Maunge & another v Moses (Miscellaneous Application E017 of 2021)
[2023] KEELC 21520 (KLR) (21 March 2023) (Ruling)

Neutral citation: [2023] KEELC 21520 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

MISCELLANEOUS APPLICATION E017 OF 2021

A KANIARU, J

MARCH 21, 2023

BETWEEN

MOSES NGARI MAUNGE ..... 1ST APPELLANT

EDISON NDII MAUNGE ..... 2ND APPELLANT

AND

ESTON NYAGA MOSES ..... RESPONDENT

RULING

1. The application before me for determination is a motion on notice dated 4/11/2021 and filed on 5/12/2021. It is expressed to be brought under Articles 25(c) and 50(1) of *the Constitution* of Kenya, 2010, Sections 13(7)(a) and 16 A(2) of the *Environment and Land Court Act*, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Act and all other enabling provisions of the land.

2. The applicants – Moses Ngare Maunge and Edison Ndii Maunge – intend to appeal against the ruling of the lower court at Siakago in Civil Suit No. MCL&E 44 of 2018 delivered on 4/8/2021 in which they are the defendants and where the respondent in this application is the plaintiff. The applicant's want this court to allow them to file the appeal out of time as the time within which it should have been filed has lapsed.

3. In a more specific way, the application came with four (4) prayers as follows:

    1. The application be certified urgent and be heard exparte in the first instance.

    2. Further proceedings in Siakago MCL&E 44/2018 be stayed pending hearing and determination of this application.

    3. The memorandum of appeal dated 1/10/2021 be admitted out of time.

4. Costs of the application be provided for.

4. I have set out the prayers as they are formulated in the application because my considered view is that the prayers for consideration at this stage are 3 and 4 while the submissions filed by both sides seem to assume that prayer 2 is also for consideration. I will come to this issue at a later stage in this ruling.

5. The application is premised on grounds, interalia, that the applicants were aggrieved by the lower court decision and they even drew a memorandum of appeal but inadvertently filed it in the wrong court; that the error was discovered after the time within which an appeal should be filed had expired; and that as it is the applicant's advocate who made that mistake, the applicant's themselves should not be punished.

6. Further, it was stated that admission of the appeal out of time will enable the applicant's to access justice; that the delay in filing the appeal was not inordinate or dilatory as it is explained; that the appeal is arguable and has a high chance of success; that the appeal seeks to end the litigation; and that the respondent will not suffer prejudice or injustice if the application is allowed.

7. The application came with a 20-paragraph supporting affidavit which generally is an elaboration of what the grounds in support of the application contain.

8. The respondent responded to the application via a replying affidavit filed on 2/9/2022. According to the respondent the lower court's decision was correct; the delay in filing the appeal was unreasonably long and not well explained; and the intended appeal was said to be meant only to delay the matter and will not ultimately resolve the dispute. The respondent further deposed that it is only fair and just that the dispute between them be heard so that the issues can be resolved. The rest of the contents of the replying affidavit give a background and some antecedents surrounding the lower court case.

9. The response filed by the respondent elicited the filing of a supplementary affidavit by the applicant on 28/11/2022. In that affidavit, it was deposed, interalia, that the reasons for the delay are well explained; that the matter in the lower court is similar to another matter – MCCC 152/1994 – filed and decided in Embu and from which no appeal was preferred; and that the intended appeal is an arguable one.

10. The application was canvassed by way of written submissions. The applicant's submissions were filed on 30/11/2022. They reiterated that sufficient explanation has been given for not filing the appeal within time. They submitted too that the intended appeal is arguable and that the respondent will not suffer prejudice if the application is allowed. Several cases were cited and quoted to reinforce the applicants position. Among them was *Belino Mrai vs Amos Wainaina* [1979] eKLR, *Shah vs Mbogo* [1967] EA 116, *Sayers vs Clarke Wlaker (a firm)* EWCA Civ 645, and Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral & Boundaries Commission & 7 others [2014] eKLR. These cases were meant to persuade the court regarding how to approach the issue of mistake (Belinda Mrai's case), how to exercise discretion (SHAH's) case), and the necessary considerations to be met in making a decision relating to extension of time to file an appeal (sayers and Nicholas Kiptoo's cases).

11. The court was also urged to stay the lower court proceedings. It was submitted that the dispute involves land and as land is immovable property, the respondent will suffer no prejudice if the order of stay is granted to last until the intended appeal is heard and determined. For persuasion and/or guidance, the cases of *Niazons (Kenya) Ltd vs China Road and Bridge Corporation (Kenya) Ltd*: HCC No. 126 of 1999 and Re Global Tours & Travel Ltd HCWC No. 43 of 2000 were cited and quoted. Both cases stand for the position that where the interests of justice so demand, an order for stay of proceedings can be granted.

12. The respondents submissions were filed on 10/2/2023. According to the respondent, there has been unreasonable delay in filing the appeal. The respondent complained that he was not served with the appeal said to have been filed in the wrong court or any other communication with the court and that it even took the intervention of the court for him to be served with the application now under consideration. The delay in filing the appeal was said to be insufficiently explained and the applicant was said also not to be keen in prosecuting this application.

13. The contested ruling of the lower court was said to be on a preliminary objection raised by the applicants seeking to have the respondents suit dismissed before it was heard. The preliminary objection was dismissed and since then, some other developments – like directing the Director of physical planning to visit the site – have taken place. The intended appeal was said not to have high chances of success. Besides, it was pointed out that the applicants also have a counter-claim in the lower court. They seek to have the respondent's suit in the lower court declared Res Judicata. The respondent submitted that this will affect their counter-claim too as the decision will also affect that claim. On that basis, the respondent also oppose the prayer for stay of proceedings.

14. I have considered the application, the response made, the supplementary affidavit filed, and the rival submissions. I pointed out at the beginning of this ruling that the prayers for consideration are 3 – which relates to admitting the appeal out of time – and 4 – which is about costs. But both the applicant and the respondent seem to think that prayer 2 – which is about staying the lower court proceedings – is also for consideration. With tremendous possible respect, I beg to differ. And here is why:

15. Prayer 3 as appearing on the face of the application is meant to be granted to apply "pending hearing and determination of this application." The import of this is that the order sought can only apply before the application is determined. In simple terms, the order sought can only apply or last as long as the application is pending hearing and determination. Prayer 3 is therefore not focused on the period beyond or after the determination of the application and I say this because the application will not be pending hearing and/or determination at that time. Both the pendency and determination of the application will have ceased by then. I emphasize that the order is supposed to apply "pending hearing and determination of the application", meaning the period when the application is not heard and determined or when it is still pending.

16. In my view, if the applicants wanted an order that should serve them well, they should have sought the order to apply Pending Hearing And Determination of the Intended Appeal. As things stand now, the prayer as sought is of the kind that the court usually considers at the exparte stage of an application. I entertained this application Exparte here on 9/11/2021. That is when the prayer was considered and as I didn't grant it, the prayer must be considered moot or spent at this interpartes stage.

17. I now turn my focus to prayer 4, which is about admitting the appeal out of time. From a jurisprudential standpoint, granting of this prayer requires satisfaction of various criteria including length of delay, reason for the delay, likely prejudice to be suffered by the respondent, and/or possible success of the appeal.

18. The appellants submissions have cited and quoted several cases which spell out what should be considered in deciding whether or not to admit an appeal out of time. I have already mentioned some of the decisions in this ruling. I may add that in *Thuita Mwangi vs Kenya Airways Ltd* [2003] eKLR the factors to consider were stated as follows:

    1. The period of delay.

    2. The reason for the delay.

3. The arguability of the appeal.

4. The degree of prejudice which could be suffered by respondents if the extension is granted.

5. The importance of compliance with time limits to the particular litigation in issue.

6. The effect, if any, on the administration of justice or public interest if any is involved.

19. In the application before me, reason for the delay was explained as being inadvertent filing of the original memorandum of appeal in the wrong court. The explanation for the delay or the reason for the same is not the only factor. The court is entitled for instance to consider also the arguability of the appeal. In this regard, the court needs to be enabled to have a look at the memorandum of appeal and the ruling or judgement intended to be appealed against. In this matter, only the memorandum of appeal was made available. The ruling of the lower court was not. In my view, the decision of the lower court should have been made available. The decision of the court in the matter said to form the basis of allegations of res judicata should also have been made available.

20. The court was not sufficiently enabled to establish whether the intended appeal is arguable. This omission is in my view fatal to the application. The court must guard against a situation where frivolous or useless appeals are filed. It must also guard against a situation where the appeal filed is merely meant to vex the respondent or to delay implementation of an otherwise inevitable execution.

21. My findings therefore are that the merits of the application before me are not well demonstrated. I therefore dismiss the application with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21ST DAY OF MARCH, 2023.

In the presence of M/s Mureithi Gachumba for appellant/Application and Munene for Rose Njeru for respondent.

Court assistant: Leadys

A.K. KANIARU

JUDGE

21.03.2023