Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others (Application 12 (E021) of 2021) [2022] KESC 3 (KLR) (10 February 2022) (Ruling)

Neutral citation: [2022] KESC 3 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 12 (E021) OF 2021

MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU & W OUKO, SCJJ

FEBRUARY 10, 2022

BETWEEN

KENYA REVENUE AUTHORITY ..... 1ST APPLICANT

THE COMMISSIONER GENERAL OF KENYA REVENUE AUTHORITY ..... 2ND APPLICANT

THE COMMISSIONER OF CUSTOMS & EXCISE ..... 3RD APPLICANT

AND

MOUNT KENYA BOTTLERS ..... 1ST RESPONDENT

RIFT VALLEY BOTTLERS ..... 2ND RESPONDENT

NAIROBI BOTTLERS ..... 3RD RESPONDENT

KISII BOTTLERS ..... 4TH RESPONDENT

THE HON. ATTORNEY GENERAL ..... 5TH RESPONDENT

(Being an application for leave to file a notice of appeal and an appeal out of time from the judgment of the Court of Appeal dated 19th July 2019 (W. Karanja, J. Otieno Odek and S. Ole Kantai, JJ.A)

Guiding principles for extension of time to file an appeal out of time at the Supreme Court.

Reported by Kakai Toili

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to extend the time for filing an appeal - what were the guiding principles for extension of time to file an appeal out of time at the Supreme Court – Supreme Court Rules, 2020, rules 15, 36, 37 and 38; Court of Appeal Rules, 2010, rules 56,64,68 and 84.*

Brief facts

The applicants' appeal to the instant court was struck out for want of form. The court noted that the appeal did not contain any prayer for any specific relief; further, the appellant had failed to include in the record of appeal,

substantial and essential parts of the petition in the High Court. The applicant filed the instant application for leave to extend time to file a fresh notice of appeal or in the alternative, that time to file an appeal out of time be extended.

Issues

What were the guiding principles for extension of time to file an appeal out of time at the Supreme Court?

Relevant provisions of the Law

Supreme Court Rules, 2020

Rule 15 - Computation and extension of time

(1) The computation of time for any action under these Rules shall be in accordance with—

1. *any timeline provided for under the Constitution;*
2. *section 57 of the Interpretations and General Provisions Act (Cap. 2);*
3. *any directions of the Court.*

(2) The Court may extend the time limited by these Rules or by any decision of the Court

Held

1. The appeal did not pray for the setting aside of the judgment of the Court of Appeal, not to mention that the matter was mentioned several times before the Deputy Registrar, with the issue of incompleteness of the record coming up on August 25, 2020. An adjournment was granted specifically to allow the applicant to file a supplementary record of appeal. That was duly done on October 19, 2020. However, only the order and notes of the judges of the Court of Appeal were introduced in the supplementary record, omitting the High Court petition and part of the affidavit in support of the appeal.

2. Extension of time was an equitable remedy, the grant of which involved the exercise of judicial discretion. Equity aided the vigilant and not the indolent. From the numerous infractions and omissions identified, the appellants had not taken the processes of the court and their own appeal with the seriousness deserved.

3. The circumstances of the instant application were not contemplated by the Rules of the Supreme Court (the Rules). The extension of time for purposes of appeal to the court contemplated by rule 15 of the Rules were those arising from rules 36, 37 and 38 of the Rules. The court did not in its Rules have the equivalent of rules 56, 64, 68 and 84 of the Court of Appeal Rules, which provided, respectively for the restoration of a dismissed appeal where a memorandum of appeal was not lodged within the prescribed time or for non-appearance by the applicant or the appellant on the date of the hearing or where the appeal had been struck out on the ground that no appeal lay or that some essential step in the proceedings had not been taken within the prescribed time. The inherent power of the court to make such orders for the ends of justice to be met or to prevent abuse of the due process of the court, was not exercised in a vacuum.

4. The guiding principles in applications for extension of time were as follows;

1. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
2. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
3. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
4. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. whether there would be any prejudice suffered by the respondents if the extension was granted;
6. whether the application had been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.

5. The only regime of law that governed proceedings before the court were, the Constitution, Supreme Court Act, Supreme Court Rules and any practice directions. The Appellate Jurisdiction Act and the Civil Procedure

Rules were not applicable when moving the court. The court had to be moved under the correct provisions of the law, failing which the cause would be struck out.

6. The dispute commenced in the High Court in October 2012, ten (10) years ago, then moved to the Court of Appeal, over nine years ago in July 2013. To start the case all over again, for no fault of the respondents, was not only unconscionable but also insensitive and cruel. The applicants had not only been injudicious but also brazen in flouting the directions of the Registrar, and therefore undeserving of the court's exercise of discretion.

Application dismissed.

Orders

Applicants to bear costs of the application.

