



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 94 of 2009

GLADYS WANJIRU NGACHAAPPLICANT

AND

1. **TERESA CHEPSAAT)**
2. **PIUS KIBWETTI SEVREY)**
3. **BERNARD KATHANGA)RESPONDENTS**
4. **KERUGOYA COUNTY COUNCIL)**
5. **THE ATTORNEY GENERAL)**

*(Appeal from the judgment and order of the High Court of Kenya
at Nyeri (Makhandia, J.) dated 28th November, 2008*

in

H.C.C.C. NO. 182 OF 1992)

RULING

I have before me notice of motion dated 11th May 2010 and filed on the same day in which the applicant **Gladys Wanjiru Ngacha**, through her advocates M/s Bali-Sharma & Bali – Sharma, is seeking one main order namely:-
“That this Honourable Court be pleased to extend time within which the applicant/appellant may serve the record of appeal filed on 4th May 2009 and the record so filed be deemed as served within time on all the respondents.”

That order is sought on three grounds which are;

- “(a) That both notice of appeal and the record of appeal have been lodged and served.**
- (b) That the cause of not serving the record within time was due to miscalculation of time.**
- (c) That no prejudice will be occasioned to the respondents in any way.”**

Two affidavits were filed in support of the application. The first affidavit was sworn by the applicant. In a summary, that affidavit depones that the applicant, being dissatisfied with the judgment delivered by Makhandia J. on 28th November 2008, caused her advocates to lodge appeal against the same judgment; that her advocates filed notice of appeal timeously on 2nd December 2008 and lodged record of appeal on 4th May 2009; that that record of appeal was served upon the fifth respondent on 8th May 2009 and upon the advocates of first, second and third respondents on 13th May 2009 whereas the fourth respondent’s advocates were served on 11th June 2009. She depones further that the advocates for the fourth respondent – P. M. Muchira was served late because he had not filed any statement of address as is required by the Rules of this Court; that as the names of the advocates for the 1st, 2nd and 3rd respondents and that of the 4th respondent were almost alike, her advocates clerk who was responsible for serving the record of appeal, having served Machira & Company on 13th May 2009 with the

record, did not realize that he had not served the advocate for the fourth respondent P. M. Muchira, advocates and the omission was only brought to the clerk's attention on 10th June 2009 when the deponent (applicant) visited her advocates' office and on checking, she realized that P. M. Muchira had not been served. Immediately that omission was realized, the same advocate for the fourth respondent was immediately served with the record of appeal the next day 11th June 2009. Lastly she says in that affidavit that no prejudice would be caused to the respondents if the application is allowed and that her appeal which is already filed has high chances of success. The second affidavit was sworn by Newton Muthuri Mathenge, court appointed Process Server while under the employment of the applicants' advocates. He deposes that on 13th May 2009, he served the firm of Machira & Company, the advocates for the first, second and third respondents, but he miscalculated the time and that service was two days out of time; that after serving Machira & Company, he did not remember to serve the advocates for the fourth respondent as the names of the two advocates are alike and thus he assumed he had served the record properly; that immediately this mistake was brought to his attention, he served Muchira on 11th June 2009.

In his address to me at the hearing of the application, Mr. Mahan summarized the contents of the two affidavits, and referred me to the overriding objective as enshrined in the recently introduced **sections 3A** and **3B** of the Appellate Jurisdiction Act and urged me to allow the application.

The application was opposed by both Mr. Machira and Mr. Muchira. In opposing the application, Mr. Machira relied on the replying affidavit sworn by Bernard Kathanga, the third respondent on which the deponent does not deny the applicants' allegation that his advocate was served with the record of appeal on 13th May 2009 as deposed at paragraph 5 of the applicants' affidavit but states that the appeal already filed is not arguable and that the appeal is defective in several respects such that it is in any case bound to fail and so there would be no need to entertain this application as doing so would be an act in vain. Further that affidavit also states that the third respondent would suffer prejudice as the applicant is likely to hang on its appeal for several years to come before the same is finally heard and decided. Mr. Machira, emphasized those contents of this replying affidavit and urged me to dismiss the application with costs to the respondents.

Mr. Muchira, conceded that his client did not file any replying affidavit but accepted that he was served on 11th June 2009 which he contended was 30 days late. He claimed that delay was inordinate on grounds that he had been on record in the matter for sometime, and there should not have been any confusion based on the almost similarity of their names. He however, admitted that he had not filed in his address for service and had not done so even up to the date the application was heard. He ended by saying that as his clients were wrongly described in the proceedings, it would suffer prejudice if the application is granted. M/s Munyi for the fifth respondent did not oppose the application. Service upon fourth respondent was timeous.

I have anxiously considered the application, the grounds canvassed, the record, the decision of the superior court, the submissions before me. This Court when considering an application such as this one before me brought under **rule 4** of this Court's Rules exercises unfettered discretionary jurisdiction. Like all such discretionary powers, it must be exercised judiciously. It must not be exercised capriciously nor upon the whims of the Court. In doing so, there are guiding principles which because of long usage, have gained the status of law. The list of these principles is not and cannot be exhaustive, as that would militate against the exercise of discretion. The most common ones are that the Court in considering such an application considers; the length of delay; the reasons or explanation for such delay; whether the intended appeal or the appeal, if one is already filed as is the case here, is arguable (but without going into the merits of the appeal; and the prejudice that the respondent would suffer if the application is granted. See the case of **Fakir Mohamed vs. Joseph Mugambi and 2 others, Civil Application No. 332 of 2004**. As I have stated above, the list is not exhaustive.

In this application, the length of the delay is two days in case of service upon the first, second and third respondents. This is not in dispute. As to the fourth respondent, Mr. Muchira says the delay period was thirty (30) days and this sounds correct because the record of appeal was lodged on 4th May 2009 and should have been served upon him by latest 11th May 2009 but was served on 11th June 2009. Mr. Mahan has not disputed that and applicants' affidavits do confirm that Mr. Muchira was indeed served on 11th June 2009. What is the explanation for that delay. As to the first, second and third respondents, the delay of 2 days is blamed on miscalculation of time. It is not stated what constituted miscalculation of time but I will accept that the delay is not inordinate and I will not take any drastic action such as refusing extension on that score. As to service upon Mr. Muchira for the fourth respondent, the applicant says as a result of the confusion caused by the near similarity of the names of the advocates of the respondents i.e. Mr. Muchira and Mr. Machira, the clerk, having served Mr. Machira, thought Mr. Muchira had also been served until the applicant reminded him. It is not well brought out as to how P. M. Muchira skipped his attention, but I do take it that what he meant was that as a result of the near similarity of the two names, he assumed that he had served both after he had served only one. That could have been possible and I do not want to view it as weird explanation. Added to that, Mr. Muchira readily conceded that he had not filed address for service. That being the case, I cannot fault the applicant for delay of service upon him, as without address of service, the applicant might have well assumed after serving Macharia & Company, Advocates, that all was well.

I will accept the explanation advanced for the delay in serving the record of appeal. In my view, it is for minor matters that **sections 3A** and **3B** were introduced into the Appellate Jurisdiction Act so that courts can do substantive justice without due regard to technicalities where mistakes are to an extent minor as is in this matter here. However, that is not all. Mr. Machira says the appeal which has been served stands no chances of success as his client had a claim based on first registration. I cannot go into the merits of the appeal already filed. I note however, that one of the grounds of appeal is challenging the superior court's decision on the grounds that first and second respondent did not give evidence in the superior court and that their evidence could have been important for the fair decision of the case. I do think that, without going into the merits of the appeal, the appellate court needs to investigate that allegation if nothing more.

In my view, I do not think any of the respondents will suffer prejudice by my granting this application. The appeal has already been filed and is Civil Appeal No. 94 of 2009. Applications filed to strike out the appeal had come up for hearing more than once. The parties have had the record for over one year and they cannot claim that if the service upon them is deemed to have been done when they were actually served, they would suffer any prejudice.

I am certain in my mind that upon the above reasons, this is a proper application for the exercise of my discretion. The application is allowed. The time for serving the record of appeal filed on 4th May 2009 is extended to such time such that the record is deemed to have been served upon each respondent within the time. The costs of this application to be in the Civil Appeal No. 94 of 2009.

Dated and delivered at Nyeri this 19th day of November, 2010.

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR