Murithi v Nkoroi (Environment and Land Appeal E022 of 2023) [2024] KEELC 6939 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6939 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E022 OF 2023

CK YANO, J

OCTOBER 24, 2024

BETWEEN

TIMOTHY MURIUNGI MURITHI .... APPELLANT

AND

SAMWEL NKOROI .... RESPONDENT

RULING

1. Before me is a notice of motion dated 16th April, 2024 brought pursuant to Section 7 of the *Appellate Jurisdiction Act* and all other enabling provisions of the Law. The motion seeks for extension of time for the appellant to serve a Notice of Appeal out of time, that the annexed notice of appeal be deemed properly and timely filed for purposes of record and costs of the application be in the cause.

2. The motion is based on the ground on its face and supported by the affidavit sworn by Samwel Nkoroi on 11th April, 2024 together with annextures thereto wherein the applicant avers that he entered appearance and on 29th October, 2018 when the matter came up for hearing the appellant who was acting in person misunderstood the court's direction and left before the matter was heard and an ex-parte judgment was delivered on 14th February, 2019. The applicant attached a copy of the judgment delivered on 14th February, 2019 marked SN – 01.

3. The applicant avers that he subsequently via the application dated 6th September, 2021 sought the court's discretion and or leave to set aside the ex-parte judgment delivered on 14th February, 2019, to allow him to defend the suit. That the trial court delivered its ruling on 1st March, 2022 whereby it allowed his application and set aside the ex-parte judgment delivered on 14th February, 2019, re-opened the plaintiff's case to allow for cross examination of the appellant/respondent and gave the applicant a chance to adduce his evidence in the matter. The applicant annexed a copy of the ruling delivered on 1st March, 2022 marked SN – 02.

4. The applicant states that the appellant/respondent thereafter moved to this court to challenge the ruling delivered on 1st March, 2022. That the appeal was heard and judgment was delivered on the 20th March 2024 whereby the court allowed the appeal and reinstated the judgment dated 14th February, 2019 in Nkubu SPMC ELC No. 76 of 2010. The applicant attached a copy of the judgment delivered on 20th March 2024 marked SN- 03.

5. The applicant avers that during the delivery of the said judgment, he was not present but was represented by his former advocate who failed to inform him of the outcome until 11th April, 2024 when he visited his chambers to follow up on his case. That he is aggrieved by the said judgment which not only has the effect of denying him a chance to be heard, but has also reinstated the judgment dated 14th February, 2019 which is irregular for among other things awarding the appellant/respondent the sum of Kshs. 400,000 as general damages which was never pleaded or proved.

6. The applicant states that immediately he learnt of the judgment, he took steps including obtaining a copy of the judgment and moving the court for leave to lodge his notice of appeal out of time. That he is advised by his advocates that an appeal to the court of Appeal is instituted first by a notice of appeal which should be lodged within 14 days of the judgment. The applicant has annexed a copy of the notice of appeal marked SN – 04 and prayed that the court may deem it as properly filed for purposes of record.

7. The applicant avers that the delay in filing the said notice was inadvertent, excusable and not inordinate since he only learnt of the said judgment on 11th April, 2024. That he stands to suffer irreparable loss if the orders sought are not granted since he will be condemned to pay general damages of Kshs. 400,000/= awarded in the judgment delivered on 14th February, 2019 when the same was neither pleaded nor proved which would have been brought out had he been granted the chance to defend the suit.

8. The applicant states that no person shall be prejudiced if the orders sought are granted. That the instant application is instituted in order to serve the course of justice.

9. The respondent filed grounds of opposition dated 12th June 2024 wherein he states that the applicant has a history of indolence that has dragged the matter in court since 2010 when the trial court suit was instituted. That this is the applicant's case and he cannot purport to blame his former advocates for failing to issue a Notice of Appeal within the stipulated timelines. The respondent states that the impugned judgment was delivered in the presence of counsel for both parties thus the failure to promptly issue the intended Notice of Appeal is not justified. That the applicant was even served with the appellant's Bill of Costs but he failed to respond as at the time of filing the present application. That the applicant has a tendency of changing advocates then blaming the previous one and has now appointed the third advocate in order to pull the same trick. That the applicant has therefore not demonstrated a plausible justification for his delay in filing a Notice of Appeal. That the applicant is perpetually defiant of court orders and was even sent to jail for six months by the trial court for contempt of court orders. That the applicant has not deposited Kshs. 613,725 being the total sum of the decretal sum plus costs as assessed by the trial court. It is the respondent's contention that the present application is scandalous, frivolous, vexatious and an abuse of the court process thus deserves the fate of dismissal with costs.

10. The application was canvassed by way of written submissions. The applicant filed submissions dated 15th July, 2024 through the firm of Mithega & Kariuki advocates while the respondent's submissions dated 4th September, 2024 were filed by the firm of Kitheka & Ouma advocates.

11. The applicant gave a brief background of the matter and identified the issues for determination to be whether the applicant should be granted leave to lodge his appeal out of time and costs. The applicant

relied on Section 7 of the *Appellate Jurisdiction Act* (Cap 9) Laws of Kenya. The applicant further relied on the case of Kenya Airports Authority & another Vs Timothy Nduvi Mutungi Court of Appeal Civil Application No. Na. 165 of 2013 (UR 113/2013) 2014) eKLR.

12. It was submitted that it can be gleaned from the above provisions and case law that the court has the requisite jurisdiction to hear the application and extend the time for filing a Notice of Appeal. The applicant also relied on the case of Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1997)

13. The applicant argued that he was not present during the delivery of judgment and his advocate failed to inform him of the outcome until the 11th April, 2024 when the applicant visited his chambers to follow up and that immediately the applicant learnt of the judgment, he took steps including obtaining a copy of the judgment and has timeously moved the court via this application.

14. The applicant stated that it was expected that he files his appeal within 14 days from 20th March, 2024 which were expected to lapse on or about 9th April, 2024 and therefore he was 7 days late in filing the same by the time he moved the court via the present application.

15. The applicant argued that he has explained that the delay in filing the said notice was inadvertent, excusable and not inordinate since he was not aware of the said judgment until 11th April, 2024 when he followed up on the same with his former advocate and soon thereafter moved the court via the present application.

16. The applicant further contended that he moved within reasonable time to follow up on the matter and instructed his present advocate to file the instant application without unreasonable delay. That the delay cannot be said to have been inordinate in the circumstances adding that the delay was also occasioned by the failure of the applicant's former counsel to inform him of the delivery of the judgment until the 11th April, 2024 when the applicant followed up on the same. The applicant relied on the case of *Sokoro Savings and Credit Co-operative Society Ltd Vs Mwamburi (Civil Application E032 of 2022* (2023) KECA 381 (KLR).

17. The applicant submitted that the respondent does not stand to suffer any prejudice if the instant application is allowed. That in fact the respondent has not pleaded that he will suffer any prejudice whatsoever in his ground of opposition.

18. The applicant submitted further that he stands to be more prejudiced if he is denied the chance to challenge the judgment of this court which has the effect of reinstating the judgment dated 14th February, 2019 in NKubu ELC No. 76 of 2010 which he argued is irregular for among other things the fact that the applicant was not heard and awarding the appellant/respondent the sum of Kshs. 400,000 under general damages which were neither pleaded nor proved.

19. It is the applicant's submission that the interest of justice demands that a party is accorded every reasonable and available opportunity to ventilate their grievances within the available ranks of our judicial system which is the applicant's prayer herein. That the ultimate goal and purpose of the justice system is to hear and determine disputes fully. That it follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. The applicant relied on the case of Stecol Corporation Limited Vs Susan Awuor Mudemb (2021) eKLR and urged the court to arrive at the conclusion that the instant application is merited and should be allowed as prayed in the interest of justice.

20. The respondent gave a detailed facts of the case and cited Rule 77 (1) and (2) of the Court of Appeal Rules, 2022 which prescribes the time limit for an aggrieved party to lodge an appeal before the Court

of Appeal and relied on the case of Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission & 7 others (2024) eKLR as was quoted in the case of Rufus Murithi Nyaga Vs Juliet Wanja Ireri (2018) eKLR, Falim Yasin Twaha Vs Timamy Issa Abdalla & 2 others (2015) eKLR and the cse of Imperial Bank Ltd (receivership) & another Vs Alnashir Popat & 18 others (2018) eKLR.

21. The respondent pointed out that the judgment in this matter was delivered on 20th March, 2021 in the presence of counsel for both parties, thus the applicant cannot purport not to have been informed of the outcome of the appeal. That even if they were to give the applicant the benefit of doubt that he did not attend court on the date of judgment, it was incumbent upon the applicant to follow up with his advocate on the same day or as soon as possible so as to promptly take the necessary action. The respondent submitted that this was the parties case and not of their advocates and as such the applicant should not be allowed to use his former advocate on record as a scape goat for the applicant's failure to issue a notice of appeal within the stipulated timelines. The respondent relied on the case of Rufus Murithi Nyaga Vs Juliet Wanja Ireri (2018) eKLR and Rajexh Rughani Vs Vifty Investment Ltd & another (2006) eKLR.

22. The respondent submitted on the issue of costs and cited Section 27 of the *Civil Procedure Act* which provides that costs follow the event. The respondent therefore urged the court to condemn the applicant to bear the costs of the application. The respondent urged the court to dismiss the application with costs.

Analysis & Determination

23. I have considered the application, the response and the submissions made. The issue for determination is whether the court should extend time for the applicant to file and serve Notice of Appeal out of time. Section 7 of the *Appellate Jurisdiction Act* gives the court power to extend time for giving notice of intention to appeal from a judgment of this court, notwithstanding that the time for giving such notice may have already expired.

24. An applicant for extension of time must show good and substantial reason for the delay and prima facie good cause why the intended appeal was not lodged within time before a court exercises its discretion to extend time. This discretionary power, however, is judicial in nature and must be confined to the rule of reason and justice.

25. The Supreme Court in Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 others [2014] eKLR set out the consideration to guide the court in exercising its discretion in cases of this nature. It stated-; i. 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; ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis, iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court: v. Whether there will be any prejudice suffered by the respondents if the extension is granted; vi. Whether the application has been brought without undue delay, and vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

26. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent, a position well stated in M/s Portreitz Maternity Vs James Karanga Kabia Civil appeal No. 63 of 1997 thus-;

> " That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."

27. The main reason offered by the applicant is that during the delivery of the judgment he was not present but was represented by his former advocate who failed to inform him of the outcome until 11th April, 2024, when he visited his chambers to follow up on his case. The question here narrows to whether the delay is excusable. Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party's control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay.

28. In deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation therefor, and the prospects of success. This list is not exhaustive and each case will depend on its peculiar facts and circumstances. In National Union of Mineworkers Vs Council for Mineral Technology [1998] Zalac 22 at para 10 the court held-; '

> " The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the decree of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation of the delay, an application for condonation should be refused."

29. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

30. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation or the further delays.

31. I have evaluated the reason offered for the delay. It is stated that the delay was occasioned by the failure of the applicant's advocate to inform the applicant of the outcome of the judgment. I find and hold that the delay is excusable and that it has been satisfactorily explained. However, the applicant should note that a case belongs to him and not to his counsel and is therefore expected that he be appraised

with every detail regarding his case. That he cannot purport to blame his former advocates for failing to issue a notice of Appeal within the stipulated timelines.

32. I find that the application meets the tests for the court to exercise its discretion in the applicant's favour. Accordingly, I allow the applicant's application dated 16th April, 2024 and order that the intended notice of appeal be filed and served within 14 days from the date of this ruling.

33. The applicant is condemned to bear the costs of the application.

34. It is so ordered.

DELIVERED, DATED AND SIGNED AT MERU THIS 24TH DAY OF OCTOBER, 2024

C.K YANO

ELC JUDGE

In The Presence Of

Court Assistant – Tupet

Ms Gitari for respondent/applicant

Munene Kirimi holding brief for Ouma for appellant/respondent