



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 45 OF 2016

SAM KIPLAGAT.....1ST APPLICANT

NATION NEWSPAPERS.....2ND APPLICANT

AND

CHARLES WANJOHI WATHUKU.....RESPONDENT

(An application for extension of time to file and serve the Record of Appeal against the judgment of the High Court of Kenya at Nyeri (Onganya, J.)

dated 5th day of December, 2014

in

H. C. C. No. 160 of 2010)

RULING

1. The ruling on the notice of motion dated 28th June 2016 which was heard on 7th November 2016 should have been delivered on 18th January 2017 and the oversight is regretted. An apology to the parties is also necessary. It is an application for extension of time under **Rule 4** of the Rules of this Court to file and serve a record of appeal out of time.

2. The judgment the subject matter of the intended appeal was delivered by **Byram Ongaya J.** on 5th December 2014 in a suit claiming damages for defamation. It had been alleged in the suit that the 2nd applicant had published a story authored by its employee, the 1st applicant, which depicted the respondent herein as having been corruptly involved in bribing a Judge of the High Court in order to subvert the course of justice. The trial court found for the respondent and awarded damages in the sum of Ksh. 4 million. The applicants made their intentions to appeal against the judgment by filing a notice of appeal on 10th December 2014 and serving it on 17th December 2014. In accordance with the Rules, the record of appeal was due 60 days thereafter, that is, on or before 16th February 2015, but none was filed; hence the application before me which was filed on 15th July 2016-one year and five months late.

3. The applicants have attempted to explain that delay through the affidavit of their learned counsel, **Ms**

Caroline Serem, sworn on 28th June 2016. In essence she explains that some considerable time was taken by negotiations on the terms of an order for stay of execution pending the intended appeal. A consent recorded on 11th March 2015 requiring the applicants to pay half the decretal amount to the respondent and deposit the balance in a joint interest earning account in the names of counsel for the parties seems to have taken them 8 months up to 25th November 2015 to resolve. The affidavit, however, says nothing more about the period between November 2015 and July 2016 when this motion was filed. More significantly, it says nothing about the date of the letter bespeaking copies of proceedings and whether it was copied to the respondent's counsel. Under the rules, that would have stopped time from running until the copies were availed. There is also nothing said about the date of collection of the proceedings and judgment and any certificate of delay issued by the Deputy Registrar.

4. At the hearing of the motion, Ms Serem was at pains to confirm that there were omissions made in preparing to file the intended appeal but pleaded for a favourable order because no prejudice was caused to the respondent whose fruits of judgment are secured. In her submission, the overriding objective under **Sections 3A and 3B** of the **Appellate Jurisdiction Act** may be invoked to temper the situation in favour of the applicants although those provisions were not pleaded in the motion. Counsel cited the cases of **M.S.K v S.N.K [2010] eKLR**, **Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR** and **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** all on the principles and application of the so-called 'Double O' or 'Oxygen' principle.

5. In response to the motion, the respondent swore an affidavit on 16th September 2016 to show how the application was frivolous and the conduct of the applicants an abuse of court process. He acknowledged that there was a tussle relating to the order for stay of execution but pointed out that it was settled on 25th November 2015. Although there was no evidence of the applicants having applied for copies of the proceedings and judgment, the respondent produced a copy of a letter dated 29th July 2015 addressed to the applicants' counsel confirming the availability of the copies and inviting them to collect. The letter shows that the copies were collected about two months later on 22nd September 2015. The applicants do not dispute that they were served with the letter and do not deny they collected the copies on the date stated therein. When the applicants did nothing despite collection of the copies, the respondent filed a notice of motion on 11th November 2015 seeking to have the notice of appeal struck out. That too did not jog the applicants into action until July 2016 when they filed this motion. That was almost a year after they had obtained copies of the proceedings and judgment of the trial court. In submissions of learned counsel for the respondent **Mr. A. M. Ng'ang'a**, there was absolutely no explanation given for the inordinate delay occasioned in this matter; at any rate after the initial delay caused by the orders for stay of execution. Counsel further submitted that the Oxygen principle was not a panacea for all ills including total inaction and subversion of the court process. The delay, he asserted, was prejudicial to the respondent who has been waiting in vain to enjoy the fruits of the judgment in his favour. He relied on two decisions of this court: **Peter Ndiritu Muhuhu & Another v. Esther Wairimu Ndungu, Civil Application No. NYR 22 of 2015 (UR)** and **Stanley Ndiritu Kiambati & Another v. Jollie Ngoy Mwamba Civil Appeal Application No. 27 of 2015(UR)**.

6. I have considered the application, the affidavits on record, the submissions of counsel and the authorities cited. **Rule 4** on which the motion is premised provides as follows:

“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”.

7. I have had occasion to consider the application of the Rule in the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo Civil Appeal Application No. 124 of 2004** which decision was upheld by the full bench on a reference made to it. I stated as follows:-

“I am aware that the discretion I have to exercise under Rule 4 is unfettered and does not

require establishment of “sufficient reasons”. Indeed I stated as much as a single judge and was upheld by the full court in Fakir Mohamed v Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR), thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive factors: See Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General, Civil Application No. Nai. 8 of 2000 (ur) and Murai vs Wainaina (NO. 4) [1982] KLR 38”.

I am also aware that there is a duty imposed on the Court under Sections 3A and 3B of the Appellate Jurisdiction Act to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court. As explained in the case of City Chemist (Nbi) & Ano. vs Oriental Commercial Bank Ltd Civil Application No. NAI 302 of 2008 (UR 199/2008):

“The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective.”

In the same case, however, the Court cautioned thus:-

“That is not to say that the new thinking totally up-roots well established principles or precedent in the exercise of the discretion of the Court which is a Judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and un-ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in Court. It also guides the lower Courts and maintains stability in the law and its application.”

Those Sections of the Appellate Jurisdiction Act came first in legislative time but have found legitimacy in Article 159 of the Constitution 2010 which deals with judicial authority and the administration of justice without regard to technicalities of procedure. The Supreme court has had occasion to interpret Article 159 and did so in the case of Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR where it agreed with the dicta of Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR stating:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is

in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

The Supreme Court further emphasized:

“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis. Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR”.

8. Applying those principles to the motion before me, it is clear that despite the applicants complying with the rules of court by filing and serving the notice of appeal, they made no efforts to pursue the intended appeal. Prudence required that they show their intentions of proceeding further than filing the notice by applying for copies of the proceedings and judgment and copying the letter to the respondent’s counsel. That way the proviso to **Rule 82(1)** would have availed them. For then it would have been clear to the respondent that the intention to pursue the appeal was live. But they did not. At any rate, no evidence was placed before me to show that they did. Nor did they make any attempt to obtain a certificate of delay from the deputy registrar of the trial court. These would all have been actions of a diligent litigant which would have endeared the applicants to a court of equity.

9. I would be prepared to accept the applicants’ plea that the process of seeking and resolving the matter of stay of execution may have derailed them for about 8 months until November 2015. By that time they already had the necessary copies to facilitate the filing of the appeal since September 2015 when they collected them. But they did nothing between November 2015 and July 2016 when they filed the application before me. And that despite their knowledge that the respondent had filed an application to have their notice of appeal struck out. There is no explanation for such conduct.

10. It seems to me that the applicants are merely seeking the sympathy of the court in this matter. But that has never been the basis upon which courts operate. As the Privy Council stated in the case of Ratnam v.. Cumarasamy [1964] 3 ALL E R 933:

“The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion . If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

11. There is no place for the application of **Sections 3A** and **3B** (supra), firstly because they were not pleaded and secondly, even if they were, because there was a blatant abuse of the Rules of Court by the applicants. It is not enough to point out that the decretal amount is available whilst trashing the Rules of Court. It is prejudicial to the respondent who has a right to enjoy the fruits of his judgment as much as the applicants have a right of appeal. The two rights must be balanced on reason and in this matter the balance tilts in favour of the respondent.

12. For those reasons, I decline to exercise my discretion in favour of the applicants and reject their application. It is dismissed with costs.

Dated and delivered at Nyeri this 5th day of April, 2017

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR