Kiu & another v Khaemba & 3 others (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR) (17 December 2021) (Ruling)

Neutral citation: [2021] KECA 318 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL (APPLICATION) E270 OF 2021

RN NAMBUYE, JA

DECEMBER 17, 2021

BETWEEN

FAITH JEROP KIU ..... 1ST APPLICANT

BEATRICE WANGARE KIU ..... 2ND APPLICANT

AND

PATRICK WANYONYI KHAEMBA ..... 1ST RESPONDENT

FRANCIS TANUI ..... 2ND RESPONDENT

BOARD OF MANAGEMENT, KAPLETING MIXED DAY SECONDARY SCHOOL ..... 3RD RESPONDENT

TEACHER SERVICE COMMISSION ..... 4TH RESPONDENT

(An application for extension of time to deem the already filed Notice of Appeal as having been properly filed and served within time from the Judgment of the High Court of Kenya (H. A. Omondi, J.) dated 22nd July, 2019 in Eldoret Petition No. 18 of 2017)

RULING

1. Before me is a Notice of Motion dated 3rd October, 2021 brought under Articles 159, 259(1) of the *Constitution of Kenya, 2010,* sections 3, 3A, 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, Rule 1(2), 4, 42, 43(1) and 77 of the *Court of Appeal Rules*. The motion substantially seeks an order that the Notice of Appeal filed on 13th August, 2019 be deemed to be duly filed, served and properly on record together with an attendant prayer for provision for costs.

2. The motion is supported by grounds on its face, a supporting affidavit sworn by Ghati W. Magwi and written submissions dated 25th June, 2020, and the 1st respondent's written submissions dated 16th September, 2021.

3. It has been opposed by the 2nd, 3rd and 4th respondents' replying affidavit sworn by Mary C. Rotich (Mrs.) on 12th October, 2021 on behalf of the 2nd, 3rd and 4th respondents together with annexures thereto, and written submissions dated 12th October, 2021.

4. Cumulatively, it is the applicants' assertions that they were parties in Eldoret High Court Petition No. 18 of 2017. Judgment in the said petition was delivered by H. A. Omondi, J. on 22nd July, 2019 in the presence of their advocates but in their absence.

5. It was not until 9th August, 2019 when their advocate got through to them, appraised them of the contents of the judgment which aggrieved them hence their instructions to their advocate to initiate the appellate process against the said decision by which time, time for initiating appellate process as of right had long lapsed. They nonetheless filed a notice of appeal albeit out of time on 13th August, 2019 a period of seven (7) days from the date it ought to have been lodged pursuant to Rule 75 of the Rules of this Court.

6. To buttress the above assertion, the applicants rely on sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, section 3 donating the appellate mandate of the court and the overriding objective principle of the court which donates power to the court to discharge its mandate with greater latitude respectively.

7. The case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2013] eKLR on thecrystallization by the Supreme Court of Kenya of the principles for granting extension of time.

8. The case of *Moroo Polmers Limited vs. Wilfred Kosyoki Willis* [2019] eKLR in support of their assertion that a delay of seven (7) days from the date the notice of appeal ought to have been filed to the date it was filed is not inordinate. It has also been satisfactorily explained and therefore excusable.

9. On arguability of the intended appeal, the applicants contend that they intend to argue on appeal that "damages awarded were inordinately too low, the learned Judge erred in failing to hold the 3rd and 4th respondents vicariously liable for the acts of the 1st and 2nd respondents and lastly, that the learned Judge also failed to exercise her discretion judiciously."

10. The also rely on the case of *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan* [2016] eKLR for the holding/proposition that "whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word "possibly"."

11. The application is therefore well founded both in law and on the facts. They have also demonstrated their seriousness of their quest to pursue their appellate rights by filing and serving a record of appeal in Civil Appeal No. 71 of 2019 on 4th November, 2019.

12. The 1st respondent supports the application on the grounds that he filed an application of this nature seeking extension of time within which to lodge a notice of appeal out of time against the impugned judgment and which Kiage, JA in the said application *Patrick Wanyonyi Khaemba vs. Faith Jerop Kiu & Another* [2021] eKLR declined to exercise the court's discretion to grant him that relief because he, (the 1st respondent) had filed a cross-appeal dated 19th November, 2019 in Civil Appeal No. 71 of 2019 which stands to fail if the applicants appeal is not validated. The 1st respondent concurs with the applicants' assertion that a delay of seven (7) days from the date the applicants notice of appeal ought to have been filed to the date it was lodged.

13. To buttress the above supportive submission, the 1st respondent also relies on the prerequisites in sections 3, 3A and 3B of the *Appellate Jurisdiction Act* [supra]; the case of *Charles Karanja Kiiru vs.*

Charles Githinji Muigwa [2017] eKLR for the holding/proposition by the supremeCourt that a court of law has mandate not only to enlarge time for lodging an appeal but also to deem one already filed as having been validly filed for ends of justice to be met to respective parties involved; and the case of *Kamlesh Mansuklal Damji Pattni vs Director of Public Prosecution & 3 Others* [1995] eKLR for the holding/proposition that:

i. Courts exist for purposes of dispensing justice;

ii. Decisions of the courts must be redolent of fairness and must also reflect the best interest of the people whom the law is intended to serve whether such decisions are interse (involve only parties to the litigation) or transends (affect the public)

iii. Expectation of the constitution is that courts do adhere to the Rule of law in the discharge of their mandate, in the dispensation of justice with a view to enhancing public confidence in the justice system of.

14. The 2nd, 3rd and 4th respondents on the other hand cumulatively contend that since Kiage, JA on 19th March, 2021, declined to exercise the court's discretion in favour of the 1st respondent on a similar application, consequently, the applicants' application is res judicata and therefore offends section 7 of the *Civil Procedure Act*.

15. It is also the 2nd, 3rd and 4th respondents position that the applicants conduct with regard to the issues in controversy herein is a clear demonstration of indolence on their part. The 2nd, 3rd and 4th respondents therefore urge the court to decline the exercise of its discretion in favour of the applicants as allowing the application will grossly prejudice them should the intended appeal succeed as they will be forced to trace their witnesses in order to prepare for their defences. They also contend that the applicants do not have an arguable appeal. It is therefore a waste of the court's precious time to allow the application.

16. To buttress the above submissions, the 2nd, 3rd and 4th respondents rely on section 7 of the *Civil Procedure Act* which enshrines the doctrine of res judicata; the case of *Independent Electoral and Boundaries Commission vs. Maina Kiasi & 5 Others* [2017] eKLR on the thresholdfor sustaining a plea of res judicata; the case of *Naomi Wangechi Gitonga & 3 Others vs. Independent Electoral & Boundaries Commission (IEBC) & 4 Others* [2014] eKLR on the threshold for granting the relief ofextension of time.

17. My mandate to intervene has been invoked substantively under Rule 4 of the Court of Appeal Rules. It provides:

"(4) The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

18. The principles that guide the court in the exercise of its mandate under he said rule are set out in the very case law that the applicant has relied upon in support of his application already highlighted above. The principles in the above cited case law among numerous others have now been crystallized by the Supreme Court of Kenya. I take it from (M.K. Ibrahim S.C. Wanjala SCJJ.) decision in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others [2013] eKLR in which these were crystallized as follows:- "

19. From the above, the factors I am supposed to take into consideration in the determination of an application of this nature are firstly, the length of the delay. Secondly, reason for the delay. Thirdly, "possibly" arguability of the intended appeal and fourthly, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.

20. Starting with the period of delay, it is evident from the record that the impugned judgment was delivered on 22nd July, 2019. The notice of appeal sought to be validated was filed on 13th August, 2019 being a period of seven (7) days delay from the date it ought to have been filed. The application under consideration which seeks the court's intervention was filed on 3rd October, 2019, being a period of about two (2) months and twelve (12) days.

21. In *George Mwende Muthoni vs. Mama Day Nursery and Primary School*, Nyeri C.A No. 4 of 2014 (UR), extension of time was declined onaccount of the applicant's failure to explain a delay of twenty (20) months, while in *Aviation Cargo Support Limited vs. St. Marks Freight Services Limited* [2014] eKLR, the relief for extension of time was declined for theapplicant's failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

22. In the instant application, the period of delay is much less than what was under consideration in the *George Mwende case* [supra]. It is therefore not inordinate. This finding alone however, cannot, per se entitle the applicants to the relief sought. It is imperative for me to consider the other factors falling for consideration in an application of this nature as well before finally deciding either way. The next factor falling for consideration is the explanation that the applicants have proffered for the failure to initiate their intended appellate process timeously as already highlighted above. I find the reason for the delay well explained and therefore excusable.

23. On the arguability of the intended appeal, the applicants have not annexed a draft memorandum of appeal indicating the issues they intend to take up on appeal. The position in law however is that where there is no memorandum of appeal annexed to the application, the court can discern the grievances intended to be taken up on appeal from any other supportive facts proffered by the applicant in support of the application.

24. In their written submissions, the applicants intend to challenge the award of damages terming it inordinately too low and an improper exercise of judicial discretion with regard to assessment of an appropriate award for compensatory damages on the part of the Judge. In law, an arguable appeal/ intended appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto. In my view, issue as to whether the award of damages was inordinately too low and alleged want of a proper exercise of judicial discretion is definitely arguable. See *Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank* [2020] eKLR.

25. The applicants have also relied on the non-technicality principle enshrined in Article 159(2)(d) of the Constitution, 2010. It provides:

> "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;

26. The principles that guide the court in the discharge of its mandate donated by the above provision have now been crystallized by case law. I take it from the cases of *Jaldesa Tuke Dabelo vs. IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others vs. IEBC & 3 Others* [2013] eKLR; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others* [2014] eKLR; *Patricia Cherotich Sawe vs. IEBC & 4 Others* [2015]eKLR for principles/propositions, inter alia, that: the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice save that Article 159(2)(d) of the Constitution is not a panacea for all procedural ills.

27. Also falling for consideration is the right to be heard on the already initiated appellate process which in law is to be weighed against the prejudice the 2nd, 3rd and 4th respondents stand to suffer should the relief sought by applicants be granted. According to the current jurisprudential trend the right to appellant justice is now constitutionally entrenched. The parameters for according this right to a deserving party have also been crystallized by case law. See I take it from the case of *Richard Nchapi Leiyagu vs. IEBC & 2 Others* [2013] eKLR; *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; in which it was variously held, inter alia, that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.

28. Also invoked is the inherent power of the court enshrined in Rule 1(2) of the Court of Appeal Rules. It provides:

> 1(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

29. The principle that guide the court in the exercise of its mandate under the said Rule have also been crystallized by case law. I take it from *Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR, for holding that the court's inherent power is a residual intrinsic authority which it may resort to in order to put right that which would otherwise be an injustice. In light of the above crystallized position, shutting out the applicants and sending them away from the seat of justice empty handed in the wake of existence of provisions of law donating power to the court to extend time within which to validate an appellate process in the absence of any valid reason for withholding the relief sought, would in my view be tantamount to rendering justice on technicalities. Interest of justice herein, therefore, would demand that the applicants be accorded an opportunity to pursue their already initiated appellate process by granting the order sought for validation of that process.

30. On the totality of the above assessment and reasoning, I am satisfied that the applicant has satisfied the prerequisite for granting of a relief under Rule 4 of this Court's Rules. I therefore proceed to make orders as follows:

    1) The applicant's application dated 3rd October, 2019 be and is hereby allowed on the following terms:

        a) Leave of extension of time within which to file and serve a notice of appeal is granted to the applicant.

b) The period within which to comply with the lodging and service of the notice of appeal is extended to the date which the notice of appeal was lodged and served.

c) The notice of appeal filed on 13th August, 2019 is therefore hereby deemed as properly filed and served.

d) Costs of the application to abide the outcome of the appeal No. 71 of 2019 already filed.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR