



REPUBLIC OF KENYA



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Nyamugara v Ogalo & another (Environment and Land Civil Miscellaneous Application 20 of 2022) [2023] KEELC 16863 (KLR) (19 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16863 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION 20 OF 2022

CA OCHIENG, J

APRIL 19, 2023

BETWEEN

JANE MORAA NYAMUGARA APPLICANT

AND

KENNEDY OGALO 1ST RESPONDENT

PAUL MUSUNGU 2ND RESPONDENT

RULING

1. What is before Court for determination is the applicant's notice of motion application dated the March 31, 2022 where she seeks the following orders:-
 1. That this honourable court be pleased to enlarge the time within which to file an Appeal against the Judgment of the Honourable H. Onkwani, Principal Magistrate delivered in court on April 8, 2021 in Mavoko ELC Case No. 52 of 2019.
 2. Spent.
 3. That the costs of this Application be provided for.
2. The Application is based on grounds on the face of it and supported by the Affidavit sworn by one Jane Moraa Nyamugara where she deposes that her case in the lower court, being Mavoko ELC No. 52 of 2019, proceeded ex parte as the Defendants never entered appearance despite service and Judgment was scheduled for March 25, 2021 but on or about March 16, 2021, the Judiciary announced total closure of the Mavoko Law Courts for two (2) weeks following the testing and diagnosis of some members of staff with Covid-19. She explains that at the end of the second week of closure, the Mavoko Law Courts administration posted a Notice in the Kenya Law Reports website announcing the intended re-opening of the court on March 29, 2021. Further, the Notice gave guidance on what would happen to the matters that were coming up during the period of closure, which was between March 16,



2021 and March 26, 2021. Further, concerning the Judgments and Rulings, the said Notice indicated that they would be delivered on Notice. She avers that no further Notices were received concerning the matters that were affected by the temporary closure of the court. Further, that her Counsel on record pursued the issue with the Court Administrator who responded several times that the file did not have a Judgment date until July 15, 2021 when the counsel wrote to the Court Administrator and he responded by confirming that apparently the Judgment had been delivered on April 8, 2021, without Notice to counsel or the applicant. She contends that upon collection of the Judgment, they realized that it had errors as it had named the wrong parties and upon correction, the applicant's name was still wrongly stated and further requests for correction are yet to be satisfied as the corrections are yet to be made, hence the delay in filing of the Appeal. She is apprehensive that without the Appeal being heard, the respondents' blatant actions of trespass will imminently result in her being unfairly and unlawfully dispossessed of her land.

- 3 The Respondents despite being duly served did not file any replying affidavit to oppose the instant Application which was canvassed by way of written submissions.

Submissions by the Applicant

- 4 The applicant submitted that she has a constitutional right to Appeal and has demonstrated to the court the circumstances that led to her failure to file the Appeal in time. She argued that this court has jurisdiction to order extension of time as provided for, under section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure (Amendment) Rules*, 2020. She is apprehensive that unless her Appeal was heard, she would be unlawfully dispossessed of her land. She opined that no prejudice would be suffered by the Respondents if the orders sought were granted. To buttress her averments, she relied on the following decisions: *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR; *Elisha Jaboya v Kennedy Odhiambo Nyaoro* (2021) eKLR and *Vishya Stone Suppliers Company Limited v RSR Stone [2006] Limited* eKLR

Analysis and determination

- 5 Upon consideration of the instant Notice of Motion Application including the Supporting Affidavit, annexures and submissions, the only issue for determination is whether the Applicant should be granted leave to file an Appeal out of time against the Judgment of Hon. H. Onkwani, Principal Magistrate delivered on April 8, 2021 in Mavoko ELC Case No. 52 of 2019.
- 6 The legal framework governing enlargement of time within which to file an appeal from a Subordinate Court to the High Court is contained in various legal provisions which are highlighted here below:

Section 79G of the *Civil Procedure Act* provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.



7 Further, Section 95 of the Civil Procedure Act stipulates thus:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

8 While Order 50 Rule 6 of the Civil Procedure Rules states that:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

9 The applicant in her supporting affidavit annexed a draft Memorandum of Appeal as annexure “JM 5” wherein she highlighted her Grounds of Appeal and contended that she has an arguable Appeal. The respondents did not file a response to oppose the instant Application. In the case of Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR the Learned Judge stated that:

Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in Mwangi v Kenya Airways Ltd [2003] KLR. They include the following:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved...

10 Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The applicants have easily met that standard. I believe that the Applicant has discharged this burden.”

11 While in the case of Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 others [2015] eKLR the Court of Appeal stated that:

It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers,



and consequently, are enjoined by article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

12 For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve ____. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.

See also the following decisions: Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR; Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others, Sup Ct. Application 16 of 2014 [2014] eKLR; Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR

13 In the instant case, the lower court dismissed the applicant's suit on April 8, 2021. The Applicant is yet to lodge an Appeal. She has explained that she was not notified of the date when Judgment was to be delivered since the trial court had been closed due to the COVID-19 pandemic. Further, that her Counsel on record pursued the issue with the Court Administrator who responded several times that the file did not have a Judgment date until July 15, 2021 when the said Court Administrator confirmed that apparently the Judgment had been delivered on April 8, 2021, without Notice to her. She averred that upon collection of the impugned Judgment, she realized that it contained errors as it had named the wrong parties and upon correction, her name was still wrongly stated and further requests for correction are yet to be dealt with, hence the delay in filing of the Appeal. On perusal of the impugned Judgment, it confirms that the same was delivered in the absence of both parties. Further, from the citation, it is apparent, there was a mistake in naming the Applicant in the said Judgment. I note the applicant annexed several correspondence between her Advocates and the Lower Court in respect to the date of delivery of the Judgment as well as correction of the said Judgment. I opine that the explanations by the applicant as to the reasons for the delay in lodging the Appeal are plausible. I have perused the lower court Judgment and the draft Memorandum of Appeal and it is my considered view that the intended Appeal is arguable. Since the 1st and 2nd respondents did not oppose the instant Application, it is my considered view that they will not suffer any prejudice if the orders sought are granted.

14 Based on my analysis above while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that the reasons advanced by the applicants are plausible and will exercise my discretion to enlarge time to enable her file the Memorandum of Appeal.

15 It is against the foregoing that I find the applicant's Notice of Motion dated March 31, 2022 merited, and will allow it.

16 I direct the applicant to file and serve the Memorandum of Appeal within fourteen (14) days from the date hereof.

17 Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF APRIL, 2023

CHRISTINE OCHIENG



JUDGE

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