Kibunja v Kariuki & another (Civil Application 308 of 2019)
[2021] KECA 354 (KLR) (17 December 2021) (Ruling)

Neutral citation: [2021] KECA 354 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPLICATION 308 OF 2019

RN NAMBUYE, JA

DECEMBER 17, 2021

BETWEEN

MARY WAMBUI KIBUNJA ..... APPLICANT

AND

JAMES NGUGI ..... 1ST RESPONDENT

PETER KARIUKI ..... 2ND RESPONDENT

(An application for extension of time to serve Notice of Appeal against the Ruling in the High Court of Kenya (S. M. Githinji, J.) dated 9th October, 2019 in Eldoret HC Succession Cause No. 304 of 2001)

RULING

1. Before me is a Notice of Motion dated 11th November, 2019 brought under Articles 20(3)(a),(b), 48, 50, 159(2)(d) and 259(1) of the *Constitution* of Kenya, 2010, sections 3A, and 3B of the *Appellate Jurisdiction Act*, Rules 4, 75 and 77 of the Court of Appeal Rules, 2010. It seeks prayers as follows:

> "2. THAT the honourable court be pleased to extend time for the applicant to serve the Notice of Appeal dated 15th October, 2019 upon the respondents.
>
> 3. THAT the service of the Notice of Appeal filed on the 17th October, 2019 and served upon the respondents on 26th November, 2019 be deemed to have been served on time.
>
> 4. THAT the costs of this application be provided for."

2. It is supported by grounds on its face, a supporting affidavit of Catherine Nyokabi Kinyanjui an advocate of the High Court of Kenya and practicing as such in the firm of C. N. Kinyanjui & Company Advocates having conduct of the matter on behalf of the applicant herein and that of Joseph Muigai Maina the process server who on the instructions of the firm of Catherine Kinyanjui served the notice of

appeal in Eldoret on the firm of Magare Musundi Advocates on record for the respondents both sworn on 11th December, 2019 together with annexures thereto, and the applicants written submissions dated the 7th day of October, 2021. It has been opposed by the respondents replying affidavit sworn by James Ngugi, the 2nd respondent herein on the 12th October, 2021 on his own behalf and on behalf of the 1st respondent together with annexures thereto and submissions dated 12th October, 2021.

3. Cumulatively, it is the applicant's position that the impugned ruling was delivered on 9th October, 2019 following which the applicant timeously filed a notice of appeal on 17th October, 2019 within the fourteen (14) days stipulated in Rule 75 of the Court of Appeal Rules, 2010. The notice of appeal was however inadvertently not served on the respondents advocates until the 26th November, 2019 outside the seven (7) days prerequisite stipulated in Rule 77(1) of the *Court of Appeal Rules* hence the filing of the application under consideration to validate that process.

4. It is the applicants position that the mistake in inadvertently serving the notice of appeal on the respondents outside the time stipulated in the Rules was neither deliberate nor careless, having been occasioned by the advocates clerk who upon filing the notice of appeal inadvertently failed to serve it timeously on the respondents advocates, and which default should not be visited against her.

5. Her appeal is arguable borne out by the contents of the annexed memorandum of appeal raising a litany of thirteen (13) grounds of appeal. In summary, the applicant intends to argue an appeal, inter alia, that the Judge failed to properly apply principles of law applicable in granting an application for substitution; to consider the merits of the applicant's affidavit and submissions; erred in disregarding decisions rendered by other High Court Judges when confronted with similar issues and failing to give reasons for such disregard and/or reason for non-persuasion; to properly analyze the evidence and submission presented by the applicant and in the process rendered a decision that sanctioned an irregular, fraudulent and skewed process detrimental to the applicant's rights of inheritance to the only asset forming the estate of her late father to which she was entitled.

6. The supporting affidavit of Joseph Muigai Maina on the other hand is basically on the inadvertence occasioned by his failure to timeously serve the notice of appeal on the advocate for the respondents upon filing the same on 17th October, 2019, and which he rectified as soon as it was brought to his notice.

7. To buttress the above submission, the applicant relies on the threshold for granting relief under Rule 4 of the Court of Appeal Rules which is the substantive provision for granting the relief sought herein as enunciated by the Court in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2 E. A 331*, and as crystallized by the Supreme Court of Kenya in the case of *County Executive of Kisumu vs. County Government of Kisumu & 8 Others [2017] eKLR* 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:
>
> 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 respondents 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."

8. The case of *Kenyatta University vs. Esther Njeri Maina [2021] eKLR* in which Ouko, J. (as he then was) when similarly confronted exercised his discretion in favour of the applicant therein because, firstly, the applicant therein had been vigilant and filed all the necessary documents for progressing his/her appellate process; and secondly, the respondents stood to suffer no prejudice if the relief sought were granted to the applicant therein, and, lastly, the case of *Mistry Pramji Ganji (Investments) Limited vs. Kenya National Highway Authority [2019] eKLR* for the holding, inter alia, that Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms that service of the notice of appeal must always be effected upon the respondents in accordance with the said Rule, however, in the event of any default in the service of a notice of appeal on the opposite party, the default may be excused for good reason(s) if an applicant is able to satisfy the court that the same was excusable in the circumstances.

9. In rebuttal, it is the respondents' cumulative submission that the applicant's application is incompetent for the applicant's failure to timeously serve on them both the notice of appeal and the letter bespeaking proceedings in the first instance and subsequently the record of appeal. It does not lie in law because, firstly, no reasonable explanation has been given for the applicant's failure to serve them with the above processes on time. Neither has the length of delay involved for the failure to timeously serve them with the above processes been explained. Second, the reasons given by the applicant as reason for the delay is not plausible. The resulting delay is therefore unreasonable and should not be excused.

10. On the degree of prejudice to be suffered by them if the orders sought were granted to the applicant, the respondents contend that they are being dragged into the succession matter that pitched their late father and the applicant in respect of which they had no control over. Neither did they stand to personally benefit from the said estate of their late grandfather.

11. On the arguability of the intended appeal, they contend there was an earlier attempt which flopped as a court of competent jurisdiction ruled in their favour about fifteen years ago. The matter is therefore res judicata.

12. To buttress the above submissions, the respondents have cited the case of *Daniel Nkirimpa Manirel vs. Sayialel Ole Koilel & 4 Others [2016] eKLR*,on the importance of timeous service of a notice of appeal on the opposite party; the case of *Karny Zahrya & Another vs. Shalom Levi [2018] eKLR* in which the court expressed itself on the factors to be taken into consideration in an application of this nature; and lastly, the case of *Abdul Azizi Ngama vs. Mungai Mathayo [1976] KLR 61, 62* for the reiteration ofthe threshold for granting relief under Rule 4 of this Court's Rules.

13. My mandate to intervene on behalf of the applicant has been invoked under the provisions of law cited above. Articles 23(3)(a)(b), 48 and 50 enshrine the right of a party to approach the court for redress in the event of real or threat of violation of fundamental rights, access to justice and fair hearing. Article 159(2)(d) unclutches the court from subservience to procedural technicalities in the discharge of its mandate and 259(1) on the proper interpretation and application of constitutional provisions. Section

3A and 3B enshrines the overriding objective principle of the court that donates power to the court to discharge its mandate with greater latitude. Rules 75 and 77 provide for timelines within which to lodge and serve a notice of appeal. The substantive rule for the relief sought is 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 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."

14. The principles that guide the court in the exercise of its mandate under he said rule are set out in the very case law that the applicant has relied upon in support of his application and which I fully adopt are as crystallized by the Supreme Court in the case of County Executive of Kisumu vs. County Government of Kisumu & 8 Others [supra] already highlighted above.

15. From the above, the factors I am supposed to take into consideration in the determination of an application of this nature are first, the length of the delay. Secondly, reason(s) for the delay. Thirdly, possible arguability of the intended appeal and fourthly, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted. Fourthly, any public interest that may be involved in the matter.

16. Starting with the period of delay, it is evident from the record that the notice of appeal sought to be validated was timeously filed on 17th October, 2019. It ought to have been served on the respondents within seven (7) days of its being lodged which fell on 23rd October, 2019. It was however served on 26th November, 2019, a period of one (1) month and nine (9) days. The application under consideration seeking the court's intervention was filed on 11th December, 2021 a period of about one month and twenty-four (24) days from the date of the lodging of the notice of appeal to the date of seeking validation and fifteen (15) days from the date of erroneously serving the notice out of time and seeking validation.

17. 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.

18. In the instant application, the period of delay indicated above is much less than what was under consideration in the George Mwende case [supra]. It is therefore not inordinate. This finding alone cannot, however, per se entitle the applicant to the relief sought. It is imperative for me to consider the other factors as well before finally deciding either way. The next factor falling for consideration is the explanation that the applicant has proffered for the failure to comply with the timelines set for service of the appellate process under consideration. She cites inadvertence on the part of the advocates clerk tasked to serve those processes on the respondents' advocates. The clerk swore an affidavit not only explaining but also accepting to have been party to that inadvertence.

19. The position in law with regard to circumstances under which the court may either pin or decline to pin responsibility for an advocates mistake or inadvertence on a client have been crystallized by case law enunciated by the court. I take it from *Owino Ger vs. Marmanet Forest Co-operative Credit Society*

Ltd [1987] eKLR, among numerous others, for theproposition that a court of law will be inclined not to visit wrongs of advocates on their clients where like in the instant application there is sufficient demonstration that noncompliance with any prerequisites provided for in the applicable rules was due to the advocate's fault. I therefore find the reason for the delay well explained and therefore excusable as the applicant who trusted the good workmanship of her advocate in the processes undertaken to progress her intended appellate process had no policing power over her advocate in the discharge of those functions.

20. On the arguability of the intended appeal, I have given due consideration to the applicant's grievances in the litany of grounds of appeal mentioned above. It is view that they warrant both the courts interrogation and also the court's invitation to the respondents to respond thereto. See *Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank [2020] eKLR*. It is also now trite that one arguable ground suffices. Herein, the applicant has raised several. See *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*. Herein, the applicant has raised a litany of grounds of appeal as mentioned above.

21. The applicant has also relied on the non-technicality principle enshrined in Article 159(2)(d) of the Constitution, 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;

22. The principles that guide the court in the discharge of the court's mandate donated by 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.

23. Also falling for consideration is the right to be heard on the intended appellate right which is now constitutionally entrenched with the only caveat in an application of this nature that it be weighed against the prejudice likely to be suffered by the opposite party should the relief be granted. The parameters for according this right to a deserving party have also been crystallized by case law. See 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.

24. In light of the above crystallized position, it is my view that shutting out the applicant and sending her away from the seat of justice empty handed in the wake of existence of provision of law donating power to the court to extend time within which to comply with procedures/rules governing an appellate process in an instance where no default to comply with the rule lay with inadvertence on the part of the advocates clerk, would in my view be tantamount to rendering justice on technicalities. Interest of justice herein, therefore, would demand that the applicant be accorded an opportunity to pursue

her intended appellate right considering the length of time for the period of default. Second, she has already filed a record of appeal.

25. On the totality of the above assessment and reasoning, I am satisfied that the applicant has satisfied the prerequisite for granting of a relief under Rule 4 of this Court's Rules. I therefore proceed to make orders as follows:

    1) The applicant is granted leave to serve the notice of appeal on the respondents out of time

    2) The time within which to comply is extended up to date of 26th November, 2019 on which the notice of appeal whose service is sought to be validated was served on the respondents.

    3) Costs of the application to abide the outcome of the appeal already filed.

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

Signed

DEPUTY REGISTRAR