Citations

Cases

East Africa;

1. *Njihia, Daniel Kimani v Francis Mwangi Kimani & another* [2015] eKLR — (Explained)
2. *Kigi, Gabriel & 6 others v Kimotho Mwaura & another* [1997] eKLR — (Followed)
3. *Steyn, Hermanus Phillipus v Giovanni Gnecchi-Ruscone* [2013] eKLR — (Explained)
4. *Jedida Alumasa & 3 others v SS Kositany* [1997] eKLR — (Mentioned)
5. *Salat, Nicholas Kiptoo arap Korir v Independent Electoral and Boundaries Commission & 7 others* Application No 16 of 2014; [2014] eKLR — (Explained)

Statutes

East Africa;

1. Constitution of Kenya, 2010 articles 159(2)(d); 163(4)(a) — (Interpreted)
2. Court of Appeal Rules, 2010 (cap 9 Sub-Leg) rules 56, 64, 68, 84 — (Interpreted)
3. Customs And Excise Act (cap 472) section 127 C — (Interpreted)
4. Finance Act, 2020 (Act No 8 of 2020) section 13 — (Interpreted)
5. Supreme Court Act, 2011 (Act No 7 of 2011) sections 3, 21(2); 24(1) — (Interpreted)
6. Supreme Court Rules, 2012 (No 7 of 2011 - Sub-Leg) (Repealed) rules 9(1)(d); 33(4) — (Interpreted)
7. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) rule 3(9) 15(2); 32; 36(1); 37; 38(1) — (Interpreted)

Advocates

None mentioned

RULING

A. Introduction and Background

1. Being alive to the fact that on September 22, 2021, the applicants' Appeal, S C. Petition No 41 of 2019 (*Kenya Revenue Authority & 2 others v Mount Kenya Bottlers Limited & 4 others*) was struck out for want of form; the court noted that the Appeal did not contain any prayer for any specific relief; further, the appellant had failed to include in the record of appeal, substantial and essential parts of the Petition in the High Court contrary to rule 9(1) (d) of the *Supreme Court Rules of 2012 (repealed)*, which requires that a Petition must contain the relief sought.

   Being satisfied that failure to comply with rule 33(4) of the repealed 2012 rules, that requires certain documents to form part of the record of appeal, for the purpose of an appeal from the Court of Appeal was fatal and that the court having expressed disapproval at the lack of candour on the part of counsel for the applicant in failing to disclose the state of the record of appeal, though fully aware of its deficiency, and instead was prepared, to proceed with the hearing of the appeal as if all was well; and

2. For the aforesaid reasons the Appeal was struck out, prompting the applicant to take out the instant notice of motion dated September 29, 2021 for leave to extend time to file a fresh Notice of Appeal; or in the alternative, that time to file an appeal out of time be extended; and

3. Upon carefully perusing the motion, expressed to be brought pursuant to articles 159(2) (d) and 163 (4) (a) of the *Constitution*, sections 3, 21 (2) and 24(1) of the *Supreme Court Act (No 7 of 2011)*, rules 3(5), 15(2), 32, 36(1) and 38(1) of the *Supreme Court Rules 2020*; and

4. Upon considering the affidavit in support of that motion and a further affidavit sworn by Philip Munyao, who is described simply as an officer of the applicant as well as the replying affidavit sworn on the 15th of October 2021 by Xavier Alcoverro Selga, the Managing Director of the 3rd respondent on behalf of the rest of the respondents; and

5. Upon considering the written submissions on behalf of the applicants, to the effect that the order striking out the Appeal did not bar them from filing a fresh competent appeal; that they are, however, in a dilemma as to whether the striking out of the Appeal equally struck out the notice of appeal on record, hence the need to first seek leave to file a fresh notice of appeal out of time if that is the route, or whether the notice of appeal was not affected so that all they need to seek is time to file the fresh Appeal out of time; that this dilemma has been caused by the conflicting jurisprudence emanating from the Court of Appeal on the implication on the notice of appeal where an appeal has been struck out; that the applicants are still desirous of having the matters in controversy resolved on merit, being matters of great public interest touching on the Constitutional Interpretation of Parliament's mandate and power to legislate on taxation; that they have met the conditions set out in N*icholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, Sup Ct. Application 16 of 2014 [2014] eKLR; that they have satisfactorily explained the reasons for bringing the application; and that no prejudice will be occasioned to the respondents; and

6. upon perusing the two decisions of the Court of Appeal cited by the applicant as being contradictory on the effect of striking out the Appeal on the notice of appeal, namely, *Jedida Alumasa & 3 others vs SS Kositany* [1997] eKLR and *Gabriel Kigi & 6 others v Kimotho Mwaura & another* [1997] eKLR; and;

7. Having considered too the respondent's submissions in opposition to the application to the effect that, contrary to the submission by the applicants, the intended appeal is not concerned with the general interpretation of tax statues but limited to the interpretation only of section 127 C of the *Customs and Excise Act* following the amendment introduced by section 13 of the *Finance Act, 2004* which neither raises a matter of public interest nor of general public importance as enunciated by this court in *Hermanus Phillipus Steyn vs Giovanni Gnecchi – Ruscone*, [2013] eKLR; that the applicants failed to seek any specific reliefs in the Appeal; failed to amend or to apply for leave to amend it out of time, even after they were granted leave to file a supplementary Record of Appeal; that they cannot now plead that a mistake of their counsel should not be visited upon them; that they will be greatly prejudiced if the process was to start all over again; that the respondents have endured considerable costs and expense in defending the Appeal, while the applicants who are represented by an in-house counsel are not incurring any legal costs; and finally, that this litigation must come to an end.

B. Analysis and Determination

8. Recalling that on the 22nd of September 2021, when the appeal came up for hearing before the court, by an ex tempore order, it was struck out for two reasons as explained above, that there were no specific

reliefs sought in it, and secondly, that the record of appeal did not include essential portions of the Petition that was the subject matter in the two courts below. In the reasons rendered on 26th November 2021, the court explained that the applicant having had sufficient time to comply with rule 33(4) of the Supreme Court Rules 2012, which was applicable at the time, even after time to do so was availed, it was improper for its Counsel to still be willing to continue with the matter even when he was fully aware that the record was incompetent; and

9. Noting that indeed the respondents had in their affidavit warned the applicants that by merely asking this court to make pronouncements on certain principles of taxation "with a view to build the jurisprudence in taxation", their Appeal did not meet the threshold of article 163(4)(a) of the Constitution; and

10. Noting further that the appeal did not even pray for the setting aside of the judgment of the Court of Appeal, not to mention that the matter was mentioned several times before the Deputy Registrar, with the issue of incompleteness of the record coming up on the 25th of August 2020. An adjournment was granted specifically to allow the applicant to file a supplementary record of appeal. This was duly done on October 19, 2020. However, only the order and notes of the judges of the Court of Appeal were introduced in the supplementary record, omitting the High Court Petition and part of the affidavit in support of the Appeal; and

11. Considering that extension of time is an equitable remedy, the grant of which involves the exercise of judicial discretion, and that equity aids the vigilant and not the indolent, it is quite apparent to us, from the numerous infractions and omissions identified above, that the appellants have not taken the processes of this court and their own Appeal with the seriousness deserved, even after the applicants urged us to note that the matters in issue raise "matters of grave taxation implications".

12. Noting further that by rule 15 of the Supreme Court Rules, time will only be extended;

> " ... for any action under these Rules.....in accordance with—
>
> a. any timeline provided for under the Constitution;
>
> b. section 57 of the Interpretations and General Provisions Act
>
> c. any directions of the court.
>
> (2) The court may extend the time limited by these Rules or by any decision of the court" (Our emphasis).

13. Therefore the circumstances of the present application are not contemplated by the rules of this court, as readily admitted by the applicants in their arguments to the effect that the fate of the notice of appeal was not clear after the appeal was struck out. The extension of time for purposes of appeal to this court contemplated by rule 15 are those arising from rules 36, 37 and 38. This court does not in its rules have the equivalent of rules 56,64,68 and 84 of the *Court of Appeal Rules*, which provide, respectively for the restoration of a dismissed appeal where a memorandum of appeal is not lodged within the prescribed time or for non-appearance by the applicant or the appellant on the date of the hearing or where the appeal has been struck out on the ground that no appeal lies or that some essential step in the proceedings has not been taken or taken within the prescribed time. The two rulings cited to show inconsistencies in the decisions of the Court of Appeal court, as indeed all the provisions of the Constitution, the Supreme Court Act and the Supreme Court Rules relied on are of no help in the circumstances of this matter, and the inherent power of the court to make such orders for the ends of justice to be met or to prevent abuse of the due process of the court, is not exercised in a vacuum; and

14. Having considered this court's decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court, for the first time considered and outlined the guiding principles in applications for extension of time in this court, as follows:

> " 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
>
> vi) Whether in certain cases, like election petitions, public interest should be a consideration for extending time"; and

15. Recalling the history of this dispute, as well as the principles laid down by the court in *Daniel Kimani Njihia v Francis Mwangi Kimani & another*, [2015] eKLR, that the only regime of law that govern proceedings before it are, the Constitution, Supreme Court Act, the Supreme Court Rules and any Practice Directions; that the Appellate Jurisdiction Act and the Civil Procedure Rules are not applicable when moving this court; and that the court has to be moved under the correct provisions of the law, failing which the cause will be struck out.

16. Wenote that the dispute commenced in the High Court in October 2012, ten (10) years ago, then moved to the Court of Appeal, over nine years ago in July 2013. To start the case all over again, for no fault of the respondents, is not only unconscionable but also insensitive and cruel.

17. For these reasons we unanimously conclude that the applicants have not only been injudicious but also brazen in flouting the directions of the Registrar, and therefore undeserving of this court's exercise of discretion.

    We find no merit in the application and accordingly reject it. As costs follow the event, the applicants shall bear the costs of the Application.

C. Orders

18. Consequently, we make the following orders:

> i. The notice of motion dated September 29, 2021, filed on 1st October 2021 is disallowed.
>
> ii. The applicant shall bear the costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2022.

.....

M. KOOME

CHIEF JUSTICE & PRESIDENT

OF THE SUPREME COURT

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT

OF THE SUPREME COURT

.....

M.K IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA