



REPUBLIC OF KENYA



**Njagi & 36 others v Attorney General (Civil Appeal (Application)
E112 of 2021) [2021] KECA 250 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 250 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E112 OF 2021
RN NAMBUYE, JA
DECEMBER 3, 2021**

BETWEEN

JACOB MBUGUA NJAGI	1 ST APPLICANT
MOSES IRUNGU KAMAU	2 ND APPLICANT
NICHOLAS MAINA WAWERU	3 RD APPLICANT
JAMES MURIUKI NJIHIA	4 TH APPLICANT
SAMUEL GITONGA WANG'OMBE	5 TH APPLICANT
JAMES KIMEMU KIMANI	6 TH APPLICANT
DAVID WANJOHI WANJIRU	7 TH APPLICANT
HUMPHREY GACHANJA THUO	8 TH APPLICANT
SAMUEL MUTURI NGIGE	9 TH APPLICANT
EDWARD NG'ANG'A KAMAU	10 TH APPLICANT
PAUL GITHINJI MUNGAI	11 TH APPLICANT
BONIFACE JUMA MBUGUA	12 TH APPLICANT
EPHANTUS HEMI MWANGI	13 TH APPLICANT
MICHAEL KAMAU GITHINJI	14 TH APPLICANT
JULIUS KANYI MWANGI	15 TH APPLICANT
JOSEPH GITONGA KIMATHI	16 TH APPLICANT
CHARLES MBUGUA KARIUKI	17 TH APPLICANT
DAVID GICHERU KUNG'U	18 TH APPLICANT
ABUBAKAR IRUNGU NDUNG'U	19 TH APPLICANT



JOSEPH NDIRANGU MWANGI	20 TH APPLICANT
PAUL MBURU GIKONYO	21 ST APPLICANT
PETER KAMAU MAINA	22 ND APPLICANT
ANTHONY KERICHO KIRINGU	23 RD APPLICANT
JOHN KANG'AU NJOKI	24 TH APPLICANT
PETER NJAU GATHURU	25 TH APPLICANT
STEPHEN KARIUKI NDERITU	26 TH APPLICANT
JAMES MWANGI MWANGI	27 TH APPLICANT
ROBERT MAINA GACHAU	28 TH APPLICANT
KENNETH MBURU WAHOME	29 TH APPLICANT
JOHN KIBE MACHARIA	30 TH APPLICANT
EDWARD IRUNGU KOROFI	31 ST APPLICANT
WILSON MUCHIRI KIMANI	32 ND APPLICANT
JAPAT IRUNGU NDIRANGU	33 RD APPLICANT
BENSON MBUGUA RUHIU	34 TH APPLICANT
JAMES MBUGUA MACHARIA	35 TH APPLICANT
ROSE NYAMBURA MWIHAKI	36 TH APPLICANT
ANN NJOKI KARANI	37 TH APPLICANT

AND

ATTORNEY GENERAL RESPONDENT

((An application for extension of time to file and serve a record of appeal out of time from the ruling and order of the High Court of Kenya (R. Mwongo, J.) dated 4th April, 2019 in Nairobi HC Civil Case No. 528 of 2009))

RULING

1. Before me is the appellants/applicants (hereinafter referred to as applicants) Notice of Motion dated 9th April, 2021; brought under sections 3A and 3B of the *Appellate Jurisdiction Act* and Rules 4 and 42 of the *Court of Appeal Rules*. It substantively seeks prayers as follows:
 - “ 1. THAT the Court be pleased to grant leave to the applicants/appellants to file and serve a record of appeal out of time against the ruling and order of the High Court at Nairobi (The Hon. Mr. Justice Richard Mwongo) dated the 4th April, 2019 in High Court at Nairobi Civil Case No. 528 of 2009.
 2. THAT the Court be pleased to deem the record of appeal filed and lodged in Civil Appeal herein No. E112 of 2021 on 9th March, 2021 as duly filed.



3. THAT costs of the application be provided for.”
2. It is supported by grounds on its body and a supporting affidavit sworn by Leah Gikonyo, an advocate of the High Court of Kenya practicing in the law firm of M/s Mbugua Mureithi & Co. Advocates having the conduct of the proceedings triggering the application under consideration on behalf of the applicants hence competent to swear the supporting affidavit together with annexures thereto.
3. The application is not opposed. At least I have not traced on the record any replying affidavit deposed and filed on behalf of the respondent. Neither did any of the respective parties herein file written submissions either in support of or in opposition to the application in response to the Deputy Registrar’s hearing notice served electronically on the respective parties herein on Monday, November 15, 2021 at 11.07a.m notifying the parties of the hearing date and also directing them to file written submissions according to the specifications given therein.
4. Supporting the application, it is the applicants position that: R. Mwongo, J. read and delivered a judgment on 29th January, 2019 in High Court Civil Case No. 528 of 2009. Upon perusal of a copy of the judgment thereof, the applicants noticed that the Court had failed to award interest pleaded as payable on the special damages claimed therein to run from the date of the filing of the suit. They promptly brought what they believed was an issue of inadvertence on the part of the Judge to the attention of the Deputy Registrar of the Court vide a letter from their firm of advocates Ref: MM/SMG37/1/08 dated 1st February, 2019.
5. The Deputy Registrar caused the file to be placed before the learned Judge for reconsideration. On 4th April, 2019, advocates for both parties appeared before the Judge and made representations thereon. The Judge after due consideration of the rival representations on the issue declined to vary the order on interest, citing a proper exercise of his judicial discretion in declining to award the applicants claim for interest on the amount awarded to them as compensation for special damages in the judgment delivered on 29th January, 2019 aforesaid.
6. The applicants were aggrieved and timeously filed a notice of appeal dated 4th April, 2019 and a letter bespeaking proceedings also dated the same date of 4th April, 2019. The proceedings were not supplied timeously prompting the applicants’ advocates to make a follow up vide their numerous letters to the Deputy Registrar of the Court bearing the same reference among these one dated 8th September, 2020. Upon being notified by the Deputy Registrar on 29th October, 2020 that the proceedings were ready for collection, they accordingly collected them on 4th November, 2020. They also realized that there was also need for a certificate of delay to enable them lodge their appeal out of time.
7. They therefore applied for a certificate of delay on 24th November, 2020. They received no prompt response to that communication necessitating them to engage the registry in numerous communications among these those annexed to the application dated 27th November, 2020, and 3rd December, 2020. It was not until 28th January, 2021 that their firm of advocates received certified copies of the proceedings and a certificate of delay. A certified copy of the decree on the other hand was supplied to them on 22nd February, 2021 by which time, the time for lodging of the record of appeal against the ruling of 4th April, 2019 as of right had long lapsed hence the filing of the application under consideration to seek the court’s intervention to validate their earlier timeously initiated appellate process.
8. The applicants also cite challenges caused by the Covid-19 pandemic as another major contributing factor. Due to the quarantine measures put in place by the Ministry of Health, the applicants’ advocates were forced to work online and sometimes from home. At one time, they were also required to close their offices. It was not until the 9th of March, 2021 that the firm of advocates completed computing



the record of appeal and promptly caused it to be filed on the same 9th March, 2021 clearly out of time and in respect of which they now seek to have validated vide the application under consideration.

9. My mandate to intervene on behalf of the applicants has been invoked under the provisions of law cited above. Rule 42 is merely procedural and needs no further interrogation. Sections 3A and 3B enshrines the overriding objective principle of the Court. The parameters for exercise of the Court's mandate under the said provisions have now been crystallized by case law. I find prudent not to set out these in extenso. It is sufficient for me to state that these enshrine the court's overriding objective principle that enables the court achieve fair, just, speedy, proportional, time and cost-saving disposal of cases before it. Secondly, it emboldens the court to be guided by a broad sense of justice and fairness. Thirdly, it gives the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective. 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.
10. The substantive provision for accessing the relief as sought herein by the applicants 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 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.”
11. The parameters for the exercise of the Court's mandate under the said provision have also been crystallized by case law. 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* [2014] eKLR in which these were crystallized as follows:- “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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.”
12. From the above, factors I am supposed to bear in mind when determining 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.
13. Starting with the delay, it is evident that the impugned decision was made on 4th April, 2019. I have deliberately used the word impugned because the applicants have already filed an appeal whose validation is sought vide the application under consideration. From 4th April, 2019 to 9th April, 2021, when the application seeking the Court's intervention was filed is a period of two years and five (5) days.
14. In *George Mwende 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 (60) days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six (6) months to seek extension of time within which to comply.

15. In light of the above case law, the period of delay herein is two (2) years and five (5) days. In the above case law, the Court declined to grant reliefs therein for the applicants' failure to give plausible reasons for the delay to the satisfaction of the Court. Herein, the applicants' explanation as already highlighted above is failure on the part of the Deputy Registrar to capacitate and/or facilitate them to timeously lodge their appellate process. They have exhibited documentation indicating that the notice of appeal was timeously filed. A letter bespeaking proceedings was also timeously filed and served. The applicants were only capacitated with proceedings on 29th October, 2020. They immediately sought for a certificate of delay to capacitate them progress their intended appellate process.
16. Both the impugned order and the certificate of delay exhibited on record are dated 28th January, 2021. The applicants have also cited challenges caused by the ongoing Covid-19 pandemic, a matter of public notoriety and judicial notice which not only affected the public sector but also the manner, mode and amount of service delivery by the judiciary to esteemed consumers of judicial services. There is nothing on record to make me doubt the applicants' assertion with regard to Covid-19's contribution to the delay in the timeous lodging of the appeal, I find this too to be a plausible explanation.
17. As I have already mentioned above, it is also evident from the record that the applicants were capacitated on 28th January, 2021. They embarked on compiling the record which they managed to file on 9th March, 2021, a period of two months from the date of capacitation, and a period of about two (2) months and ten (10) days from the date of capacitation to the date of filing of the application for validation, and about ten (10) days from the date of the filing of the record of appeal to the date of seeking the court's intervention for validation of the said record.
18. In light of the totality of the above assessment and reasoning on the ingredient of period of delay and reasons for the delay, I am satisfied that the period of delay from the date of capacitation to the date of filing the record of appeal and from the date of filing of the invalid record of appeal to the date of seeking the court's intervention to validate the record of appeal already filed tabulated above is not inordinate. It has also been sufficiently explained as already highlighted. It is therefore excusable.
19. On the arguability of the intended appeal, the applicants have annexed a copy of the memorandum of appeal contained in the record of appeal sought to be validated raising four (4) grounds of appeal. They intend to argue on appeal that the learned Judge erred both in fact and in law: in declining to award the appellants interest on general damages when interest was specifically prayed for and deserving; in declining to award the appellants interest on general damages without ascribing any cogent reason(s) or at all for the finding; in exercising his discretion in an arbitrary, irrational and capricious manner in declining to award the appellants interest on general damages, and, lastly, in declining to award the appellants interest on general damages without taking into account the underlying objective for which the law provides for the grant of interest on award of general damages.
20. In law, an arguable appeal is one that need not succeed but one that warrants the Court's interrogation on the one hand and a response from the opposite party on the other hand. See *Sammy Mwangi Kirietho & 2 Others vs. Kenya Commercial Bank* [2020] eKLR. The grounds annexed by the applicants to the affidavit in support of the application for validation in my view, satisfy the threshold for arguability of the intended appeal notwithstanding its ultimate success or otherwise.
21. Also falling for consideration is the degree of prejudice to be suffered by the opposite party if the relief sought were granted. None has been demonstrated herein for lack of proffering any response from the opposite party. Lastly, the right to be heard on appeal which is now constitutionally entrenched. 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 Sberally & 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.

22. Herein, it is undisputed that the appeal sought to be validated is already filed, a position not contested by the respondent. It is therefore my position that in the peculiar circumstances prevailing herein ends of justice would dictate that the applicants be heard on the said appeal unless and until otherwise vitiated.
23. On the totality of the above assessment and reasoning, I am therefore satisfied the application is meritorious. I grant relief as follows:
 1. Leave be and is hereby granted to the applicant to appeal out of time against the decision of the High Court at Nairobi, by R. Mwangi, J. dated 4th April, 2019 in Nairobi HC Civil Case No. 528 of 2009.
 2. Leave to file an appeal granted to the appellants is extended to the date the record of appeal was filed on 9th March, 2021.
 3. Civil Appeal No. E112 of 2021 herein filed on 19th March, 2021 be and is hereby therefore deemed to be properly filed.
 4. Costs of the application to abide the outcome of the Appeal in E112 of 2021.

DATED AND DELIVERED AT NAIROBI THIS 3RD 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

