



Ochanda (Suing on his Behalf and on Behalf of 996 Former Employees of Telkom Limited) v Telkom Kenya Limited (Motion 24 of 2014) [2014] KESC 7 (KLR) (25 November 2014) (Ruling)

John Ochanda v Telkom Kenya Limited [2014] eKLR

Neutral citation: [2014] KESC 7 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
MOTION 24 OF 2014
MK IBRAHIM & SC WANJALA, SCJJ
NOVEMBER 25, 2014**

BETWEEN

JOHN OCHANDA APPELLANT

**SUING ON HIS BEHALF AND ON BEHALF OF 996 FORMER EMPLOYEES OF
TELKOM LIMITED**

AND

TELKOM KENYA LIMITED RESPONDENT

(Being an application for Extension of time within which to file and serve a Notice of Appeal against part of the judgment and orders of Hon. Justice Githinji, Karanja and Kiage JJA delivered on the 9th of April 2014 allowing Respondents Appeal)

Principles to be considered in exercising discretion to extend time for filing appeals

Reported by Nelson K Tunoi

***Civil Practice and Procedure** – extension of time – application for extension of time to file and serve a notice of appeal – where the applicants, inter alia, had inadvertently cited rule 30 instead of rule 31 of the Supreme Court Rules in their already filed notice of appeal – whether that was sufficient reason to warrant the extension of time by the court – whether the respondents would suffer prejudice if the application was granted – whether the application was merited – Supreme Court Rules, 2012, rules 3(1), (5), 23 & 53*

***Jurisdiction** – jurisdiction of the Supreme Court - Whether the Supreme Court had jurisdiction to entertain an application where leave to file such an application had not been granted by the Court of Appeal – Constitution of Kenya, 2010, article 163(8); Supreme Court Rules, 2012, rule 53*

Brief facts

The applicants filed an application before the Supreme Court for extension of time within which to file and serve a notice of appeal against part of the judgment and orders of the Court of Appeal. The applicants had inadvertently cited rule 30 instead of rule 31 of the Supreme Court Rules in their already filed notice of appeal.



In addition they erroneously indicated that they intended to appeal to the Court of Appeal instead of the Supreme Court. In response, the respondent contended that that was an abuse of the courts process as the applicants did not have an automatic right of appeal to the Supreme Court. The respondents further argued that the Supreme Court lacked jurisdiction to determine the application for extension of time as the applicants had neither sought nor been granted leave to appeal to the Supreme Court.

Issues

- i. Whether the applicant had established a satisfactory basis to warrant the Supreme Court to extend time to file a notice of appeal.
- ii. Whether the Supreme Court had jurisdiction to entertain an application where leave to file such an application had not been granted by the Court of Appeal.

Held

1. Extension of time was a discretionary and a very powerful tool which should be exercised with abundant caution, care and fairness. It should be used judiciously and not whimsically to ensure that the principles enshrined in the Constitution were realized.
2. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & Others* (the *Nick Salat* case laid down the following principles to consider in exercising its discretion to extend time:
 - i. 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;
 - ii. A party who sought for extension of time had the burden of laying a basis to the satisfaction of the court.
 - iii. Whether the court should exercise the discretion to extend time, was a consideration to be made on a case to case basis;
 - iv. Whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there would be any prejudice suffered by the respondents if the extension was granted;
 - vi. Whether the application had been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
3. The question of jurisdiction to extend time to file a notice of appeal to 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 same Court Rules. These Supreme Court Rules were enforced by the Supreme Court as provided by article 163(8) of the Constitution.
4. The Supreme Court was a new court in the Kenyan legal system and its *modus operandi* was still not conversant to most litigants and members of the bar at large. While the *Nick Salat* case (*supra*) the Supreme Court on its own motion moved to correct the anomaly after noting that the counsel for the applicant had cited the old Supreme Court Rules, 2011, in the instant case, it was the advocate for the applicant who noted the anomaly and took steps to correct it. Though he may have opted for a longer route of withdrawal and not amendment, the Court took into consideration the principles in article 159(2)(d) of the Constitution to focus on substantive justice in disregard to procedural technicality in that case.
5. The applicants complied with the substantive requirement and filed a notice of appeal within time. However due to what they confessed to be some inadvertent errors, the notice of appeal had apparent errors and they withdrew it. Without appearing to sanction the errors on the face of the notice of appeal, it was not in doubt that the 'notice of appeal' served its substantive purpose: the respondents were informed of the appellants intent to appeal and any subsequent proceedings thereafter could not be said to constitute an ambush to the respondents. Consequently, that settled any prejudice that the respondents may be apprehensive of: there was none as they already had notice.



