



**Mwangi & 2 others (As the Administrators of the Estate of Kenneth K Mwangi - Deceased)
v City County of Nairobi & another; Fidelity Commercial Bank (Interested Party)
(Miscellaneous Application 18 of 2018) [2019] KESC 35 (KLR) (29 March 2019) (Ruling)**

Damaris Njeri Mwangi & 2 others v City County of Nairobi & another; Fidelity Commercial Bank (Interested Party) [2019] eKLR

Neutral citation: [2019] KESC 35 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
MISCELLANEOUS APPLICATION 18 OF 2018
MK IBRAHIM, JB OJWANG, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ
MARCH 29, 2019**

BETWEEN

**DAMARIS NJERI MWANGI 1ST APPLICANT
VICTORIA NYAMBURA MWANGI 2ND APPLICANT
JEAN NYAMBURA MWANGI 3RD APPLICANT
AS THE ADMINISTRATORS OF THE ESTATE OF KENNETH K MWANGI -
DECEASED**

AND

**CITY COUNTY OF NAIROBI 1ST RESPONDENT
NANAK HOSPITAL MANAGEMENT SERVICES LIMITED . 2ND RESPONDENT**

AND

FIDELITY COMMERCIAL BANK INTERESTED PARTY

(Being an application for extension of time to file an appeal against the Judgment and Orders of the Court of Appeal (Asike-Makhandia, W. Ouko & A.K Murgor, JJA) at Nairobi delivered on 14th July, 2017 in Civil Appeal No. 228 of 2008))

Supreme Court dismisses an application for extension of time where the applicants did not account sufficiently for the nearly 3 months delay

The instant application was for extension of time to file an appeal against the judgment and orders of the Court of Appeal. The court dismissed the application as the applicants had not sufficiently accounted for the nearly 3 months delay.



Reported by Ian Kiptoo

Jurisdiction – *jurisdiction of the Supreme Court – jurisdiction of the Supreme Court to grant extension of time to file an appeal – discretionary power of the Supreme Court - where delay was occasioned by receiving typed and certified copies of the proceedings of the Court of Appeal late – where there was 3 months delay – whether the Supreme Court could allow an application for extension of time where the delay in filing an appeal was occasioned by receiving typed and certified copies of proceedings of the Court of Appeal late - Constitution of Kenya, 2010, article 163(8); Supreme Court Rules, rules 31 and 53*

Jurisdiction – *jurisdiction of the Supreme Court – jurisdiction of the Supreme Court – where an applicant invoked the civil procedure rules – where civil procedure rules were used to invoke High Court’s instructions - whether the Civil Procedure Rules as subsidiary legislation under the Civil Procedure Act could be used to invoke the jurisdiction of the Supreme Court*

Brief facts

The application before the court was for extension of time to file an appeal against the judgment and orders of the Court of Appeal. The applicants submitted that the delay in filing the appeal was occasioned by the delay in receiving the typed and certified copy of the proceedings in the Court of Appeal, having only received the certified proceedings once the time for lodging the petition to the Supreme Court had lapsed; that the delay of less than three months could not be considered inordinate; and that there would be no prejudice suffered by the respondents as they would be able to challenge the petition when presented in court.

On the other hand, the 2nd respondent contended that the court had no jurisdiction to determine the matter and that the applicants had failed to obtain a certification in respect of the intended appeal as required by the Supreme Court Rules, 2012.

Issues

- i. Whether the Supreme Court could allow an application for extension of time where the delay in filing an appeal was occasioned by receiving typed and certified copies of proceedings of the Court of Appeal late.
- ii. Whether the Civil Procedure Rules as subsidiary legislation under the Civil Procedure Act could be used to invoke the jurisdiction of the Supreme Court.

Held

1. As provided under rule 53 of the Supreme Court Rules, 2012, the Supreme Court could give further directions and extend the time limited under the Rules upon consideration of prevailing circumstances. The court had previously held that the discretionary power provided for under rule 53 would not be exercised where one had not acted equitably since the extension of time itself was a creature of equity. Furthermore, the court had previously found that a delay of 4 months in obtaining the typed proceedings was sufficient reason to justify the delay in filing a petition.
2. The applicants did not account sufficiently for the nearly 3 months delay, from the date when the typed proceedings were ready for collection, in filing the instant application other than to state that they made repeated inquiries to follow up on the status of the typed proceedings.
3. The question of prejudice had not been addressed by the respondents who would be best placed to state what prejudice they would suffer should the application be granted. That fact notwithstanding and while the delay had not been satisfactorily explained, on the face of it, no prejudice would be suffered by them.
4. The question of jurisdiction to extend time to file a notice of appeal to the Supreme Court was not an issue subject to controversy. The notice of appeal was provided by rule 31 of the Supreme Court, Rules 2012. Further, the power to extend time was provided for by rule 53 of the Rules. Those Supreme Court Rules were enforced by the Supreme Court as provided by article 163(8) of the Constitution of Kenya, 2010 (Constitution).



5. The court's alleged lack of jurisdiction raised by the 2nd respondent in regard to the lack of certification and/or there being no matters of constitutional interpretation and application in the intended appeal was premature and could only be properly determined when there was a petition before the court routing specific issues that could raise jurisdictional questions. At the instant stage, there was nothing before the court to point to that issue.
6. The applicants partly invoked the jurisdiction of the court by citing rules applicable in the High Court being the Civil Procedure Rules. Those procedural rules were not applicable before the court.

Application dismissed with no orders as to cost.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. Upon perusing the Notice of Motion application by the Applicants dated 29th June, 2018 and filed under Certificate of Urgency by the Applicants on 3rd July, 2018 brought under Sections 1A, 1B & 3A of the Civil Procedure Act, Rules 33 and 53 of the Supreme Court Rules, Order 50 Rule 6 and Order 51 of the Civil Procedure Rules and all enabling provisions of the Law, seeking for extension of time to file an appeal out of time against the Judgment and Orders of the Court of Appeal in Civil Appeal No. 228 of 2008; and
2. Upon reading the Applicants' grounds in support of the Application, the Supporting Affidavit sworn on 29th June, 2018; and
3. Upon considering the Applicant's written submissions dated 3rd September, 2018 and filed on 5th September, 2018 wherein the Applicants submit that the delay in filing the appeal was occasioned by the delay in receiving the typed and certified copy of the proceedings in the Court of Appeal, having only received the certified proceedings once the time for lodging the Petition to the Supreme Court had lapsed, and that: (a) the delay of less than three months cannot be considered inordinate; (b) the prejudice to the Applicant would be substantial as the denial of the right to be heard would lead to the loss of Kshs. 400 million; and (c) there would be no prejudice suffered by the Respondents as they would be able to challenge the Petition when presented in Court;
4. Further, it was submitted by the Applicants that the Preliminary Objection raised by the 2nd Respondent that this Court has no jurisdiction to determine this matter and that the Applicants had failed to obtain certification in respect of any appeal to be filed, is ideally misplaced at this point in time because the Petition is not yet before the Supreme Court for its determination; and
5. Upon reading the 2nd Respondent's Preliminary Objection dated 1st August, 2018 and filed on 2nd August, 2018 wherein it submits that this Court has no jurisdiction to determine this matter and that the Applicants had failed to obtain a certification in respect of the intended appeal as required by Rule 24(1) of the Supreme Court Rules, 2012; and
6. Upon considering the 2nd Respondent's written submissions dated and filed on 27th September, 2018 in which it has urged that there is inordinate and unexplained delay as the Applicants have not demonstrated how they made the alleged inquiries and follow-ups on the typed proceedings or disclosed when they collected the certified typed proceedings and that in any event, Rule 33(3) of the



Supreme Court Rules, 2012 does not make mention of certified typed proceedings as one of the prerequisites for filing a Record of Appeal. And that the typed proceedings in this matter were ready for collection from 15th March, 2018 making it unclear why the Applicants took more than three months to file this Application;

7. We find as follows;
 - a. As provided under Rule 53 of the Supreme Court Rules, 2012, the Court may give further directions and extend the time limited under the Rules upon consideration of prevailing circumstances.
 - b. In *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014 eKLR] this Court held that the discretionary power provided for under Rule 53 will not be exercised where one has not acted equitably since the extension of time itself is a creature of equity.
 - c. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR this Court found that a delay of 4 months in obtaining the typed proceedings was sufficient reason to justify the delay in filing a Petition.
 - d. The Applicants here do not account sufficiently for the nearly 3 months delay (from the date when the typed proceedings were ready for collection) in filing the present Application other than to state that they made repeated inquiries to follow up on the status of the typed proceedings.
 - e. The question of prejudice has not been addressed by the Respondents who would be best placed to state what prejudice they may suffer should the Application be granted. That fact notwithstanding and while the delay has not been satisfactorily explained, on the face of it, no prejudice would be suffered by them.
 - f. On the Court's jurisdiction to extend time, this Court settled that question in *John Ochanda v Telkom Kenya Limited* [2014] eKLR where we stated thus: "We have already stated the Court's jurisdiction to extend time. We reiterate that the question of jurisdiction to extend time to file a notice of appeal to appeal to the Supreme Court is not an issue subject to controversy. The notice of appeal is provided by rule 31 of the Supreme Court, Rules 2012. Further, the power to extend time is provided for by Rule 53 of the same Court Rules. These Supreme Court Rules are enforced by the Supreme Court as provided by Article 163(8) of the Constitution which...."
 - g. The second aspect of this Court's alleged lack of jurisdiction as raised by the 2nd Respondent is the lack of certification and/or there being no matters of constitutional interpretation and application in the intended appeal. That matter is premature and can only be properly determined when there is a Petition before the Court routing specific issues that may raise jurisdictional questions. At this stage, there is nothing before us to point us to that issue.
 - h. We note, lastly, that the Applicants partly invoke the jurisdiction of this Court by citing Rules applicable in the High Court being the Civil Procedure Rules. Those procedural Rules are not applicable before this Court.
8. Without a satisfactory explanation as to delay, the present Application is one for dismissal which we hereby do.
9. Having therefore considered the Application and affidavit in support thereto, the preliminary objection in opposition thereof and the written submissions of the respective parties, by a unanimous



decision of this Bench, we make the following orders under Section 23(2)(b) of the Supreme Court Act, 2011 and Rules 21 and 23 of the Supreme Court Rules, 2012;

Orders

- a. The application dated 3 July, 2018 is hereby dismissed;
- b. There shall be no order as to costs.

10. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH, 2019

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

THE REGISTRAR

SUPREME COURT OF KENYA

