Attorney General v Law Society of Kenya & 4 others (Civil Application 327 of 2018) [2018] KECA 51 (KLR) (20 December 2018) (Ruling)

Attorney General v Law Society of Kenya & 5 others [2018] eKLR

Neutral citation: [2018] KECA 51 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 327 OF 2018

PO KIAGE, JA

DECEMBER 20, 2018

BETWEEN

THE HON. ATTORNEY GENERAL ..... APPLICANT

AND

LAW SOCIETY OF KENYA ..... 1ST RESPONDENT

NATIONAL ASSEMBLY OF KENYA ..... 2ND RESPONDENT

JUSTICE MOHAMED WARSAME ..... 3RD RESPONDENT

SAMUEL NJUGUNA ..... 4TH RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 5TH RESPONDENT

(An application for extension of time to serve a notice of appeal, file and serve memorandum of appeal and record of appeal out of time against the judgment and orders of the High Court of Kenya (E.C. Mwita, J) dated 6th July, 2018inPetition No. 106 of 2018 Consolidated with Petition No. 119 of 2018)

RULING

1. By the motion dated 8th November 2018 brought under Rule 4 of this *Court's Rules* though, for good measure, also citing some other rules, provisions of the jurisdictional statute of this Court, and the Constitution; the Attorney-General seeks orders;

> " 2. That the honourable court do deem that the notice of appeal filed on 16th July 2018 and lodged on the 17th July 2018 at Nairobi High Court being an appeal against the judgment and orders of Hon Justice E.C, Mwita issued and delivered on 6th July 2018 in Nairobi Constitutional Petition No. 106 of 2018

consolidated with Nairobi Constitutional Petition Number 119 of 2018 are deemed to be properly on record and/or alternatively the time for serving the notice of appeal herein extended."

2. The application is grounded on grounds appearing on its face including;

> " 1. The applicants have already filed their notice of appeal and hence this court has the requisite jurisdiction to hear this application.
>
> 2. That the notice of appeal was filed and lodged but due to inadvertent mistake on the part of the clerk of the appellant the same was not served on the respondents.
>
> 3. That the failure to serve the notice of appeal was not deliberate or meant to subvert the authority of the court or the rule of law but due to an excusable mistake."

3. There are other grounds to the effect that the appeal is an arguable one for some seven stated grounds, and that the same would be rendered nugatory if the prayers sought are not granted and that the rule of law, public interest and constitutionalism would be in jeopardy were the nominee of this Court to the Judicial Service Commission to be sworn into office without regard to the procedure enshrined in the Constitution. It may well be that the Attorney General is acting out of a high sense of duty to the Constitution and there might be something to be said about all those other grounds but I perceive my remit at this point, and in this motion, to be limited to a consideration of the narrow question of whether or not I should exercise my discretion in favour of extension of time for service of the notice of appeal.

4. The evidentiary backing for the motion is provided by the affidavit of Peter Thande Kariuki, learned State Counsel at the Attorney General's chambers sworn on 8th November 2018. He explained that following delivery of judgment at the High Court on 6th July 2016, (sic) the Attorney General being dissatisfied therewith, instructed him to appeal and he prepared a notice of appeal dated 16th July 2018 which was lodged at the High Court Registry on 17th July 2018, all within time.

5. The Attorney General thereafter filed an application for stay of execution of the impugned judgment on 31st October 2018 and it is only when the same was listed for hearing that he learned from the respondents that no notice of appeal had ever been served upon them. He proceeded to swear as follows;

> " 12. That upon enquiry from the head in charge of our registry, I was informed that the said clerk is currently out of duty due to health issues and is currently in a rehabilitation centre.
>
> 13. That we proceeded to his desk and after diligently searching, we found that the advance copies of the letter requesting for typed proceedings and the notice of appeal meant to be served upon the respondents were never served but placed in a folder."

6. He went on to plead that it would be in the interest of justice for time to be extended for the service of the notice of appeal as well as the record of appeal, the proceedings for which are ready. When he appeared before me Mr. Thande repeated those pleas and urged me to exercise my unfettered discretion in favour of the applicant.

7. The motion was opposed by way of replying affidavit by the Judicial Service Commission (JSC) whose secretary, Anne A. Amadi swore on 19th November 2018 that no convincing basis had been laid to warrant extension of time, nor any cogent reason proffered to the satisfaction of the Court to explain the inordinate delay in instituting an appeal, and that the motion itself was brought after unreasonable delay. She took issue with the applicant's failure to effect service on the respondents of the letter bespeaking proceedings and so termed the application an afterthought. She pointed out that the clerk alleged to have failed to serve the notice of appeal did not file any affidavit and so what we have are mere allegations, as are the claims that there was a challenge at the High Court Registry leading to the delay in typing proceedings and instituting the appeal. She swore that there is no appeal and the application is an abuse of process which is occasioning the JSC further prejudice.

8. Mr. Okongo Omogeni, learned Senior Counsel used that affidavit as the basis for his stringent opposition to the application. He in particular reiterated the absence of an affidavit by the clerk who failed to serve and the absence of any medical chits to show that the said clerk was indeed unwell and if so, during what period. He contended that the duty of diligence repose with advocates and posed the question:"Is it excusable for an advocate not to have checked whether there was service?" He also queried why there was no follow up of the proceedings by the applicant had he been disatisfied. Citing our decision in *Donald O. Raballa vs.The Judicial Service Commission & The Hon. Attorney General*[2018] eKLR, Counsel pressed that an applicant bears a burden to satisfy the Court the he deserves the favourable exercise of discretion and he fails to do so when he does not furnish material, as is in the instant case. Terming the intended appeal "a surprise" for non service of the notice, Mr. Omogeni urged me to dismiss it with costs.

9. Mr. Issa, learned counsel for Justice Mohamed Warsame, the 3rd respondent associated himself with those submissions. He added that the absence of an affidavit by the defaulting clerk at the Attorney General's chambers was fatal to the application. He also was unimpressed with the explanations given and asserted that the obligation to follow up was on the advocate. He concluded by stating that even if this application were dismissed the Attorney General had opportunity to ventilate his case in a different appeal filed by the National Assembly, the 2nd respondent, in which he is a respondent.

10. Also urging me to dismiss the application was Ms. Nkonge, learned counsel for the Law Society of Kenya (LSK). She indicated that the LSK came to be aware of the intended appeal only when served with the motion for stay of execution and it felt like an untenable ambush. She added that it was further proof of the applicant's laxity that even after learning of the default of service, it took him 14 days to bring the present application.

11. In a brief rejoinder Mr. Thande countered the complaints of surprise and ambush by pointing out that the complaining respondents always knew there would be appeals against the impugned judgment as the 2nd and 4th respondents did file their own notices of appeal. He defended the absence of medical records on the basis that they were private to the clerk and could not just be exhibited in these proceedings.

12. Both sides to this contest have cited various authorities on the subject of extension of time and the principles applicable. The Supreme Court in *Nicholas Kiptoo Arap Salat v Independent Electoral And Boundaries Commission*[2014] eKLR cited by the LSK, after a comparative analysis of decisions from various jurisdictions starting with our own, laid down the underlying principles that a court should consider in exercising discretion on an application for extension of time as follows;

> " 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 a reasonable reason for delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the 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."

See also*Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others*[2015] and *Donald Raballa V Jsc & Anor*(supra).

13. Those seven principles are not exhaustive, in my way of thinking, but are indicative of the logical manner in which a judge should exercise the discretion which, though free and unfettered, is nonetheless a judicial one to be exercised judicially and judiciously not on the basis of caprice, whim or personal idiosyncrasy. The principles though expanded, speak the same essential language of this Court in numerous cases including *Mwangi v Kenya Airways*[2003] KLR 486/, namely that a judge would consider the length of the delay, the explanation for the delay, (possibly) the likelihood of the appeal succeeding and the prejudice (if any) that an extension may occasion the other parties. The thing to say about these principles, though, is that they are not doctrinal, nor are they cast in stone. Rather, they are merely indicative and should not be seen to strait-jacket a Judge, thereby fettering his discretion since his only aim is to do justice between the parties.

14. In the matter before me, the Attorney General readily admits to having failed to serve the notice of appeal within the 7 days appointed by the Rules. It would appear that he would have remained in that blissful default indefinitely had he not been roused by the respondents, who pointed out that they had never been served with a notice of appeal, when they were served with an application for stay of execution in the month of November 2018. This was more than three months out of time. The Attorney General then rushed and served the notice of appeal, belatedly, on 7th November 2018. One of the firms of advocates served, that of Okongo Omogeni & Co. Advocates for the JSC, clearly noted that they were receiving it under protest because it was being served "four months" after it was lodged. Served alongside the notice were copies of a letter dated 16th July 2018 by which the Attorney General was requesting the Deputy Registrar of the High Court for the judgment and certified copies of the typed proceedings.

