Isaiah v Republic & 4 others (Civil Application 44 of 2019)
[2021] KECA 317 (KLR) (17 December 2021) (Ruling)

Neutral citation: [2021] KECA 317 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION 44 OF 2019

RN NAMBUYE, JA

DECEMBER 17, 2021

BETWEEN

ROSE MARY KALIUNTU ISAIAH ..... APPLICANT

AND

REPUBLIC ..... 1ST RESPONDENT

CABINET SECRETARY / DCC IGEMBE SOUTH DISTRICT .... 2ND RESPONDENT

JOSEPH NJORO ..... 3RD RESPONDENT

REUBEN MUTUMA MWIRABUA ..... 4TH RESPONDENT

THIAKUNU MWIRABUA ..... 5TH RESPONDENT

(An application for leave to file and serve memorandum and Record of Appeal out of time from the judgment of the Environment and Land Court (L. Mbugua, J.) dated 3rd October, 2018 in Meru ELC Judicial Review No. 24 of 2017)

RULING

1. Before me is a Notice of Motion dated 9th April, 2019 brought under Rule 4, of the Court of Appeal Rules and all other enabling provisions of the law. It seeks reliefs as follows:

> " b) THAT this Honourable Court be pleased to enlarge time and the applicant be granted leave to appeal out of time against the whole of the judgment entered at Meru on the 3rd day of October, 2018 by Honourable Lucy N. Mbugua, Judge in ELC Judicial Review No. 24 of 2017 and all consequential orders.
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> c) THAT the Memorandum of Appeal annexed hereto be deemed as duly filed.

d) THAT costs of the application be in the cause.

2. It is supported by grounds on its face, a supporting affidavit sworn by Rosemary Kaliuntu Isaiah, the applicant herein together with annexures thereto. It is opposed by the 5th respondent's replying affidavit sworn by Dr. Thiakunu C. K. Mwirabua together with annexures thereto and written submissions dated 24th November, 2021.

3. Supporting the application, the applicant submits that she was aggrieved with the judgment of L. N. Mbugua, J. delivered on 3rd October, 2018 in ELC Judicial Review Cause No. 24 of 2017. Her advocate then on record for her, timeously filed a notice of appeal against the said judgment on 8th October, 2018. The former advocates also timeously applied for a certified copy of the proceedings which took some time to be supplied. She was prevented by a medical condition namely, diabetes, and physical disability from frequenting her former advocates offices to check on the progress of the intended appellate process.

4. She changed advocates on 9th April, 2019. The incoming advocate advised her that the timelines for lodging the record of appeal as of right had lapsed hence the filing of the application under consideration to validate the stalled process. She pleads that she should not be penalized for the fault of her former advocates, especially when according to her the intended appeal is arguable with high chances of success. She intends to raise a litany of fifteen (15) grounds contained in the annexed memorandum of appeal.

5. She intends to argue on appeal, inter alia, that the Judge misapprehended and or failed to properly appreciate the law applicable to the resolution of the issues in controversy before the court. Second, misapplied the slaw to the facts and therefore rendered a decision against the weight of the evidence documentary exhibits tendered and the Judge therefore arrived at a decision which was untenable and should be interfered with, set aside and substituted with the prayers sought in the annexed memorandum of appeal.

6. In rebuttal, the 5th respondent avers and submits cumulatively that the application under consideration is an afterthought considering the date of 3rd October, 2018 on which the judgment was given and 9th April, 2019 when the application under consideration was filed, a period of six (6) months. The applicant therefore went to slumber after the delivery of the judgment and is therefore undeserving of the court's exercise of its discretionary mandate in her favour, especially when he stands to suffer great prejudice if the relief sought were to be granted as that would deny him an opportunity to enjoy the fruits of the now fully executed judgment rendered in his favour. The reasons given by the applicant are also not sufficient cause to persuade this court to grant the relief sought.

7. To buttress the above submissions, the 5th respondent has annexed to his submissions copies of rulings on Richard Apela Okiru vs. Emmanuel Ngeso Nyaoke Civil Appeal No. Nai 38 of 2000 (KSM 53/2000); James Ashiono Bukhale vs. The Minister for Lands and Settlement Civil Application No. Nai 42 of 2000 (UR 1/2000 KSM); Kamlesh Mansukhalal Damji Pattni vs. Canland Limited & Others Civil Application No. Nai 269 of 2002 (134/2000 UR) and, lastly, M'Mugambi Thiringi vs. M'Birithia Githongo Civil Application No. NYR 7 of 2015 in all of which extension of time was declined on account of existence of inordinate unexplained delay, a position the 5th respondent contends obtains herein and should similarly be treated by this Court.

8. My invitation to intervene on behalf of the applicant has been invoked under Rule 4 of the *Court of Appeal Rules, 2010*. 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 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."

9. The factors to be taken into consideration when determining an application of this nature are as enunciated by both the predecessor of this Court and this Court and which now form a well-trodden path. They have further been crystallized by the Supreme Court of Kenya and restated variously in its decision. I take it from the decision in *County Executive of Kisumu vs. County Government of Kisumu & 8 Others [2017] eKLR* and which I fully adopt. In the said case, the Supreme Court expressed itself therein as follows:

> "It is trite law that in an application for extension, the whole period of delay should be declared and explained satisfactory to the court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time. The court delineated the following as:
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> 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."