6. Counsel for the respondent contended that the applicants did not have an automatic right of appeal to the Supreme Court and having neither sought nor been granted leave, the Court lacked jurisdiction to determine the application. They did not however, challenge the fact that the applicant acted in a timely manner to correct the error and that the error was accidental. Court disagreed with the respondents that the applicants ought to have first sought leave from the Court of Appeal. The question under inquiry was one of a notice of appeal. The law was categorical that a notice of appeal had to be filed fourteen (14) days from the date of judgment whether or not leave was required.

Application allowed.

Orders

The applicants' notice of motion dated June 5, 2014 allowed; Time to file and serve a notice of appeal extended. The applicant to file and serve a notice of appeal within 7 days of the date hereof; The applicants to bear the costs of the respondents in the application.

Citations

Statutes

1. Constitution of Kenya, 2010

Advocates

Mr Oluoch and Ms Beatrice Nduta

Mr Emmanuel Wetangula

RULING

Introduction

- 1 This is an application by way of Notice of Motion dated 5th June, 2014 brought under Rules 31, 53, and 53 of the Supreme Court Rules 2012 seeking orders that:
 - a. This application be certified as urgent and for reasons to be recorded in Court, service in the 1st instance be dispensed with.
 - b. This Honourable Court be pleased to extend the time within which to file and serve a notice of appeal.
 - c. Costs of this application be awarded to the applicant.
- 2 The application is premised upon eight 8 grounds in the body of the application and the Supporting Affidavit of the applicant, John Khoyi Ochanda, dated 5th June, 2014. These grounds are inter alia that:
 3. On the 21st of May, 2014 the applicants filed a notice of appeal in the Court of Appeal registry as per the old Rules of the Supreme Court and cited Rule 30 instead of Rule 31 of the Supreme Court Rules.
 4. The said notice carried an erroneous but inadvertent statement that “it is intended to appeal against part of the Judgment to the Court of Appeal” instead of ... intended to appeal to the Supreme Court.
 5. These inadvertent errors may compromise the applicants’ intended appeal and accordingly wrote to the Registrar of the Supreme Court to cause the matter to be mentioned before the Court for purposes of withdrawal of the said defective notice of appeal.



6. The initial but defective notice of appeal was timeously sic and served in accordance with the rules of the Supreme Court.
 7. The applicants have also timeously sic taken steps to withdraw the said defective notice and hereby apply to the Court to grant leave to file a fresh notice of appeal out of time.
- 3 On the 10th June, 2014 this matter heard by a single judge of this Honourable Court, Ibrahim, SCJ, who certified it urgent and set it down for hearing on the 23rd June 2014.

Background

- 4 This application originates from the actions of the applicants', who being aggrieved by Court of Appeal judgment in Civil Appeal No. 60 of 2013, Telkom Kenya V John Ochanda & 996 others delivered on 9th May 2014, filed a notice of appeal on the 21st May 2014 in the Court of Appeal Registry. On the face of the notice of appeal, the applicant cited rule 30 instead of rule 31 of the Supreme Court Rules, 2012. In addition, the notice of appeal erroneously indicated that they applicants intend to appeal to the Court of Appeal instead of the Supreme Court.
- 5 Upon realising the errors on the face of the notice of appeal, the applicants wrote to the Registrar of the Supreme Court on 30th May, 2014 informing her of their intention to withdraw the notice of appeal under rules 19 of the Supreme Court Rules, 2012 as read together with rule 40 2 of the Supreme Court Rules 2012. They further urged the Registrar to place the matter before the Court for directions. Rule 19 provides:
- 19.
 1. A party may at any time before judgment, with leave of the Court, withdraw any proceedings.
 2. An application under this rule may be made orally in Court.
- 6 Notably, on 10th June, 2014, the applicants filed Application No. 25, John O. Ochanda vs Telkom Kenya Limited in which they sought leave of the Court to withdraw the said 'defective notice of appeal'. The matter was heard by a single judge of the Court, Ibrahim, SCJ who while allowing the motion for withdrawal stated inter alia:

“I do hold the view that a prospective Appellant is at liberty to withdrawal a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents, if any.

In this particular case, there cannot be any reason for inter partes hearing and the matter can proceed ex parte as the right to withdraw cannot be taken away.”

- 7 Following the Court's order withdrawing the notice of appeal, the applicants now seeks this Court intervention to exercise its discretion to extend time within which to file and serve a notice of appeal.



Submissions

Applicants' submissions

- 8 The application was canvassed on 23rd June, 2014. The applicants, being represented by learned counsel Mr. Oluoch and Ms Beatrice Nduta, submitted that they were aggrieved by the Court of Appeal decision delivered on 9th May 2014 allowing Civil Appeal No 60 of 2013 Telkom Kenya Limited V John Ochanda & 996 Others. On the 21st May 2013, they proceeded and filed a notice of appeal as required by the law. However, it was counsel's submission that on the face of the notice of appeal, they cited rule 30 instead of rule 31 of the Supreme Court Rules, 2012. Counsel submitted that rule 30 was in reference to the old Supreme Court Rules, 2011.
- 9 Mr. Oluoch also stated that the notice of appeal filed contained an erroneous and inadvertent statement that "it is intended to appeal against part of the judgment to the Court of Appeal" instead of "intended to appeal to the Supreme Court". Counsel submitted that while it is arguable that the apparent defects could be cured by way of amendments, the applicants have opted and timeously taken steps to withdraw the defective notice of appeal. Having withdrawn the defective one, they are hereby seeking an extension of time to enable them file a fresh one as in their opinion, the one with errors could compromise their intended appeal.
10. Counsel argued that the defective notice of appeal was timely filed and served in accordance with the rules of this Court. He further urged this Court to take into account the period of the delay and stated that the Court will note that no time was wasted. Even upon the discovery of the error, it was submitted that steps were taken immediately to correct the same by filing Application Motion No. 25 of 2014 to this Court.
- 11 It was also submitted that the matter involves a large number of applicants who were former employees of the respondent company. Counsel urged the Court that in the interest of justice, it considers the grant of leave to file a fresh notice of appeal by extension of time.
- 12 In response to the objection, in the Replying Affidavit of the respondents, that no leave has been granted to appeal to the Supreme Courts, counsel submitted that the intended appeal is one based on constitutional interpretation and no leave is required as they shall be moving the Court as of right. He also countered that it is immature at this stage to lay down the merits of the appeal as they will be advanced at the correct time. He submitted that a question of interpretation cannot be speculated at this juncture. He sought to rely upon the case of Kenya Bankers Association v. Rose Florence Wanjiru & 2 Others, Civil Application No. 7 of 2013 in which it was stated:
- "The time for lodging the appeal is hereby extended to 14 days after the applicant obtains certification that a matter of general public importance is involved from either the Court of Appeal or the Supreme Court. Needless to say this extension has no bearing on the outcome of the application pending before the Court of Appeal or any possible other application in the Supreme Court."
- 13 Counsel urged the Court to grant the orders as prayed and extend time so as to avail audience to the applicants.

Respondents' Submissions

- 14 Learned Counsel Mr. Emmanuel Wetangula appeared for the respondents. In opposition to the application, counsel submitted that Civil Appeal No. 60 of 2013, subject matter of the decision of



the Court of Appeal subject of this application, was not the substantive appeal from the High Court decision but an appeal against an attempt by the applicants' herein to execute, albeit prematurely, the decree of the High Court and an attempt to convert the declaratory judgment into one for special damages and money decree through affidavit long after the final judgment had been delivered by the High Court on 28th September 2011.

- 15 Counsel submitted that this application is misconceived and an abuse of the Court's process for the reason that the applicants do not have an automatic right of appeal to this Court hence the Court lacks jurisdiction to determine it. Counsel argued that no application for leave has been filed in the Court of Appeal; the intended appeal has not been certified as raising any substantial question of law under Article 163 4 of *the Constitution*. He stated that in the absence of the certification from the Court of Appeal, the applicant has no right of audience before this Court on any issue arising from the judgment of the Court of Appeal.
- 16 Counsel urged the Court to find that the intention to appeal was spurious and without any substantive foundation

Determination

- 17 The single issue before this Court is whether a basis has been satisfactorily laid to warrant this Court to extend time to file a notice of appeal. Rule 53 of the Supreme Court Rules, 2012 grants this Court discretion to extend time. It provides that:

The Court may extend the time limited by this rules or by any other decision of the Court.

- 18 This Court in the Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & Others Supreme Court Application No. 16 of 2014 The Nick Salat case acknowledged that extension of time is a discretionary and a very powerful tool which should be exercised with abundant caution, care and fairness. It should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realized. The Court proceeded to lay down the following under-lying principles to guide the Court, at page 31 thus:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and



7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

19 The applicants herein submitted that on the 21st May 2014 they filed a notice of appeal and inadvertently cited rule 30 instead of rule 31 of the Supreme Court Rules. In addition they erroneously indicated that they intend to appeal to the Court of Appeal instead of the Supreme Court. In response the respondent contended that this is an abuse of the Courts process as the applicants do not have an automatic right of appeal to this Court. They further argued that this Court lacked jurisdiction to determine this application as the applicants have neither sought nor been granted leave to appeal to this Court.

20. 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 states:

The Supreme Court shall make rules for the exercise of its jurisdiction.

Consequently the respondents’ claim of lack of jurisdiction is best negated.

21 It is not in doubt that the ‘defective notice of appeal’ was filed within time. Hence, it cannot be gainsaid that the applicants herein appreciated the importance of a notice of appeal. In the Nick Salat case, this Court buttressed the importance of a notice of appeal and the need of it being filed in time. The Court stated at page 19 thus:

“Suffice it to say that under the current Court Rules, one need not seek and get certification before filing a Notice of Appeal. A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant’s notice of appeal as having been filed out of time in *Silverbrand vs County of Los Angeles* 2009 46 Cal. 4th 106, 113 stated inter alia:

“As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. “Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.” Sic The purpose of this requirement is to promote the finality of judgments by forcing the losing party to take an appeal expeditiously or not at all.”

22 The importance of notice of appeal was further stated by this Court in *Zacharia Okoth Obado v. Edward Akong’o Oyugi & 2 Others*, Civil Application No. 7 of 2014, where the Court endorsed its earlier decision thus:[paragraph 36];

“The importance of the notice of appeal has been stated in *Law Society of Kenya v. The Centre for Human rights & Democracy & 12 Others*, Petition no. 14 of 2013, Law Society case in which this Court stated:

“The Notice as its title indicates is a signification of intent by the potential appellant, to challenge by way of appeal, the decision of a lower Court. The Petition of Appeal on the



other hand is a statement of grievance, an appeal cause against the judgment of a lower Court. The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it”

.....“If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine “the appeal” on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed this is the gist of Rule 33 1 of the Supreme Court Rules.”

- 23 The applicants in this matter timely filed the jurisdictional pre-requisite document that is a notice of appeal. However they erroneously cited rule 30 which refers to applications during state of emergency instead of rule 31 of the Court’s Rules. The conduct of the applicants thereafter is worth examining. Having complied with the substantive legal requirement of filing a notice of appeal, they realized that the document they had filed had errors on the face of it. They had an option of seeking to amend it but opted to seek leave of this Court to withdraw it. Thereafter, they now moved this Court to extend time so as to file a proper notice of appeal.
- 24 On the basis of the principles in Nick Salat case, it cannot be gainsaid that the applicants have not wasted any time whatsoever in their cause of action. It should also be noted that the apparent errors were not noted and/or raised by the respondents but by the applicants themselves and once they were detected steps were judiciously taken to correct them. The applicants even involved the Court by way of Application No. 25 of 2014. The applicants conduct cannot be described in any other terms but as an exercise of diligence.
- 25 The applicants’ advocate’s error is not isolated. The Supreme Court is a new court in the Kenyan legal system and its modus operandi is still not conversant to most litigants and members of the bar at large. In the Nick Salat case, this Court noted that counsel cited the old Supreme Court Rules, 2011 in its pleadings. It is the Court on its own motion that moved to correct the anomaly and set the record straight. The Court queried the conduct of the advocate in that case stating at page 18 thus:
- “This error is puzzling. An advocate is an officer of the Court and has a duty to aid the Court reach a legitimate determination founded on sound law. Hence, an advocate has to be abreast with the law and keep pace with the various developments. It is surprising that the learned Counsel referred to the Supreme Court, Rules 2011 which were repealed on 26th October, 2012 via Legal Notice No. 123 by the enactment of Supreme Court Rules, 2012.”
- 26 While in the Nick Salat case, it is the Court that noted the error, we cannot fail to note that in the present case, it is the advocate who have noted the anomaly and taken steps to correct it. Though he may have opted for a longer route of withdrawal and not amendment, this Court sees no better time when it should reflect on the principles in Article 159 2 d of *the Constitution* to focus on substantive justice in disregard to procedural technicality than this case. Article 159 2 d of *the Constitution* provides:
- 159 2 in exercising judicial authority, the courts and tribunals shall be guided by the following principles-
- ...
- d justice shall be administered without undue regard to procedural technicalities; and ...
- 27 The applicants complied with the substantive requirement and filed a notice of appeal within time. However due to what they confess to be some inadvertent errors, the notice of appeal had apparent



errors and they withdrew it. Without appearing to sanction the errors on the face of the notice of appeal, it is not in doubt that the ‘notice of appeal’ served its substantive purpose: the respondents were informed of the appellants intent to appeal and any subsequent proceedings thereafter cannot be said to constitute an ambush to the respondents. Consequently, this settles any prejudice that the respondents may be apprehensive of: there is none as they already had notice.

28 Counsel for the respondent contended that the applicants do not have an automatic right of appeal to this Court and having neither sought nor been granted leave, this Court lacked jurisdiction to determine this application. They did not however, challenge the fact that the applicant acted in a timely manner to correct the error and that the error was accidental. We disagree with the respondents that the applicants should first seek leave from the Court of Appeal. The question under inquiry is one of a notice of appeal. The law is categorical that a notice of appeal has to be filed fourteen 14 days from the date of judgment whether or not leave is required. Rule 31 of the Supreme Court Rules, 2012 states:

31.

1. A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the First schedule, with the Registrar of the court or with the tribunal, it is desired to appeal from.
2. Where an appeal lies only on a certificate that a matter of general public importance is involved, it “SHALL NOT” be necessary to obtain such certification before lodging the notice of appeal.

29 This point was buttressed in the Nick Salat case at page 19 thus:

“Suffice it to say that under the current Court Rules, one need not seek and get certification before filing a Notice of Appeal. A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

Hence respondents cannot fault the applicants for not seeking leave before filing this application to this Honourable Court.

Orders

30. From the foregoing analysis, it is our finding that the applicants have sufficiently laid a basis for extension of time. Consequently we make the following orders:

- i. The applicants’ notice of motion dated 5th June, 2014 is allowed.
- ii. Time is hereby extended to file and serve a notice of appeal. The applicant shall file and serve a notice of appeal within 7 days of the date hereof.
- iii. The applicants shall bear the costs of the respondents in this application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY NOVEMBER 2014

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

S. C. WANJALA



JUSTICE OF THE SUPREME COURT