15. Now, the nearly four month delay is not trifling but it is also not the longest delay I have seen. Of itself, before I consider the reasons given, I would not declare the delay to be inordinate: significant it is, but it is not outlandish. I need to consider the reasons for it and all I have is the affidavit by Mr. Thande who says that he prepared the notice in time together with the letter bespeaking the proceedings, whereafter he gave instructions to the court clerk in the Attorney General's chambers to go and effect service. Having done so, it would seem he went about his business in the belief, alas gravely mistaken, that his instructions had been carried out and service effected. He did not notice any default or omission till over 100 days later, as already indicated. To opposing counsel, the lapse was Mr. Thande's because, as counsel dealing, he ought to have satisfied himself that service was effected.

In fact, Mr. Omogeni declaims that it is not conceivable that an advocate would have stayed that long without satisfying himself that service had been effected. Doubtless, in a highly efficient, responsive and responsible setting there ought to have been returns, file movement registers, check lists, bring-up systems, prompts, close supervision and such like processes and procedures of work to ensure that lapses of this kind did not occur. But then again, law offices, be they of lawyers in private practice or in Government departments, sometimes do have gaps. Busy lawyers may fail to follow up purely routine clerical or ministerial tasks such as process service, but they do so at their own peril as Mr. Thande must have learned from this matter.

16. Was it a case of deliberate inaction aimed at delaying justice? Was it a case of outright lethargy and inaction? Much as the opposing respondents think so, I am not persuaded. Here, Mr. Thande swears that the documents were later discovered where they were apparently left-in the drawer of the court clerk who was then taken ill. It would have been a lot more satisfactory had the clerk himself sworn the affidavit. It would also have been helpful had medical documents been availed showing that he had been taken ill. I am not prepared to take the view, however, that Mr. Thande, an officer of this Court and a public officer in the Government law firm would perjure himself in a matter such as this. At any rate I am prepared to grant him the benefit of doubt and accept as plausible the explanation given.

17. I need not go into the question of whether or not the intended appeal is arguable. There will be a time for a bench of this Court to express itself on the issue. At any rate, facially at least, the intended appeal is presented as involving serious questions of constitutional interpretation, and the interplay between the roles or supposed roles of other players on the question of this Court's representation on the JSC, once the honourable Judges who constitute it have spoken at the ballot. Such questions, I would think, require to be pronounced upon on merit, and it is a further reason why I would be hesitant to lock out the applicant who pleads for my favourable discretion. It conduces to the doing of open justice that parties be heard on their complaints as opposed to being turned at the gate on the basis of their dilatory or tardy conduct. As a wise Judge once said, courts exist for the purpose of doing justice, not imposing discipline. I think the proper balance is to strive to do justice unless a party by his conduct undermines that hallowed goal, in which case we would not hesitate to keep him out. I am not persuaded that the applicant herein has crossed that line.

18. The final issue I would consider is whether extending time will occasion hardship to the opposed respondents. Beyond the complaint that they have been ambushed by the belated discovery that the applicant intends to appeal, I have not been presented with any evidence of real prejudice. I do not downplay the fact that an appeal will mean that the Hon. Justice Warsame the 3rd respondent is kept away from his rightful place on the JSC and this Court remains disenfranchised for longer, and that is a cause for concern. Against that, however, is the overriding need for substantive justice to not only be done, but also be manifestly seen to be done. Weighing the two I would, though it pains me as a member of this Court who together with my brethren is adversely affected by that continued non-representation, cast my vote in favour of having the issue resolved substantively by the Court by allowing time for the intended appeal to be instituted. I am fortified in this by the fact there are already two appeals filed by the 2nd and 4th respondents, so that blocking the applicant at this stage will not necessarily be the end of the matter, anyway.

19. The upshot of my consideration of this application is that it succeeds. I hereby enlarge time for service of the notice of appeal, and deem the notice of appeal filed on 16th July 2018 to be duly filed and served.

20. I further extend the time for the institution of the appeal and direct that the record of appeal, be filed within fourteen (14) days of the date hereof and served within seven (7) days thereafter.

Costs shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2018.

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR