



**Donald O. Raballa v Judicial Service Commission & Attorney General (Civil Application 10 of 2015) [2018] KECA 641 (KLR) (4 May 2018) (Ruling)**

*Donald O. Raballa v Judicial Service Commission & another [2018] eKLR*

Neutral citation: [2018] KECA 641 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 10 OF 2015  
PN WAKI, PO KIAGE & K M'INOTI, JJA**

**MAY 4, 2018**

**BETWEEN**

**DONALD O. RABALLA ..... APPLICANT**

**AND**

**THE JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An Application for extension of time to file and serve notice of appeal and record of appeal out of time in an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Odunga, J.) dated 13th May, 2013 in Judicial Review Misc. Appl. No. 648 of 2009)*

**RULING**

1. The applicant herein was aggrieved by the dismissal of his application for extension of time to file and serve a notice of appeal and record of appeal out of time by a single Judge of this Court (Musinga, JA) made on 17<sup>th</sup> April, 2015. He now comes before us on a reference under Rule 55 (1) (b) of the [Rules](#) of this Court (“the Rules”) pleading that we “vary, discharge or reverse” that decision.
2. The reference is, of course, not an appeal and we may only interfere with the exercise of the wide discretion bestowed on a single Judge under Rule 4 of the rules on the basis of sound principles. These in substance are that the single Judge took into account an irrelevant factor which he ought not to have taken into account or that he failed to take into account a relevant factor which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to the issues at hand; or that the decision on the available evidence and law is plainly wrong. The onus of demonstrating the breach of any or all such principles is on the applicant. See [Ramesh Shah v Kenbox Industries Limited](#) [2008] eKLR.



3. The applicant was employed by the 1<sup>st</sup> respondent (JSC) as a Magistrate from June 23, 2005 until May 13, 2009 when his services were terminated. He challenged the termination through a Judicial Review application seeking orders of prohibition, *certiorari* and *mandamus* but his application was dismissed by Odunga, J. on May 13, 2013 for reasons on record. He says he was aggrieved by that decision and thereafter instructed his advocates on record, M/s Ashfords & Company to file a notice of appeal, which the advocates timeously did on May 20, 2013. But they never served the notice on JSC. The advocates also applied for and received copies of the proceedings and judgment as well as a certificate of delay on February 19, 2014. The appeal could have been filed sixty days thereafter but again, it never was. That is why the applicant filed the application which gave rise to the reference before us.
4. In his explanation for the delay, the applicant heaps the blame on M/s Ashfords Company advocates, who, according to him, failed to file the record of appeal despite severally prompting them to do so. That is why he instructed new advocates, M/s
5. Maingi Musyimi & Company on October 31, 2014 to file the appeal. The new Advocates drew up the application on December 22, 2014 but did not file it until January 15, 2015.
6. The learned single Judge, in line with authority, examined the period of delay and the explanation for it from the time the impugned judgment was delivered on May 13, 2013 until the proceedings were obtained on 19<sup>th</sup> February, 2014, which was over 217 days. He observed that there was only one single letter written to apply for the proceedings and judgment but no reminders or follow ups were made with the court registry to show some diligence. Nevertheless, the Judge restrained himself from making an adverse finding on account of the certificate of delay which was not challenged. The further period of delay between February 14, 2014 until the application was filed on January 15, 2015 - about 11 months - as well as the reasons for the delay were also examined and the learned Judge came to the following conclusion:-

“Turning to the reasons for the delay, the applicant blames his erstwhile advocates and to some extent, though indirectly, the Court. He does not attribute any delay to himself at all. I have already stated that the applicant was a resident magistrate and therefore well acquainted with the legal requirements and procedure for filing appeals from the High Court to the Court of Appeal. He was well aware of the statutory timelines that must be met, failing which any delay must be sufficiently explained.

The applicant was by a letter dated December 6, 2013 notified that the proceedings were ready for collection upon payment of the requisite fees. He did not pay that fees until February 4, 2014, a delay of 60 days. The applicant further delayed in collecting the certified copies of the proceedings and only did so on February 19, 2014, a further delay of 15 days. All that delay has not been sufficiently explained.

M/S Maingi Musyimi and Associates advocates were retained by the applicant in place of Ashfords & Company Advocates on 31<sup>st</sup> October, 2014. They drafted the application now before this Court as well as its supporting affidavit sometimes in December, 2014. Both documents are dated 22<sup>nd</sup> December, 2014. What were they doing the whole of November 2014 and almost the whole of December 2014, a period of 52 days? And that is not all, they did not file the application until 15<sup>th</sup> January, 2015, a further period of 23 days.

Taking all the above into consideration, I find and hold that the delay in filing this application for extension of time has not been sufficiently explained.”



7. The learned Judge would not be persuaded that article 159 (2) (d) of the Constitution was applicable as contended by the applicant because:

“Statutory timelines are set for good reasons and in instances where the court is permitted to exercise its discretion to extend time for compliance, the law requires that the reasons for failure to meet the timelines be sufficiently set out.”

8. As the reasons were not set out in this case, the application failed despite the further finding that the intended appeal was not frivolous and was arguable.

9. We are now told by learned counsel for the applicant, Mr. Maingi Musyimi, that the learned Judge did not consider relevant factors and considered irrelevant ones. According to counsel, the Judge failed to consider or wrongly considered that the applicant was pursuing his lawyers to ensure that the appeal was filed; that the failure to file the appeal was an excusable mistake of counsel which should not be visited on the applicant; that the fact that the applicant was a former magistrate was not relevant since he was represented by an advocate; that time did not run between 22<sup>nd</sup> December and 13<sup>th</sup> January each year and therefore the delay was not inordinate. Counsel relied on the cases of Kenya Industrial Estates Limited v Samuel Sand & another (2008) eKLR where Deverrell, JA stated that there were “numerous decisions of this court stressing that lengthy delays resulting from mistakes of advocates should not always lead to dismissal of applications for extension of time.” He also cited the case of Lingam Enterprises Limited & others v Radio Africa Limited Civil Application No. Nai. 175 of 2014 (UR 136/2014) to the same effect and for the proposition that if a litigant is prejudiced because of the conduct of counsel the court should not lay the blame on the litigant. Finally counsel submitted that the issue of prejudice was not considered by the single judge although there was none.

10. There was no representation from JSC or the Attorney General who represented it at the time, despite service of hearing notice.

11. We have anxiously considered the reference particularly in view of the caution we must always administer that the single Judge in exercising his discretion under rule 4 does so on behalf of the full Court and therefore his decision ought not to be easily dislodged. As stated earlier, the full court may only interfere when the applicant demonstrably shows that the principles stated above were not observed. From a long line of authorities including Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application Nai. 251 of 1997 the single judge has unfettered discretion to consider an application for extension of time and generally the matters taken into account are ‘the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted’.

12. Those factors are not exhaustive, and indeed the Supreme Court, in the case of Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR laid out some general principles in matters extension of time thus:-

“As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the



application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”.  
[emphasis supplied].

13. We are satisfied that the learned single Judge considered the issue of delay and the reasons advanced therefor. He was of the view that the explanation was unsatisfactory and we have no good reason to fault that finding. The applicant's case is rather that he was not to blame for the delay as it was caused by his counsel. We have no quarrel with the long line of authorities cited to underscore the established doctrine that a mistake of counsel should not be visited on the client. It was famously stated by Madan, JA (as he then was) in the case of *Murai v Wainaina* (No. 4) (1982) KLR 33 as follows:

“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate”.

14. But the circumstances disclosed in this case do not amount to a mistake of counsel but inaction after receiving instructions to act in the matter. In the case of *Rajesh Rughani v Fifty Investment Ltd. & another* (2005) eKLR this Court held:

“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.



15. Similarly in *Bains Construction Co. Ltd. v John Mzare Ogowe* (2011) eKLR the court observed:

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences”.

16. In the absence of any affidavit from the applicant's erstwhile advocates to explain their failure to file the appeal for a lengthy period, it can only be surmised that they were guilty of inaction. The learned Judge was vilified for questioning why the applicant himself, who, having been a Resident Magistrate and was knowledgeable in court procedures, did not make personal follow-up to mitigate his advocates' inaction. But this was a relevant factor to consider as stated in *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR, thus:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

17. It would not matter whether the party was schooled in legal procedures or was a functional illiterate.

18. In our view, the new advocates of the applicant cannot be said to have fared any better than the previous advocates, and it is no wonder that the learned single Judge posed the pertinent hypothetical questions he did. According to the applicant, the advocates were instructed in October 2014 but did nothing on the matter until December 22<sup>nd</sup> when they made a draft of the application before us. They then waited until 15<sup>th</sup> January the following year to file it in court. Even assuming without deciding that time does not run for some functions of the court between mid-December and January, it is not argued that the court registries were closed and the filing of the application was impossible. This was not an ordinary matter. A judgment had been in existence unchallenged since 13<sup>th</sup> May, 2013. There was already a long delay caused by inaction by previous advocates. Surely in those circumstances, it behooved the new advocates to move with alacrity to save the situation before a court of equity. But no, they took their sweet time before drawing up the application and before filing it. We say they took their time because they have not sworn any affidavit to explain the inaction apparent in the matter. In court, counsel appeared to tell us, not in so many words, that he was entitled to go on vacation because the court was also on vacation between 21<sup>st</sup> December and 15<sup>th</sup> January! That is why he did nothing. A court of equity would frown on such conduct and we do not blame the single Judge for the findings he made.

19. As for the intended appeal being meritorious or having high chances of success, this is only a factor for possible consideration as stated in the Leo Mutiso case (*supra*). As explained further in the case of *Mwangi v Kenya Airways Ltd* [2003] KLR 486:

“It is clear that the third issue for consideration, namely, the chances of the appeal succeeding if the application is granted is merely stated as something for a “possible” consideration, not that it must be considered. This is understandable because the “the chances of an appeal succeeding” is normally dealt with by this Court under the rubric of “an arguable appeal” or “an appeal which is not frivolous” and the full court normally considers that issue under rule 5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on.”



20. We conclude this ruling the same way the full Court did in the *Ramesh Shab case* (*supra*), thus:

“The authorities cited before us are consistent that the delay in taking the necessary steps to mount an appeal should not be inordinate and that there should be reasons given for any delay. The period and the reasons given therefor were indeed the two factors first considered by the learned single Judge and were found wanting. In effect they could not form the basis of exercise of his discretion in favour of the applicant. On a reference, the full court would have no basis to interfere with such finding. We think the two factors must take primacy of consideration if the time table laid in the rules for conduct of court business will have any meaning. As stated earlier, it would be a rare case where the arguability of the intended appeal would outweigh all other considerations, and it would at best, in our judgment, be considered in borderline cases”.

21. This reference is lacking in merit and we order that it be and is hereby dismissed.

22. As there was no representation from the respondents, there will be no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF MAY, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

Deputy Registrar