10. From the above exposition, the factors to be taken into consideration when determining an application of this nature are namely, the length of the delay, reasons for the delay, possibility of the arguability of the intended appeal, prejudice to be suffered by the opposite party if the relief sought were granted, any public policy issues that may be involved and the right of access to appellate justice which the current jurisprudential trend crystalizing this position state explicitly that being constitutional entrenched, it can only be denied in exceptional circumstances.

11. Starting with the length of the delay, the application under consideration was presented six (6) months from the date of the delivery of the intended impugned decision.

12. In *George Mwende Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)*, extension of time was declined onaccount 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.

13. The period of delay in the George Mwende case [supra] that led to the court declining to exercise its discretion in favour of the applicant therein was far much more than the length of the period in the application under consideration. This finding alone though favourable to the applicant, is not sufficient to warrant the exercise of the court's discretionary power in favour of the applicant. There is therefore need for me to interrogate other relevant factors falling for consideration in an application of this nature before I can finally decide either way. Among these, falls the reasons for the delay.

14. The applicant has proffered two reasons for failure to timeously comply with the timelines set in the Rules. Firstly, a medical condition affecting her and, second, inadvertence on the part of her former advocates. She has annexed a medical assessment report whose contents are merely dealing with her physical condition and the recommendation that she needs an automated wheel chair as she cannot walk on her own.

15. On the inadvertence attributed to her former advocates all there is, is that she left the matter to her former advocate to handle and moved with speed upon change of advocates. In *Owino Ger vs. Marmanet Forest Co-operative Credit Society Ltd [1987] eKLR*, among numerous others,courts of law have refrained from pining responsibility for procedural lapses on clients where there is sufficient demonstration that the advocate is to blame. Herein, it is counsel currently on record for the applicant and who is conversant with court procedures who should have annexed proof as justification for the former advocates inaction resulting in the delay attributable to the former advocates. I would therefore adopt the position taken by the courts in the cited case law and decline to visit that default on the applicant especially when the period forming the length of delay is only six months and therefore, not inordinate. Second, the application seeking the court's intervention was filed simultaneously with the change of advocate. I therefore find that the reasons for the delay proffered by the applicant are not only reasonable but also excusable.

16. On the arguability of the intended appeal, the applicant has annexed a memorandum of appeal with a litany of grounds of appeal summarized above.

17. The position in law is that an arguable appeal need not be one that must succeed, but one that not only warrants the court's interrogation but also demonstrates sufficient basis for the court to invite the opposite party to make a response thereto. See *Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank [2020] eKLR*. My take on the litany of thegrounds of appeal the applicant intends to take on appeal highlighted above is that they are all arguable irrespective of their ultimate success or otherwise. It is also the position in law that one does not need a plethora of grounds of appeal to demonstrate satisfaction of this factor. One ground is sufficient. Herein the applicant intends to raise a litany of them. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*.

18. On the likelihood of the success of the intended appeal, it is not one of the factors that fall for consideration in an application of this nature. I therefore decline to express myself thereon.

19. On the prejudice to be suffered by the opposite party should the relief sought be granted, the 5th respondent, the only respondent who has opposed the application cites being withheld from the enjoyment of the fruits of the judgment delivered in his favour which in law has to be balanced against the applicant's right to appellate justice which is now constitutionally entrenched and should

only be curtailed in exceptional circumstances and with good reasons given as justification for such withholding or curtailing the same. See *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.

20. I have accordingly balanced the 5th respondent's right to enjoy the fruits of the judgment delivered in his favour and the applicant's right to ventilate her appellate rights and find that the issues involved in the intended appeal touch on land rights the applicant alleges were divested from her through breach of the rules of natural justice for failure to accord her an opportunity to ventilate her case on the respondents appeal to the Minister and also to cross-examine the new witnesses called in support of the respondents case before the Minister on the basis of which the earlier decision ruled in her favour was over turned. In my view, fairness and justice in the circumstances prevailing herein would demand that the applicant be accorded an opportunity of being heard on her intended appellate rights, notwithstanding the 5th respondent's uncontroverted assertion that the intended appeal will be an exercise in futility as the judgment has already been executed. Second, lack of opposition to her application by the other respondents.

21. On the basis of the above assessment and reasoning, I am inclined to exercise the court's discretion to grant relief to the applicant on the following terms:

    1. The applicant has leave of the court to appeal out of time against the whole of the judgment entered at Meru on the 3rd October, 2018by L. N. Mbugua, J. in ELC Judicial Review No. 24 of 2017 and all consequential orders.

    2. The applicant has seven days of the date of the delivery of this ruling to serve both the notice of appeal and the memorandum of appeal on the respondents.

    3. The applicant has thirty (30) days from the date of the delivery of the ruling to file and serve a letter bespeaking proceedings both on the Deputy Registrar of the ELC and the respondents.

    4. The applicant has sixty (60) days from the date of the delivery of the ruling to file and serve a record of appeal.

    5. In default of any of items 2, 3 and 4 above, the leave granted herein to stand lapsed.

    6. Costs of the application in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR