Muyonga v Public Service Commission & another (Civil Application 278 of 2019) [2021] KECA 216 (KLR) (5 November 2021) (Ruling)

Neutral citation: [2021] KECA 216 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 278 OF 2019

RN NAMBUYE, HM OKWENGU & PO KIAGE, JJA

NOVEMBER 5, 2021

BETWEEN

NAPHTALY S. MUYONGA ..... APPLICANT

AND

PUBLIC SERVICE COMMISSION ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

(An application for extension of time to file an appeal out of time against the Judgment of the High Court of Kenya (J. M. Khamoni, J.) dated 19th July, 2007 in Nairobi HCCC No. 1303 of 2001)

RULING

1. Before this Court is a Notice of Motion dated 17th August, 2020. It is brought under section 3(2) of the *Appellate Jurisdiction Act*, Rules 1(2), 35(2) and 42 of the *Court of Appeal Rules*, Articles 159(2), 43(1)(e) and 165(4) of the *Constitution of Kenya*. It is stated to be against the decision of a single Judge, (W. Ouko, (P) (as the then was) dated 24th April, 2020 in which the learned single Judge declined to exercise his discretion in favour of the applicant to extend time within which to initiate his intended appellate process, against the decision of Khamoni, J. dated 19th July, 2007 dismissing the applicants' suit in Nairobi HCC No. 1303 of 2001.

2. The grounds in support of the applicant's motion before the single Judge were inter alia that he filed a notice of appeal against the above decision but changed his mind and instead filed a constitutional petition at the High Court seeking declaratory reliefs which he subsequently withdrew when it dawned on him that the same was res judicata.

3. Dr. Khaminwa's who argued the application before the single Judge submitted that under the new Constitution issues of fundamental freedoms and individual rights are so grave that time limitations should not apply; that the applicant's explanation that the delay was occasioned by attempts at an out

of court settlement and sickness were not only well founded on the facts before the Judge, but were also sufficient explanation for the twelve (12) years delay. Therefore, according to senior counsel, the grounds placed before the single Judge satisfied the threshold for granting the relief then sought before the single Judge.

4. The application before the single Judge was not opposed but, that notwithstanding, the single Judge appreciated that he was obligated in law to interrogate its merits and rule either way.

5. As already mentioned above, the applicant has approached the court by way of a notice of motion. Our take on the same is that the nature of the application is basically a reference to the full court from a ruling of a single Judge. The applicant should have simply filed a reference under Rule 55 of the Court of Appeal Rules instead of filing a substantive motion under the numerous provisions of law cited in the application's heading. The Rule provides as follows:

> 55(1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single Judge –
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> a) In any criminal matter, wishes to have his application determined by the Court; or
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> b) In any civil matter wishes to have any order, direction or decision of a single Judge varied, discharged or reversed by the Court, he may apply therefore informally to the Judge at the time when the decision is given or by writing to the Registrar within seven (7) days thereafter.
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> 2) At the hearing by the court of an application previously decided by a single Judge, no additional evidence shall be adduced.

6. We have given due consideration to the above default. Our position is however that the applicant's failure to follow the above well laid down procedure will not of itself disentitle him to relief and drive him away from the seat of justice. We therefore invoke the inherent power of the Court enshrined in Rule 1(2) of the Court of Appeal Rules. See also *Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR*; and *Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell [2013] eKLR*.

7. We also find it prudent to have recourse to the overriding principle of the court enshrined in sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya which donates power to the court to overcome technicalities and render substantive justice to the parties before it. See *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008)*; and *Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009* among numerous others.

8. Lastly, there is also at our disposal the non-technicality constitutional principle 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;

9. The principles that guide the Court in the exercise of its mandate under the above provision have also been crystallized by case law. We 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* 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.

10. In light of the basis laid above, we hereby convert the applicant's notice of motion dated 17th August, 2020 to a reference to the full court, treat the rival submissions of the respective parties with regard to the now converted application as submissions for and against the reference under Rule 55 of the Court of Appeal Rules and proceed to pronounce ourselves thereon on its merits.

11. Supporting the reference, senior counsel Dr. Khaminwa appreciates that the applicant sought the court's intervention to resuscitate his intended appellate process vide the dismissed application twelve (12) years after the impugned decision was made. Senior counsel however contends that sufficient basis had been laid before the single Judge to warrant exercise of the Judge's discretion in his client's favour. It is the same basis on which senior counsel now invites this Court to fault the single Judge in the exercise of his mandate to decline relief to the applicant, set it aside and substitute it with an order granting the relief.

12. The grounds advanced before us are basically as those presented in the submissions made before the single Judge already highlighted above. Senior counsel has however added that there were also out of court negotiations to have the matter settled amicably which took some time before the constitutional petition was ultimately withdrawn. The applicant has also been variously plagued by medical conditions namely, diabetes, arthritis and cancer for a period spanning over fourteen (14) years prior to seeking the court's intervention which additionally prevented him from pursuing his legal rights in court.

13. The above medical conditions necessitated frequent visits to numerous doctors, some of whom have either died or retired from medical practice hence inability for him to get appropriate medical reports from them. The medical conditions highlighted above were also a financial strain on him. The client's file also got lost in his (senior counsel's) chambers and it took time to be traced.

14. In rebuttal, the respondents filed written submissions contending that if the applicant was aggrieved by the order of Khamoni, J. dismissing his claim on 19th July, 2007 he ought to have filed a notice of appeal by 2nd August 2007 being fourteen (14) days from the date of the impugned judgment. The applicant's default in complying with the above timeline not only conferred a benefit to the respondents as decree holders but also created a legal right in them to enjoy the fruits of the judgment. They urge for the dismissal of the reference as, according to them, the single Judge's decision was well founded on the record as placed before him and should therefore be sustained.

