



**Muthuuri & 4 others v Attorney General & 2 others (Petition (Application)
15 (E022) of 2021) [2022] KESC 74 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KESC 74 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) 15 (E022) OF 2021
MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM, I LENAOLA & W OUKO, SCJJ
NOVEMBER 4, 2022**

BETWEEN

EVANS MURIUKI MUTHUURI 1ST PETITIONER
ODIKARA OLING'A RUTH 2ND PETITIONER
DAVID OCHOM 3RD PETITIONER
LINET WANDIA NJAGI 4TH PETITIONER
GEORGE BARASA 5TH PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT
NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT
INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

(Being an application to extend time within which to file a Supplementary Record of Appeal)

Delays caused by a court's administrative process cannot be visited upon a party seeking to file a supplementary record of appeal

The applicant filed the instant application seeking among other orders the enlargement time within which they should file a supplementary record of appeal. The court held that delays caused by court's administrative processes to the detriment of a party could not be visited upon such a party because such a delay was beyond a party's reach. The court further pointed out that the principles for grant of an order of extension of time were that an applicant had to give sufficient reasons for any delay and that the period of delay was nonetheless an important consideration in the court's exercise of discretion to grant or deny the extension.

Reported by Kakai Toili

Civil Practice and Procedure - appeals - supplementary record of appeal - timeline for filing supplementary records of appeal - whether delays caused by courts' administrative processes to the detriment of a party seeking



to file a supplementary record of appeal could be visited upon such a party - what were the principles for grant of an order of extension of time to file a supplementary record of appeal - Supreme Court Rules, 2020, rule 15(2) and 31(1).

Brief facts

The applicant filed the instant application seeking among others the enlargement time within which they should file a supplementary record of appeal. It was their argument that the record of appeal arising from the judgment and order of the Court of Appeal in Nairobi Civil Appeal No. 352 of 2019 dated September 23, 2021 was incomplete as the duly sealed notice of appeal and order appealed from had not been filed. It was further their contention that on September 28, 2021 an application was made for the certified copy of the order arising from that judgment, however, they were directed to comply with the requirements of rule 34 of the , 2010, which they did by forwarding the draft order to the respondents on September 29, 2021 for approval.

In the absence of approval or response from the respondents, the applicants applied for settlement of the order culminating to the issuance of the notice of appeal by the Court of Appeal on January 26, 2022. The applicants further contended that the certified order dated September 23, 2021 was issued following further follow up efforts resulting in the filing of the instant application. The respondents argued that the delay was evidently inordinate and offended the principle that there should be an end to litigation and that they would suffer irreparable loss if the orders sought were granted.

Issues

- i. Whether delays caused by courts' administrative processes to the detriment of a party seeking to file a supplementary record of appeal could be visited upon such a party.
- ii. What were the principles for grant of an order of extension of time to file a supplementary record of appeal?

Held

1. Under rule 15(2) of the , 2020, the court had unfettered discretionary powers to extend the time limited by the Rules or by any of its decisions and any person intending to appeal to the court was required by rule 31(1) of the to file the notice of appeal within fourteen days from the date of the decision intended to be challenged.
2. From the record, after judgment of the Court of Appeal was rendered on September 23, 2021, the applicants applied for a certified copy of the same on September 28, 2021. The applicant's follow up efforts preceding the issuance of the order were not disputed by the respondents. Delays caused by court's administrative processes to the detriment of a party could not be visited upon such a party because such a delay was beyond a party's reach.
3. The principles for grant of an order of extension of time were that an applicant had to give sufficient reasons for any delay and that the period of delay was nonetheless an important consideration in the court's exercise of discretion to grant or deny the extension.
4. In spite of the respondents' argument that the applicants ought to have followed up physically at the registry, the application met the threshold of extension of time as the delay of two months in the instant matter was not inordinate as it was sufficiently explained, and it was not occasioned by the applicant but by the court. That explanation was reasonable and there was no prejudice to be occasioned to the respondents.

Application allowed.

Orders

Costs to abide the outcome of the appeal.

Citations

Cases

1. Aviation Cargo Support Limited v St. Mark Freight Services Limited (Civil Application 98 of 2013; [2014] KECA 835 (KLR)) — Explained



2. Base Titanium Limited v County Government of Mombasa & another (Petition 22 of 2018; [2021] KESC 33 (KLR)) — Explained
3. Charo, Hassan Nyanje v Khatib Mwashetani & 3 others (Application 15 of 2014; [2014] eKLR) — Followed
4. Geo Chem Middle East v Kenya Bureau of Standards (Petition 47 of 2019; [2020] KESC 1 (KLR)) — Followed
5. Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014; [2014] KESC 12 (KLR)) — Explained

Statutes

1. Civil Procedure Act — Section 1A, B; Section 3A — Cited
2. Constitution of Kenya, 2010 — Article 159(2)(d) — Interpreted
3. Court of Appeal Rules (CAP 9 Sub Leg) — Rule 34 — Interpreted
4. Supreme Court Rules — Rule 15(2); Rule 31(1); Rule 38(1)(a) — Interpreted

Advocates

None mentioned

RULING

1. Upon perusing the notice of motion application dated June 24, 2022 and filed physically and electronically and on July 20, 2022 and June 27, 2022 respectively pursuant to articles 159(2)(d) of the Constitution of Kenya, sections 1A, 1B and 3A of the Civil Procedure Act, rules 15(2) and 38(1)(a) of the Supreme Court Rules, 2020 and all other enabling provisions of the law, we note that the applicants seek the following orders:
 1. That this application be certified urgent and service thereof be dispensed with in the first instance.
 2. That this honourable court be pleased to enlarge time within which the petitioners/applicants should file a supplementary record of appeal being duly sealed notice of appeal dated September 28, 2021 and certified copy of Order dated September 23, 2021 in terms of the draft annexed hereto;
2. Upon perusing the grounds on the face of the application; the supporting affidavit sworn on June 24, 2022 by Evans Muriuki Muthuuri; and submissions dated July 19, 2022, it is the applicants' argument that the record of appeal dated October 28, 2021 filed on even date arising from the judgment and order of the Court of Appeal in Nairobi Civil Appeal No 352 of 2019 dated September 23, 2021 is incomplete as the duly sealed notice of appeal and order appealed from have not been filed. It is their contention that on September 28, 2021 an application was made for the certified copy of the order arising from the said judgment; however, they were directed to comply with the requirements of rule 34 of the Court of Appeal Rules 2010 which they did by forwarding the draft order to the respondents on September 29, 2021 for approval. In the absence of approval or response from the respondents, the applicants applied for settlement of the order culminating to the issuance of the Notice of Appeal by the Court of Appeal on January 26, 2022;
3. Upon considering the applicants' contention that the certified order dated September 3, 2021 was issued following further follow up efforts resulting in the filing of the present application. They affirm that their application is merited and should be allowed as the delay was caused by factors beyond their control as held by this court in Geo Chem Middle East v Kenya Bureau of Standards SC Petition (Application) No 47 of 2017 [2020] eKLR; and



4. Upon perusing the written submissions dated August 1, 2022 and filed on August 4, 2022 on behalf of the respondents and the replying affidavit by Silas Oloo Mc'Opiyo, acting Chief Executive Officer (CEO) of the 2nd respondent, sworn on August 1, 2022 and filed on August 4, 2022 wherein he deposes that the applicants having learnt of the ruling on April 20, 2022, ought to have physically followed up with the court registry within reasonable time rather than waiting for two months and following the same via email. It is their other argument that the applicants are not eager to have the said appeal determined as they are dragging their feet in filing the record of appeal considering no reasonable explanation has been rendered. Hence, the delay is evidently inordinate and offends the principle that there should be an end to litigation as held by the Court of Appeal in the case of *Aviation Cargo Support Limited v St Mark Freight Services Limited* [2014] eKLR; and, they allege that they would suffer irreparable loss if the orders sought herein are granted
5. Noting that the court under rule 15(2) of the *Supreme Court Rules 2020* has unfettered discretionary powers to extend the time limited by the rules or by any of its decisions; and any person intending to appeal to the court is required by rule 31(1) of the *Supreme Court Rules, 2020* to file the notice of appeal within fourteen days from the date of the decision intended to be challenged; and
6. Noting further from the record that after judgment of the Court of Appeal was rendered on September 23, 2021, the applicants applied for a certified copy of the same on September 28, 2021; and that the applicant's follow up efforts preceding the issuance of the order are not disputed by the respondents; and that delays caused by court's administrative processes to the detriment of a party cannot be visited upon such a party because such a delay is beyond a party's reach,
7. We reiterate our finding in the case of *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* Application No 15 of 2014 [2014] eKLR that it would not be in the interests of justice to turn away an applicant who has prima facie exercised all due diligence in pursuit of their cause but is impeded by the slow-turning wheels of court's administrative machinery; and the guiding principles set out in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* SC Application No 16 of 2014 [2014] eKLR as well as the case of *Base Titanium Limited v County Government of Mombasa & another* SC Petition (App) No 22 of 2018 which was echoed in *GEO Chem Middle East v Kenya Bureau of Standards* (*supra*) where we held that the principles for grant of an order of extension of time are that an applicant must give sufficient reasons for any delay and that the period of delay is nonetheless an important consideration in the court's exercise of discretion to grant or deny the extension;
8. We opine that in spite of the respondents' argument that the applicants ought to have followed up physically at the registry, we are satisfied that the application meets the above threshold as the delay of two months in this matter is not inordinate as the delay is sufficiently explained, and it was not occasioned by the applicant but by the court. We find that this explanation is reasonable and we see no prejudice to be occasioned to the respondents. Accordingly, we conclude that the application is meritorious and is to be allowed. As for costs, we note that the parties are still engaged in litigation before the court, it is only prudent that we defer the costs to follow the ultimate outcome of the appeal.
9. Consequently, we make the following orders:
 - i. The notice of motion dated June 24, 2022 and filed electronically and physically on June 27, 2022 and July 20, 2022 respectively be and is hereby allowed.
 - ii. The costs of this application to abide the outcome of the appeal.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2022.

.....

M. K. 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

.....

I. LENAOLA

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

