Achola v Kigen & 2 others (Residents Association (Being Sued on Their Own Behalf and on Behalf of Pioneer Phase II Estate)) (Miscellaneous Application E133 of 2024) [2024] KEELRC 13190 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13190 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E133 OF 2024

JW KELI, J

NOVEMBER 21, 2024

BETWEEN

PETER ACHOLA ..... APPLICANT

AND

MAJOR J. KIGEN, CHAIRMAN ..... 1ST RESPONDENT

MOSES WAMBUGU ..... 2ND RESPONDENT

ALBERT MAVUTHA ..... 3RD RESPONDENT

RESIDENTS ASSOCIATION (BEING SUED ON THEIR OWN BEHALF AND ON BEHALF OF PIONEER PHASE II ESTATE)

RULING

1. The applicant through Notice of Motion dated 25th April 2024 filed the instant application under Section 3A, 79G and 95 of the *Civil Procedure Act*, Order 50 Rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking the following orders:-

    1. That the Applicant herein be granted leave to file an appeal out of time against the whole of the judgment of Hon. Hosea Mwangi delivered on 16th March, 2023.

    2. That the draft memorandum of appeal attached herein be deemed as duly filed and served within 7 days upon the grant of leave by the Honourable court.

    3. That the Honourable Court do issue such orders and give such directions as it may deem fit and just to grant.

    4. That the costs of this application be in the cause.

2. Grounds of the application

a. That judgment in C.M.E.L NO. 2333 OF 2019, PETER ACHOLA VS MAJOR J.KIGEN,Chairman,MOSES WAMBUGU & ALBERT MAVUTHA, Residents Association being sued on their own behalf and on behalf of PIONEER PHASE II ESTATE was delivered on 16th March, 2023 virtually and the Claimant/Appellant's advocates wrote a letter on 4th April, 2023 and other several times and sought typed copies of proceedings and judgment for purposes of preferring an appeal to this Honourable Court.

b. That the Claimant/Appellant is aggrieved by the whole of the judgment C.M.E.L NO. 2333 OF 2019, PETER ACHOLA VS MAJOR J. KIGEN, Chairman,MOSES WAMBUGU & ALBERT MAVUTHA, Residents Association being sued on their own behalf and on behalf of PIONEER PHASE II ESTATE and wishes to appeal against the judgment.

c. The Honourable Magistrate while delivering judgment read the final orders and did not state the reasoning behind his decision and it was therefore difficult to understand his reason and therefore present grounds of Appeal before this Honourable Court.

d. That we are yet to receive the copies of the typed proceedings and judgment to date although my advocates have since received a copy of the judgement.

e. That on 26th June 2023 the file was mentioned before Hon. Joseph Karanja who ordered that the file be returned to the registry as judgment had already been rendered. Further,we were not properly notified by the court of this mention as we would have raised the issue of delay in getting the copies of the typed proceedings and judgment.

f. That on 24th October 2023, the Applicant filed an application for leave to file his appeal out of time and simultaneously filed an appeal which was Appeal No.211 of 2023; Peter Achola vs. Major Kigen & 2 others.

g. That on 20th November 2023, the Respondent replied to the Applicant's application with a Notice of Preliminary objection as well as a replying affidavit both dated 17th November 2023 contending that the appeal was incompetent for want of leave of the court to file it out of time.

h. That the application came up for hearing on 21st February 2024. The hearing did not however proceed as the applicant made an oral application to have the application and appeal withdrawn with no orders as to costs. This even as to allow him file this miscellaneous application and properly seek leave to file his appeal out of time. The court allowed the application to withdraw with no orders as to costs.

i. That the Applicant wishes to be granted leave to file an appeal out of time as he has an arguable appeal with high prospect of success as demonstrated by the draft Memorandum of Appeal attached herewith.

j. That the delay in filing the appeal was not deliberate as the Applicant was not able to get a copy of the judgment and the proceedings in good time.

k. That substantial loss will result to the Applicant if the orders sought are not granted.

l. That the Respondent is unlikely to suffer any prejudice should the orders sought herein be granted.

m. That the application herein ought to be allowed in the interest of equity and justice.

3. The application was further supported by the annexed affidavit of Peter Achola annexed letter requesting for the delivered judgment and typed proceedings(PA-1), copy of the judgment(PA-2), draft

memorandum of appeal(PA-3), AND correspondence by his advocates following up on the typed proceedings in the lower court(PA-4).

Response

4. The application was opposed by the respondent vide replying affidavit of Albert Mavutta sworn on the 12th June 2024. The crux of the response was that the applicant had earlier filed a defective application after a 12-month delay and elected to withdraw the same. He delayed for 2 months after the withdrawal of an earlier application and the said delays were not justified. The is no legal requirement to file an appeal on receipt of proceedings.

Written submissions

5. The application was canvassed by way of written submissions. The parties complied.

Decision

6. Section 79 G reads:- ''79G. Time for filing appeals from subordinate courts

> Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.''

7. The provision of the law calls for the court to exercise its judicial discretion. In the instant case the applicant had filed a similar applicant in Appeal No. E211 OF 2024 which he withdrew on the 21st February 2024. Two months later on the 25th of April 2024 he filed the instant application seeking similar prayer of leave to file appeal on same grounds and attaching the memorandum of appeal which had been withdrawn.

8. The court on perusal of the memorandum of appeal annexed to the application finds that it raised arguable appeal for lack of reasons by the lower court on the reliefs of underpayment, leave, overtime, public holidays pay and service gratuity. the Court of Appeal in *Cabinet Secretary Ministry of Health v Aura & 13 others (Civil Application E583 of 2023*) [2024] KECA 2 (KLR) (19 January 2024) (Ruling) where it was held that:

> "An arguable appeal is not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One is sufficient. For a point to be arguable it needs merely to raise a bona fide point of law or fact sufficient to call for an answer from the respondent and is worthy of the court's consideration.
>
> 33. Moreover, whereas such arguable points should ideally and conveniently be expressed in the form of a draft memorandum of appeal, there is no rule that it must be so. One can raise such grounds on the face of the motion and even in the supporting affidavit, as happened in this case.''

9. The applicant in written submissions contends that the appeal may be admitted out of time for good and sufficient cause. he relied on the decision of High Court in Richard Gichangi Karimi v Catherine Wawira Muriuki (2019)e KLR where the Judge held:-

'' 4. This court exercises discretion to allow an application for extension of time. A party seeking extension of time must show a good reason for the delay in filing the appeal.''

10. In Paul Musili Wambua v Attorney General & 2 others [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following:-

> ''.....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.''

11. The applicant relied on the criteria adopted by the Court of Appeal for application fo rleave to file appeal out of time in Thuita *Mwangi v Kenya Airways Ltd (Civil Application 162 of 2002*) [2003] KECA 201 (KLR) (11 July 2003) (Judgment)

> .. where the court adopted the position in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:-
>
> > " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted"

12. The respondent submitted indepth on the exercise of discretion as follows:- The power to grant the orders sought herein does not avail ex debito justitiae. It is a discretionary one. Judicial discretion was defined in Mombasa Employment & Labour Relations Court Civil Appeal No. 27 of 2019 Kridha Limited v Peter Salai Kituri [2020] eKLR

> Black's Law Dictionary (Tenth Edition) defines judicial discretion as:
>
> "The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right." Paragraph 2

13. The doctrine of judicial discretion was expounded in Malindi High Court Civil Appeal No. 28 of 2019 Coast Water Services Board v Rehema Charo Kahindi & Kache Chare Mramba (Legal Representatives of the Estate of Fredrick Charo Kadenge (Deceased) & another [2020] e KLR thus

> ''... The doctrine of judicial discretion as Desmith defines it, "is the legal concept of discretion which implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem." (See SA Desmith and J M Evans Judicial Review of Administrative Action 4th Edition {1980} 278.)In the same area of Law Keith

Hawkins in the use of legal discretion, perspective from Law and social science (1992, 11,11) he observed as follows:

> " discretionary decisions are those where the Judge has an area of autonomy free from strict legal rules, in which the Judge can exercise his or her Judgment in relation to the particular circumstances of the case. Discretion is the space between legal rules in which legal actors may exercise a choice in speaking of autonomy and choice, it must be acknowledged that the exercise of discretion is usually limited by guidelines or principles or by reference to a list of relevant factors to be considered. While discretion permeates both the Common Law and many, if not most, statutory instruments discretionary powers are never absolute and must also be exercised within, a broader legal and social context." Page 3 of 5

14. The Respondent submitted that the Courts have delved into the questions of the considerations Court has to have regard to in the exercise of its discretion in respect of an application for extension of time. In Supreme Court of Kenya Application No. 16 of 2014 Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] Eklr the Court delved into the principles to be had to on the question of extension of time as follows:-

> ''This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of 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 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 the 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.'' Page 16 of 18

15. The Respondent submitted that is instructive to note that the Applicant had filed an Appeal out of time, being Civil Appeal No. E211 of 2023. Within the Appeal, he filed an application to have the Appeal deemed duly filed within time on exactly the same grounds as herein. During the hearing the said Application, the Learned Judge reminded him of the authority in Supreme Courtof Kenya Application No. 16 of 2014 Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR for the position that an Appeal filed of time cannot be cured by such an application, he withdrew the Appeal in its entirety.

16. The Respondent contended that this Application is an attempt at a second bite of the cherry and shown be deprecated by the Court. This Court is beholden by the principle of finality- litigation must

at some point come to an end. We are hereby guide by the Court of Appeal in Mombasa Court of Appeal Civil Application No. 2 of 2019 Kamau James Gitutho & 3 others v Multiple Icd (K) Limited & another [2019] Eklr The above position was informed by the principle of finality which is hinged on the public interest policy that litigation must come to an end. Bosire, J.A in Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2007] eKLR succinctly described the principle as follows:

> "This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down."
>
> Further, the finality principle dealt with the all-too human predilection to keep trying until something gives. See this Court's decision in William Koross vs Hezekiah Kiptoo Komen & 4 Others [2015] eKLR. ''

17. The Respondent submitted that the earlier Application was withdrawn at the tail end when the Applicant realized that it was untenable. Herein, the Applicant is trying to make a repeat Application seeking the same orders. While the Applicant herein may not be clasped under the rule of res judicata, the Courts however deprecate a habit of bringing repeat applications except where such Applications is to seek reinstatement for good cause. This was the holding in Machakos High Court Civil Appeal No. 142B of 2015 Heritage Insurance Company Limited v Patrick Kasina Kisilu [2015] eKLR

> I agree with the general tenor of the court decisions that take the view that to file similar applications over the same subject matter seeking similar reliefs is an abuse of the court process. Indeed, where such applications have previously determined the matter the subsequent applications are barred by the principle of res judicata (see Mburu Kinyua v. Gichini Tuti (1978) KLR 69); where an application is dismissed for want of appearance, the applicant cannot be allowed to bring a second application unless he seeks reinstatement of the application for good cause (Wanguhu v. Kania (1987) KLR 51) and where the earlier one is not concluded, a similar subsequent application is sub judice by virtue of section 6 of the *Civil Procedure Act*. Paragraph 8

18. The Respondent submitted that Appeals are commenced before this Court by way of a Memorandum of Appeal. There is no rule of law before this Honourable Court, unlike for, example before the Court of Appeal, that provides that one must have, first had and obtained, the certified proceedings before the trial Court, before he can file a Memorandum of Appeal before this Court. A glean at Section 79G of the *Civil Procedure Act* as read together with rule 12(1) of the rules of this Court 2024 is clear. The only requirement under the aforementioned laws is for an Appellant to apply for typed proceedings. Typed proceedings only become condicio sine qua non during the filing of the Record of Appeal.

19. Additionally, nothing has been brought forward to show that Court that the procurement of the certified copy of the judgment added to any value to his intended Appeal. The draft Memorandum of Appeal exhibited as PA3 in his Supporting Affidavit is the same that was filed in Appeal E211 of 2023. This, with respect, makes nonsense of any purport that the delay was caused by failure to obtain certified copies of proceedings and judgment. That in any case the Application for certified copies of the proceedings was not made until 23rd June 2023 as shown in a receipt annexed as AM- 1 in the Replying Affidavit of Albert Mavutta, Respondent sworn on 12th June 2024. It is most suspicious that a letter dated 4th April 2023, and which is presented as the main ground for the filing of the Appeal, i.e., the delay in acting upon it by the trial Court, was itself not filed until after a whole 2 months after drawing. Was it possibly backdated to give it some credence?

20. This is a Court of equity. It does not aid stale demands. We are here guided by Mombasa High Court Civil Appeal No. 68 of 2021 Madison Insurance Co Ltd v Mwamba [2023] KEHC 27243 (KLR) (20 December 2023) (Ruling)

> In this case the Applicant failed to aid the court in administration of Justice.
>
> The applicant has no approached equity with clean hands. They have not fully explained their indolence. Being a discretionary order, reinstatement cannot be given to a party who tries to overreach. Doing too little too late is not enough. In Amina Karama v Njagi Gachangua & 3 others [2020] eKLR, justice Y M Angima held as doth: -
>
> It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi [2014] eKLR the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31st Edition)at page 99:
>
> "The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing." Paragraph 24.

21. The Respondent submitted that the Court is also enjoined to consider the relative prejudice that shall be visited upon the parties. The delay is inordinately long and on the whole unexplained. The Court of Appeal in Mombasa Court of Appeal Civil Application No. 33 of 2016 Charles Onyinge Abuso v Kenya Airports Authority & another [2017] eKLR the Court while considering the question of relative prejudice said When all is said and done, the applicant was obliged to place before me some material on the basis of which I could exercise discretion in his favour. The delay he has occasioned is inordinate and remains unexplained.Page 4 of 4.12. Further, the Respondents have, after the judgment, and thereafter the withdrawal of the Appeal, adjusted their lives accordingly and continued with their business of life. To date ruffle them again with such an application is not just disruptive, but most prejudicial to our peace and the conduct of their daily lives.

22. The court having perused the pleadings and the cited authorities finds that the delay is inordinate. There was plausible explanation for the delay. The court finds the initial application was withdrawn to defeat the response. The court finds there is an arguable appeal in place for lack of reasons on the reliefs sought by the claimant. The court finds that the prejudice the Respondent will suffer having had a legitimate explanation litigation had come to an end following the withdraw of the appeal and lapse of two months, can be compensated by cost. The applicant will pay costs for the prejudice caused upon the respondent of Kshs. 20,000. The court holds that it is in the interest of justice to sustain an arguable appeal.

23. Consequently, the application dated 25th April 2024 is allowed in the following terms:-

    a. The applicant is granted leave to file an appeal out of time against the judgment of Hon. Hosea Mwangi delivered on 16th March 2024 on condition that the applicant files and serves a memorandum of appeal and pays the Respondent costs of Kshs. 20,000/- within 14 days of this order.

    b. Mention on 16th December 2024 to confirm compliance and issue further directions.

24. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024.

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Caleb

Applicant: - Nyabena

Respondent: Ms mureithi h/b Githinji