15. We have considered the application in light of the totality of the rival position herein. The threshold to be applied by the single Judge in the first instance and now this court upon reference is that set out in Rule 4 of the Court of Appeal Rules. It provides as follows:

> " 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 shall be construed as a reference to that time as extended."

16. It is trite law that the mandate of the single Judge in the first instance and the court upon reference is purely discretionary, which discretion though unfettered, should be exercised judicially. See *Waki, J.A in Njuguna vs. Magichu & 73 Others [2003] KLR 507*, where he stated as follows: -

> "The discretion exercisable under Rule 4 of this Court's Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual and legal basis."

17. The approach the single Judge took when determining the applicant's motion as explicitly borne out by the record was firstly, to revisit the content of Rule 4 of the Court of Appeal Rules, appraise case law on the jurisprudential delineation of the threshold for invocation and application of the above Rule as anchor for relief namely, foreign/untold jurisprudence in the case of *Commissioner of customs and Excise vs. East Wood Care Homes [11Keston] Ltd & Others [2000] 1 WLR 3095* on the one hand and the locus classicus homegrown jurisprudence in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2 E. A 231*. He then expressed himself thereon as follows:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled 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 reason 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".
>
> "The guidelines enunciated in the cited cases and those that have been decided subsequently stresses the importance of rules and the necessity of compliance with them. They stress that extension of time is not obtainable as of right; that time limits are not merely targets to be attempted but authoritative statements to be observed. By observing the timelines set by the rules, the rights of the parties and other litigants to have their cases progress according to the periods of time prescribed by the rules are guaranteed. When the period prescribed for filing an appeal has expired the decree-holder obtains a benefit under the law to treat the decree final and beyond challenge, and a legal right accrues to him by lapse of time. He has a legitimate expectation that the decree will not be challenged. Conversely, if satisfactory and acceptable explanation for delay is shown, the Court, in exercise of its absolute discretion may excuse the delay and admit the appeal out of time. But it must be remembered that delay of even a single day, has to be accounted for otherwise there would be no purpose of having rules prescribing periods within which certain steps have to be taken. That is why there must be some material on which the court can exercise its discretion. If there was an acceptable explanation, the Court might still refuse to extend time, if the delay was substantial or if to do so would cause significant prejudice to the respondent."

18. The learned Judge also took into consideration the case of *Allen vs. Sir Alfred McAlphine and Son, (1968) I ALL ER 543 at p. 547*, *ET Monks and Company Limited vs. Evans & 3 Others, (1974) eKLR*, *Dickson Miriti Kamonde vs. Kenya Commercial Bank (2006) eKLR* all forholdings/propositions that courts will not tolerate excessive, prolonged inordinate and gross delays, and, that there is need for parties to adhere to timelines with a view to providing expedition in court processes.

19. Applying the above threshold to the uncontested position before him, the Judge ruled that although the application was uncontested, the burden remained with the applicant to justify the delay. The applicant's justification for the delay considered by the Judge were submissions that: after delivery of the judgment, he filed a notice of appeal which the Judge found he had not even exhibited but

then opted to file a petition seeking declaratory relief which he withdrew after realizing that it was res judicata; under the current Constitution of Kenya, 2010 dispensation, a party's right to be heard is so grave that time limitation should not apply so as to curtail that right; further delays were occasioned by attempts of out of court settlements; the client's file had also been temporarily misplaced at his advocate's ; and lastly, that of the two medical reports tendered in support of the application only one bore the date of 14th May, 2019. The Judge then expressed himself thereon as follows:

> " This and the other grounds proffered do not, with respect, explain the delay of up to 12 years. This period, by any and all standards is prolonged and inordinate. It cannot be excused and the applicant must reckon with the consequences of his inaction."

20. The Judge also had recourse to the holding of Lord Denning, LJ in *Revici vs. Prentice Hall Inc. (1969) 1 All ER 772*, and Article 159(2)(b) of the Constitution of Kenya, 2010 as construed and applied in the case of *Teachers Service Commission vs. Simon P. Kamau & 19 Others (2015) eKLR* and concluded as follows:

> " A long delay alone, as was the case here, would constitute prejudice and injustice. When I review the history of this matter, it appears that the applicant has not proceeded with the diligence, enthusiasm and dispatch called for under the present atmosphere of litigation in this country.
>
> There must always be a finality to litigation. For the applicant, I think that time has come.
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> The application has no merit and is accordingly dismissed. I make no orders as to costs."

21. We have considered the above conclusion in light of the rival position set out above and the principles of law that guide the court in the discharge of its mandate under the Rule 4 of the Court of Appeal Rules procedures as enunciated in the case law we have highlighted above. We find no error on the part of the single Judge for declining to exercise his judicial discretion in favour of the applicant. In our view, the single judge simply applied the threshold for granting relief under Rule 4 of the Court of Appeal Rules. Key of these is that any delay must be explained a matter the applicant failed to satisfy especially when the notice of appeal allegedly filed and subsequently withdrawn was not exhibited either to the application dismissed by the single Judge or to the application subsequently converted into a reference. All we have on record is a memorandum of appeal dated 22nd August, 2020. Second, the medical evidence introduced does not cover the 12-years period of delay. Third, there is no correspondence exhibited between him and his advocate over the missing file.

22. In the result and for the reasons given above, we find no merit in the application to warrant interference with the exercise of judicial discretion by the single Judge. The reference is accordingly dismissed. Each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI 5TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR