



Sarah Anyangu Ochieng v Technical University of Kenya (Civil Application 7 of 2018) [2019] KESC 34 (KLR) (29 March 2019) (Ruling)

Sarah Anyangu Ochieng v Technical University of Kenya [2019] eKLR

Neutral citation: [2019] KESC 34 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 7 OF 2018
JB OJWANG, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ
MARCH 29, 2019**

BETWEEN

SARAH ANYANGU OCHIENG PETITIONER

AND

TECHNICAL UNIVERSITY OF KENYA RESPONDENT

(Being an application for extension of time to file an appeal against the Judgment and Orders of the Court of Appeal (P.N Waki, F. Sichale and S. Ole Kantai, JJA) at Nairobi delivered on 21st March, 2018 in Nairobi Court of Appeal Civil Appeal No. 21 of 2018)

Factors to consider in determining whether to allow an application for extension of time to file an appeal at the Supreme Court

The instant application sought extension of time to file an appeal out of time. The court highlighted factors to consider in determining whether to allow an application for extension of time to file an appeal at the Supreme Court.

Reported by Kakai Toili & Flora Weru

Civil Practice and Procedure - appeals to the Supreme Court-timelines for filing appeals-extension of time for filing appeals - factors to consider - what were the factors to consider in determining whether to allow an application for extension of time to file an appeal at the Supreme Court.

Jurisdiction - jurisdiction of the Supreme Court - appellate jurisdiction - requirements to be met before appealing to the Supreme Court - statement of the particular appellate jurisdiction of the Supreme Court – failure to state the particular appellate jurisdiction – effect of – where one was appealing against a decision of the Court of Appeal - what was the effect of failure to state the particular appellate jurisdiction of the Supreme Court where one was appealing against a decision of the Court of Appeal.



Brief facts

The applicant filed the instant application seeking an extension of time to file an appeal out of time. The applicant contended that the delay in filing the notice was occasioned by the fact that the Court of Appeal had given a judgment date but that it did not deliver any judgment on that date. The applicant alleged that she only became aware that a judgment had been delivered when her advocates received a letter from the respondent's advocates demanding payment of costs by which time the 14 day period for filing an appeal to the Court had lapsed.

Issues

- i. What were the factors to consider in determining whether to allow an application for extension of time to file an appeal?
- ii. What was the effect of failure to state the particular appellate jurisdiction of the Supreme Court where one was appealing against a decision of the Court of Appeal

Held

1. In determining an application such as the instant one, the Court had to consider whether the explanation given for any delay was reasonable and credible. There also had to exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction. The delay, in any event, should not be so inordinate as to show that an applicant had been slothful and filed such an application as an after-thought.
2. The applicant's explanation was not tenable in view of the fact that the Court of Appeal record, which would have shown whether notice was given or not had not been placed before the Court and there was no denial of the respondent's contention that such a notice was issued hence the reason its advocates attended court.
3. Even if the delay was excusable, the respondent had raised the issue of the jurisdiction of the Court to determine the intended appeal. In other instances, the Court had declined to address the issue of jurisdiction in an application for extension of time to file an appeal. In the instant case however, the issue was glaring and had to be addressed at that stage.
4. The notice of appeal sought to challenge the whole decision that the appeal lacked merit. The draft notice of appeal did not however indicate whether the intended appeal was to be filed under article 163(4)(a) of the Constitution as a matter of right or 163(4)(b) as a matter of great public importance. It was not for the Court to speculate on whether the intended appeal fell into either of the two categories of appeals. Without clarity on the crucial question of the jurisdiction being invoked, the intended appeal was rendered vague, frivolous and untenable.

Application dismissed; applicant to bear costs of the application

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. Upon perusing the Notice of Motion Application by the Applicant dated 24th April, 2018 and filed on 25th April, 2018 brought under Rules 31(1) and 53 of the Supreme Court Rules, 2012 seeking an extension of time to file an appeal out of time against the Judgment and Orders of the Court of Appeal in Nairobi Civil Appeal No. 78 of 2018; and



2. Upon reading the Applicant's grounds in support of the Application, the Supporting Affidavit sworn on 24th April, 2018; and
3. Upon considering the Applicant's written submissions dated 25th May, 2018 and filed on 29th May, 2018 wherein the Applicant submits that the delay in filing the appeal was occasioned by the fact that the Court of Appeal had given a Judgment date for 26th January 2018 but did not deliver any Judgment on that date; and, that the Applicant only became aware that a Judgment had been delivered when her advocates received a letter dated 12th April 2018 from the Respondent's Advocates demanding payment of costs by which time the 14 days period for filing an appeal to this Court had lapsed; and
4. Upon reading the Respondent's Replying Affidavit sworn on 8th June 2018 and filed on 11th June 2018 in which it opposed the Application arguing that the same was brought inordinately and with undue and unexplained delay, and, that all parties were called to attend delivery of the Judgment on 21st March 2018 but the Applicant's advocates did not show up; and that, in any event, the filing of the present Application is an afterthought; and further, that no certification under Article 163(4)(b) of the Constitution was obtained at the Court of Appeal prior to its filing; and
5. Upon considering the Respondent's written submissions dated 8th June 2018 and filed on 11th June, 2018 in which, the Respondent has argued that the jurisdiction of this Court has not been properly invoked under Article 163 of the Constitution as read with Rule 30(2) of the Supreme Court Rules; and, that the Application is otherwise an abuse of Court process fit only for dismissal;
6. We find as follows;
 - (a) The jurisprudence of this Court on the considerations for grant or denial of an application for extension of time was well expressed in *Charo v Mwashetani and 3 others (2014) KLR-SCK and Application No.16 of 2014, Nicholas Kiptoo Arap Korir Salat v IEBC and 7 others* among other cases.
 - (b) In determining such an application, the Court has to consider whether the explanation given for any delay is reasonable and credible. That there also exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction. The delay, in any event, should not be so inordinate as to show that an applicant has been slothful and filed such an application as an after-thought.
 - (c) In the present case, the delay is of thirty one (31) days explained by non-attendance at the delivery of the Court of Appeal Judgment on 21st March 2018 because no notice of such delivery was given to the Applicant's advocates, a claim vehemently denied by the Respondent. We find that explanation not tenable in view of the fact that the Court of Appeal record, which would have shown whether notice was given or not has not been placed before us and there is no denial of the Respondent's contention that such a notice was issued hence the reason its advocates attended Court.
 - (d) More fundamentally, even if the delay is excusable, we note that the Respondent has raised the issue of the jurisdiction of this Court to determine the intended appeal. In other instances, we have declined to address the issue of jurisdiction in an application for extension of time to file an appeal. In this case however, the issue is glaring and must be addressed at this stage. We say so because we have read the Judgment of the Court of Appeal and perused the draft Notice of Appeal attached to the Applicant's Affidavit in support. The Notice seeks to challenge "the whole decision that the appeal lacked merit".



- (e) The draft Notice of Appeal does not however indicate whether the intended Appeal is to be filed under Article 163(4)(a) of the Constitution as a matter of right or 163(4)(b) as a matter of great public importance.
 - (f) It is not for this Court to speculate on whether the intended Appeal falls into either of the two categories of appeals before it. Without clarity on the crucial question of the jurisdiction being invoked, the intended appeal is rendered vague, frivolous and untenable.
7. Having therefore considered the Application, the Affidavit in support and Supplementary Affidavit filed in support thereto, the Replying Affidavit 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 24th April, 2018 and filed on 25th April, 2018 is hereby dismissed.
 - (b) The Applicant shall bear costs Application.
- (8. 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

