Nyaga v Nyaga (Environment and Land Miscellaneous Application E009 of 2024) [2025] KEELC 3288 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEELC 3288 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2024

JO MBOYA, J

MARCH 26, 2025

BETWEEN

PHILIP KITHAKA NYAGA ..... APPLICANT

AND

MERCY KARIMI NYAGA ..... RESPONDENT

RULING

1. The Applicant has approached the court vide Notice of Motion Application dated 21st January 2025; and in respect of which the Applicant has sought the following reliefs:

    i. That this Application be certified urgent and service of the same be dispensed within the first instance.

    ii. That this Honourable court be pleased to extend the time for filing the appeal in respect of the judgment in Environment and Land Court No. 140 of 2019 Chief Magistrate's Court Meru.

    iii. That this Honorable court be pleased to grant leave to file the intended appeal.

    iv. That this Honourable court be pleased to define a time span within which to file the record of appeal.

    v. That the costs of this Application be in the intended appeal.

2. The instant application is premised on the various grounds which have been highlighted in the body thereof. In addition, the application is supported by the affidavit sworn by the applicant, namely; Philip Kithaka Nyaga on even date. Furthermore, the deponent has annexed various documents including a copy of the Judgment sought to be appealed against as well as a draft memorandum of appeal.

3. The Respondent filed a Replying affidavit sworn on the 14th of March 2025; and to which the Respondent has annexed a total of four [4] documents, including the Plaint and the defence, which were filed before the trial court.

4. Upon being served with the replying affidavit the applicant herein proceeded to and filed a further affidavit sworn on the 19th of March 2025. However, the further affidavit was filed without leave of the court. Moreover, the further affidavit was not served upon the respondent.

5. When the instant matter came up for hearing, learned counsel for the respondent raised the issue as to the validity of the further affidavit which was filed without leave of the court and thereafter, sought to have the further affidavit expunged from the record of the court.

6. The learned counsel for the applicant conceded that the further affidavit was indeed filed without leave of the court. Nevertheless, learned counsel for the applicant implored the court to grant leave ex post facto. In any event, the counsel contended that the said further affidavit would be helpful to enable the court to arrive at a fair, just and proportionate decision on the question of leave to appeal out of time.

7. Owing to the objection taken by and on behalf of the respondent, it became necessary to determine and or dispose of the preliminary issue before venturing forward to address the issues at the foot of the application. To this end, the court found and held that the impugned further affidavit having been filed without leave, same [Further affidavit] could not be used by and on behalf of the applicant.

8. Furthermore, it is important to underscore that the further affidavit, which was filed without leave was never served on the respondents. Consequently, the usage and or deployment of the said further affidavit would be contrary to and in violation of the rules of fair play, justice and right to fair hearing. (See *Shollei v Judicial Service Commission & another* (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022) (Judgment) paragraph 68 thereof.

9. Arising from the foregoing, the court came to the conclusion that the further affidavit was irregularly filed and thus same was struck out and expunged from the record of the court.

10. Regarding the application beforehand, learned counsel for the applicant adopted the ground[s] highlighted in the body thereof as well as the contents of the supporting affidavit. Additionally, learned counsel for the applicant highlighted two [2] salient issues, namely, whether the applicant herein is entitled to leave to file an appeal out of time; and whether the respondent shall be disposed to suffer any prejudice or grave injustice, if the leave sought is granted.

11. In respect of the first issue, learned counsel for the applicant submitted that the applicant was neither afforded nor granted the requisite opportunity to be heard before the trial court. In this case, it was contended that the applicant was condemned unheard and thus the need to grant the applicant an opportunity to pursue and canvass the intended appeal.

12. Additionally, it was submitted that the applicant herein is seeking to have the appeal heard and determined by this court in an endeavor to protect his right to and in respect to the suit property. To this end, it was posited that the applicant is entitled to partake of and benefit from the rights of access to justice as provided for in terms of article 48 of *the Constitution* 2010.

13. Secondly, learned counsel for the applicant has submitted that the respondent herein has neither stated nor demonstrated that same respondent] shall be disposed to suffer any prejudice and or detriment of whatsoever nature if the leave sought is not granted. In this regard, it was submitted that no prejudice will be suffered in so far as the respondent shall still be at liberty to participate in the intended proceedings with a view to protecting his/her lawful rights.

14. In view of the foregoing, it was posited that the application for leave to file the appeal out of time ought to be allowed/granted. Simply put, learned counsel for the applicant invited the court to proceed and allow the application and thereafter grant liberty to the applicant to file the intended appeal within a set timeline.

15. The Respondent relied on the replying affidavit sworn on the 14th March 2025; and thereafter highlighted two [2] salient issues for consideration and determination. The issues raised by the respondent are namely; that the current application has been filed with inordinate and unreasonable delay, which delay has neither been accounted for nor explained; and that the respondent shall be subjected to undue prejudice and grave injustice if the orders sought were to be granted.

16. In respect of the first issue, learned counsel for the respondent submitted that the judgment which is sought to be appealed against was delivered on the 5th of September 2022, whereas the application beforehand was not filed until the 21st January 2025. To this end, it has been posited that the application has been filed after a duration of more than two [2] years and four [4] months, which is contended to constitute unreasonable delay.

17. Moreover, it has been submitted that despite the length of delay, the applicant herein has neither accounted for, nor explained the delay. In particular, it has been submitted that no reason or at all has been proffered by the applicant. In the absence of any plausible or credible reason, it has been submitted that the discretion of the court cannot be exercised in favour of the applicant.

18. Regarding the second issue, learned counsel for the respondent has submitted that the applicant herein has been guilty of indolence. In particular, it has been submitted that even before the trial court, the applicant engaged in tactic[s] or behavior which was intended to delay, obstruct and or otherwise defeat the scheduled hearing of the matter.

19. It was the further submission of learned counsel for the respondent that the applicant herein was afforded the opportunity to file and serve his list and bundle of documents, but same failed to do so. In this regard, it is contended that the applicant herein has not approached the court with clean hands and in good faith.

20. Nevertheless, it was submitted that the length of delay is such that the respondent herein shall be exposed to undue anxiety and prejudice. Further and in any event, it was submitted that the suit property has also been sub-divided by the applicant himself.

21. Having considered the application and the response thereto and upon taking into account the oral submissions made on behalf of the parties, I come to the conclusion that the determination of the instant application turns on two [2] salient issues, namely; whether the applicant has accounted for the delay attendant to the filing of the application or otherwise; and whether the respondent shall be disposed to suffer undue prejudice/grave injustice, if the application was to be allowed.

22. Regarding the first issue, it is worthy to recall that the judgment which is sought to be appealed against was rendered/delivered on the 5th of September 2022, while the application beforehand was filed on the 21st of January 2025. For good measure, the duration taken before the filing of the application works to more than two years and four months (i.e 28 months). Suffice to state that the duration in question is quite unreasonable and thus it behooved the applicant to place before the court some plausible, cogent and credible reasons to explain why the intended appeal was not filed timeously and with due promptitude.

23. Furthermore, it is common ground that the reasons, if any, to be provided by the applicant must be contained in the body of the supporting affidavit and not otherwise. Instructively an applicant like the

one beforehand cannot seek to supply and or provide reasons during the course of the submissions. Notably, submissions cannot take the place of evidence. [see Daniel *Toroitich Arap Moi vs Mwangi Stephen Mureithi* [2014] eKLR].

24. Back to the question as to whether the applicant has proffered any plausible reason or at all. Having read and perused the supporting affidavit, the only reason that the applicant has highlighted and or adverted to is the fact that the applicant is a pauper and hence same was unable to raise the requisite funds to facilitate the filing of the intended appeal. [See paragraph 10 of the supporting affidavit].

25. Even though the applicant contends that same is a pauper, the applicant herein has neither endeavored to place before the court any evidence to show and or demonstrate his means of livelihood and or finances. For good measure, it is not discernible from the documents filed as to how the applicant fits within the parameters of a pauper.

26. In the case of *Eliud Buku Thuku v Beatrice Wambui Mwangi* [2013] eKLR the court of Appeal [per Otieno Odek, J.A] stated and held as hereunder;

> 11. The applicant gives the reason for delay in filing the notice of appeal as financial constraints. No evidence has been given in support of this statement. It is not enough to allege financial constraints; an applicant must demonstrate the constraint either through production of a statement of financial means; lack of employment or absence of a source of income or such other means.

27. Additionally, it is not lost on this court that if the applicant was indeed a pauper, the same [applicant] was at liberty to seek for and procure leave of the court in accordance with the provisions of the law that provide for access for justice for paupers and or such persons who claim to be paupers, albeit subject to proof. [See the provisions of Order[s] 33 and 44 of the Civil Procedure Rules, 2010].

28. To my mind, if the applicant herein believed that same was indeed a pauper [which has not been demonstrated] then the applicant was at liberty to seek for and obtain leave to file the intended appeal and or further proceedings in the manner provided for in terms of orders 33 and 44 of the Civil Procedure Rules, 2010.

29. Moreover, it is imperative to state that an applicant like the one before hand bears the obligation and or burden of persuading the court that the reason being deployed to procure leave of the court is plausible, cogent and credible. Furthermore, the reason being proffered must not leave the court in doubt as to its bona fides and or veracity.

30. The Court of Appeal has had occasion to consider the parameters to be deployed while considering an application for extension of time in general. In the case of Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet (2018) eKLR, the court stated and held thus;

> (12) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.

31. Moreover, the necessity to provide credible reasons was also highlighted in the case of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) see paragraphs *12* & 13, where the court stated;

> 12. In order to exercise its discretion whether or not to grant condonation, the court must be apprised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.
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> 13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

32. The Supreme Court of Kenya [the apex Court] on its part, has distilled the guidelines and or factors to be taken into account prior to and before granting extension of time. In the case of Nicholas Kiptoo Arap Korir Salat vs IEBC and 7 others [civil application No. 16 of 2014] [2014] eKLR the court distilled the following guidelines;

> 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 underlying 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...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. [where] there is a reasonable [cause] 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."

33. Likewise, the Supreme Court re-visited the need to account for the delay and to give plausible reasons in the case of the County Executive of Kisumu v County Government of Kisumu & 8 others (Civil

Application 3 of 2016) [2017] KESC 16 (KLR) (Civ) (12 April 2017) (Ruling), where the court stated thus;

> 26. However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.

34. In my humble view, the applicant herein bore the burden of demonstrating that same has a plausible reason for the delay. However, no reason has been tendered and or placed before the court to warrant the exercise of judicial discretion in favour of the applicant. In any event, there is no gainsaying that the discretion of the court to extend time and or grant leave to file an appeal out of time is not premised on sympathy and or empathy.

35. Suffice it to underscore that the applicant has failed to place before the court for instance the basis, to enable the court to exercise its discretion. In this regard, I am not persuaded that the applicant has exercised due diligence in his endeavor to pursue [sic] the intended appeal.

36. Before departing from this issue, it is imperative to state that the quantum of delay, amounting to more than 28 months, brings into the fore the doctrine of latches. To this end, I find and hold that the delay in question is inordinate and thus deprives the applicant of the favour of equity.

37. Further and in any event, the application is defeated by the doctrine of latches. [see the decision of the Court of Appeal in the case of Chief Land Registrar and others vs Nathan Tirop Koech & 4 others (2018) eKLR.

38. Respecting the 2nd issue, namely; whether the respondent shall be disposed to suffer prejudice and or grave injustice, it is imperative to state that the respondent herein, like any other litigant, accrues a legitimate expectation that every litigation shall be undertaken with due diligence and without undue delay.

39. Where a party delays in commencing a legal process, like in the instant case, the adverse party develops a legitimate expectation that the proceedings have come to a close. In this regard, the delay to commence the process brings forth a legitimate expectation and hence, to grant leave to appeal at this juncture will certainly curtail the legitimate expectation which has since accrued to the respondent.

40. Furthermore, *the constitution* commands that court proceedings be undertaken and disposed of without undue delay. See Article 159 (2b) of *the Constitution* 2010. In this respect, there is no gainsaying that delay impacts negatively on the rule of law and by extension, the administration of justice.

41. Finally, even though the applicant espouses his entitlement to partake of and benefit from the right of access to justice in terms of Article 48 of *the Constitution*, it must not be lost on this court that the enjoyment of the right to the access of justice must be balanced against the other rights espoused vide articles 10, 19, 20, 27 and 50 of *the constitution* 2010.

42. Before departing from this issue, it is expedient to take cognizance of the dicta of the Supreme Court in the case of *Mungai v Housing Finance Company (K) Limited & 5 others* (Civil Appeal (Application) 9 of 2015) [2017] KESC 47 (KLR) (26 January 2017) (Ruling)

> 17. In a nutshell, the applicant must be told in firm terms that we find no legitimate, cognizable and sound prayer in the prayers sought that this Court can consider and grant. Access to justice as a principle enshrined in *the Constitution* is not a blank cheque for all and sundry to bring all manner of 'applications' and 'matters' before the Court. Courts are constitutional creatures and exercise that jurisdiction only bestowed to them by the law (See *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR). While the applicant comes at the disguise of seeking access to justice, the truth is that this application, because of being vexatious and frivolous, impedes the access to justice of others by clogging the judicial system and taking up this Court's precious judicial time that it would have used to hear other litigants with legitimate causes of action.[Emphasis supplied].

43. Simply put, the rights of access to justice is not by and of itself a blank cheque to be deployed by litigants, more particularly when same [litigants] have failed to comply with the statutory timelines.

Final Disposition

44. For the foregoing reasons, I find and hold that the application beforehand is devoid and bereft of merits and thus same be and is hereby dismissed with costs to the respondent.

45. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF MARCH 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Mutuma- Court Assistant.

Mr. Gatobu M'Inoti for the Applicant.

Mrs. Ntarangwi for the Respondent.