the application dated 3rd September, 2015, for the matter to be dismissed for want of prosecution was filed by the firm of Gabriel Fwaya & Company advocates which was not properly on record for the respondent as no notice of change was filed to come on record for the respondent in place of the firm of Samba & Company advocates.
4. She further deposed that she would stand to suffer prejudice because the subject parcel is where she stays currently with her four children which has been her home since acquisition of the same by her late husband in the year 1968 and that her family was staring at the threat of eviction and that the respondent had instituted execution proceedings and even had her committed to civil jail for 30 days.
5. The application was opposed vide a replying affidavit sworn by Ramesh Kotecha (the respondent herein), who deposed *inter alia* that he did instruct both M.J. Mukavale and Gabriel Fwaya advocates to act for him and that as such, the issue of representation was not an issue and that the Notice of Appeal was filed and served on 21st July, 2017, which was out of time and no explanation had been given for the same.
6. The applicant in his submissions reiterated the averments in the supporting affidavit and submitted that even though the delay in this case was long (3 years and 11 months) the same had been explained and was wholly attributable to her previous advocates and that her appeal had high chances of success as the application to dismiss the suit in the High Court had been filed by an advocate who was not properly on record and that all along she was under the impression that the appeal had been filed.
7. On the other hand, it was submitted for the respondent that the present application was filed on 12th April, 2021, a period of 3 ½ years which was inordinate and unreasonable and that further the applicant was represented by the firm of ABL Musiega & Company advocates until June 2019 when she filed a notice to act in person and that if the blame was to be on ABL Musiega & Company advocates, then the same would be up to June 2019 when the notice to act in person was filed.
8. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
9. The applicant seeks *inter alia* extension of time within which to file and serve a Record of Appeal. Rule 4 of this Court's Rules which guide the Court in applications of these nature provides:

“4 Extension of time



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 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, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

10. The principles upon which this Court exercises its discretion under Rule 4 are firmly settled. The Court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion, the Court should do so judiciously, and in accordance with the principles set out in *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi* where the Court stated:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

11. In the instant case the applicant’s suit was dismissed by the High Court on 21st June 2017, whereas the instant application was filed on 12th April 2021, a period of about 4½ years from the date of the impugned ruling. No doubt a period of over 4 years is certainly inordinate. It is also noteworthy that the Notice of Appeal herein was filed, lodged and served 12th July, 2017 (7 days beyond the statutory timelines provided by law and this delay has not been explained.) Be that as it may, the applicant squarely blames her then advocates on record who she deposes did not take any steps to pursue the certified proceedings and ruling for purposes of filing and lodging the Record of Appeal on time and that the mistake/ failure to obtain the proceedings on time was wholly attributable to the said firm of advocates and that further being a semi illiterate and ailing widow with no legal knowledge, she was under the impression that her appeal had been filed, a fact that has not been controverted by the respondent.
12. In my opinion and from the circumstances of this case, it is my considered opinion that even though the delay herein is certainly inordinate and unreasonable, sufficient reasons/explanation has been given for the delay to the satisfaction of this Court and I am inclined to exercise my discretion in favour of the applicant.
13. As to the possibility of the appeal succeeding, I am of course mindful of the fact that I cannot make a determination/finding on this issue sitting as a single Judge of the Court. Be that as it may, the applicant contends that the application for dismissal of the suit for want of prosecution which culminated in the dismissal of the suit was filed by the firm of Gabriel Fwaya & Company advocates which was not properly on record for the respondent as no notice of change was filed to come on record for the respondent in place of the firm of Samba & Company advocates which was initially on record for the respondent.
14. The respondent on the other hand contends that he had instructed both firms and that the issue of representation was not an issue. I have perused the record and indeed as rightly contended by the applicant, there doesn’t seem to be a notice of change of advocates filed by the said firm. As I noted earlier, in this ruling and being a single Judge, I cannot make a determination as to whether the applicant has an arguable appeal and I will say no more regarding this issue.
15. As regards prejudice, it has not been demonstrated to this Court that the respondent will suffer any prejudice if the orders being sought are granted. On the other hand, the applicant would stand to suffer



great prejudice in the event she is evicted from the suit property where she currently stays with her four children and notwithstanding the fact that the respondent had instituted execution proceedings and even had the applicant committed to civil jail for 30 days.

16. Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in Leo Sila Mutiso case (*supra*), to extend time and therefore allow the application in terms of prayer 2,3 and 4 save to add that with regard to prayer 3, the Record of Appeal shall be filed and served with 30 days from the date of this ruling failure to which these orders shall stand vacated.

17. The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

