



REPUBLIC OF KENYA



KENYA LAW
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Mutie v Mutiso; Wanza & 3 others (Interested Parties) (Environment & Land Case 22 of 2014) [2023] KEELC 17624 (KLR) (17 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 22 OF 2014**

**A NYUKURI, J
MAY 17, 2023**

BETWEEN

TERESIA WAMBURA MUTIE PLAINTIFF

AND

MACKENZIE SILA MUTISO DEFENDANT

AND

MARGARET WANZA INTERESTED PARTY

STEPHEN MUTISYA INTERESTED PARTY

CAROLINE NZILANI INTERESTED PARTY

LILIAN NTHAMBI INTERESTED PARTY

RULING

Introduction

1. Before court is a Notice of Motion dated 29th January 2019 filed by the Defendant seeking the following orders;
 - a. Spent
 - b. That the firm of K. N. Nyamweya & Co. Advocates be granted leave to come on record for the Defendant/Applicant.
 - c. That the Applicant be granted leave/enlargement of time to file Notice of Appeal out of time.
 - d. That costs be in the cause.
2. The application is predicated on the affidavit sworn on 29th January 2019 by the Defendant. The Applicant's case is that he was aggrieved with the judgment of this court delivered on 10th December



2018. He stated that his former advocate advised him and they agreed to file an appeal and that he was supposed to file a Notice of Appeal as well as proceedings. That the Applicant noted that their former advocate's offices had closed for December vacation until mid January 2019.
3. The Applicant stated that when he went to his advocate's office on 21st January 2018, his former advocates informed him that they had not filed Notice of Appeal nor had they requested for proceedings because the Respondent had instructed the same firm over another matter and that they could not file the appeal due to conflict of interest.
 4. That after the above conversation between the Applicant and his previous advocates, the Applicant instructed the firm of K. N. Nyamweya to represent him in this matter. He stated that if the orders are granted, the Respondent will not suffer any prejudice as the Applicant is in possession of the disputed land. He blamed the delay on his previous advocates. He also blames the delay on an alleged illness of his wife. He also blamed the Respondent for the delay stating that the delay to file appeal in time by his former advocate was because they were "in bed with the Respondent".
 5. The application was opposed. The Plaintiff filed a replying affidavit sworn on 27th March 2019. She stated that the application was based on falsehoods and that the court should not entertain it. She denied ever instructing the firm of Kamanda & Company Advocates to act for her in any matter and that therefore the Applicant's allegation that the said firm was acting for her in another matter was not true.
 6. She stated that sometimes in January 2019, the Applicant came to her and requested her to sell him a parcel of land being Machakos/Kiandani/245 measuring 260 feet by 100 feet but that she declined the offer. She stated that the application was an abuse of the court process and calculated to frustrate her. She stated that the Applicant was a notorious litigant in land cases and stated that the Applicant filed a similar suit seeking the same prayers, on the same subject matter and between the same parties vide Machakos High Court Succession Cause No. 48 of 2017. She stated that the Applicants incoming advocate namely the firm of K. N. Nyamweya is also the advocate on record in the said case and that therefore he cannot purport to be a stranger in this matter.
 7. It was the Respondent's assertion that the Applicant had continued with trespass despite the judgment and that if the application is allowed, she will suffer irreparable loss and damage. She stated that the Applicant was seeking equity with dirty hands and that the application ought to be dismissed.
 8. The application was canvassed by way of written submissions. On record are the Applicant's submissions dated 2nd May 2019 and the Respondent's submission dated 26th June 2019.

Submissions

9. Counsel for the Applicant submitted that the Applicant's appeal ought to have been filed by 24th December 2018 and that therefore only 35 days had lapsed. They therefor submitted that there was no inordinate delay on the part of the Applicant and placed reliance on the case of [*The Honourable Attorney General v Law Society of Kenya & 4 Others*](#) Civil Application No. Nai 327 of 2018 and [*Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission*](#) [2014] eKLR.
10. It was further argued for the Applicant that granting the orders sought will not prejudice the Respondent because the Applicant has had the suit property for 30 years and should continue in the possession thereof.
11. Counsel relied on Section 7 of the [*Appellate Jurisdiction Act*](#) to contend that this court has jurisdiction to grant the orders sought. It was further argued that although Rule 4 of the [*Court of Appeal Rules*](#) grants power to the Court of Appeal extend time, the same does not state that that power is exclusive to



the Court of Appeal. Therefore, counsel argued that the power to extend time to file Notice of Appeal is vested both in the Court of Appeal and in this court. The court was referred to the case of *Kenya Airports Authority & Another v Timothy Nduvi Mutungi* [2014] eKLR, for the submission that both the Court of Appeal and this court have power to extend the time of filing Notice of Appeal out of time.

12. On their part, counsel for the Respondent submitted that the Applicant was dishonest and that the application was made in bad faith and the same is an afterthought and that the reasons given by the Applicant are not genuine. Counsel argued that the appeal ought to have been filed by 24th December 2018.
13. Counsel maintained that the basis of the application were falsehoods as the allegation that the Respondent had retained the firm of Kamanda & Co. Advocates to act for her in another matter were not true. Counsel relied on the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR to argue that in considering an application for extension of time, the court ought to consider the length of the delay, the reason for the delay, chances of success of the appeal and degree of prejudice to be suffered by the other party. Counsel contended that the Applicant never attached instructions note to show he instructed his former advocates to appeal and does not provide evidence of how his previous advocates failed him or how they were compromised. Counsel relied on the case of *Ratemo Ongeru v Zacharia Isaboke & Another* [2014] eKLR for the proposition that where an advocate fails a party, the proper process for such party to take would be to sue their previous advocates for professional negligence for failing to act on their instruction. Counsel argued that the Applicant hiding behind his advocate's inaction amounts to admission on collusion and is an abuse of the court process.
14. It was contended further for the Respondent that the Applicant had adopted a way of obstructing and delaying justice. According to counsel, the application is mischievous and selfish. Counsel further argued that the Applicant had been guilty of misrepresentation and non-disclosure of material facts and therefore undeserving of an equitable remedy. Reliance was placed on the case of Andrew Ouko v KCB HCC No. 55 of 2000 for the proposition that where there is non-disclosure of material facts, an order for extension of time will not issue.
15. Counsel also argued that the Applicant was a notorious litigant in land cases as during the pendency of this matter, he filed Succession Cause No. 48 of 2017, in which case the Applicant is represented by the firm of K. N. Nyamweya. Counsel's position was that that matter was res judicata.
16. It was also submitted for the Respondent that the Respondent stands to suffer irreparable loss and damage as the Applicant was still trespassing the suit property and making attempts to alienate the same. Counsel argued that for years the Respondent has been denied an opportunity to use her land due to the Applicant's encroachment and that the legal process has inconvenienced the Respondent who has suffered socially and financially.
17. Counsel argued that to get an order of extension of time there must be a plausible and satisfactory explanation for the delay for discretion to be exercised by the court in favour of the Applicant. Reliance was placed in the case of *M/s Portreitz Maternity v James Karanga Kabia*, Civil Appeal No. 63 of 1997, for the proposition that the right of appeal must be balanced against the right of the Plaintiff to enjoy judgment made in her favour.

Analysis and Determination

18. I have carefully considered the application, the reply and the submissions. The issues that arise for determination are;



- a. Whether the Applicant ought to be granted leave for the firm of K. N. Nyamweya to come on record for him in the place of Kamanda & Co. Advocates.
 - b. Whether there is sufficient cause to extend time to file a Notice of Appeal out of time.
19. Under Order 9 Rule 9 of the *Civil Procedure Rules* provides that when there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, then such change of advocate or intention to appear in person shall not have effect without an order of the court either through an application or by consent of the previous and incoming advocate, or party acting in person, as the case may be. A party is entitled to an advocate of their choice. The Applicant has shown that he intends to change his advocates which is his Constitutional right. In the premises, the prayer for leave to allow the firm of K. N. Nyamweya & Co. Advocates to come on record for the Applicant is allowed.
 20. Section 7 of the *Appellate Jurisdiction Act*, Cap 9 of the Laws of Kenya grants this court the power to extend time for giving notice of intention to appeal from a judgment of this court.
 21. The jurisdiction to extend time is not a right of parties and the same is an equitable remedy which can be granted upon the court being satisfied with the reasons for the delay, and upon considering, the length of the delay and the prejudice that may be suffered by the opposite party.
 22. I take the view that the Applicant herein ought to first explain the reason for the delay and if the court is satisfied, then the length of the delay and the prejudice that may be suffered are subsequent and secondary considerations. This is because the exercise of judicial discretion must not be capricious or whimsical but must be based on sound judicial principles.
 23. Having considered the Applicant's affidavit, I note that he has listed three reasons for the delay. These are that his former advocates failed to file a Notice of Appeal because they were representing the Plaintiff in another matter and that therefore there was conflict of interest; that the Applicant's previous advocates were acting in collusion with the Respondent to frustrate the Applicant and that is why they failed to file a Notice of Appeal despite being instructed to do so and that the Applicant's wife was going through chemotherapy in Nairobi. There was no evidence to support the allegation that the Applicant's previous counsel was appearing for the Plaintiff in any matter, in view of the fact that the Plaintiff denied ever instructing the said firm of advocates. Also, there was no evidence to show that the former advocates were "in bed with the Respondent" as alleged by the Applicant. This being a serious allegation which could have been a matter of ethical misconduct on the part of the Applicant's former counsel. Further, there was no evidence that the Applicant complained about these actions to the disciplinary body regulating advocates. In addition, there is no evidence that the Applicant's wife was unwell undergoing chemotherapy. Therefore, the Applicant's reasons for delay are not based on any factual truths and I find that the Applicant was dishonest in his reasons for the delay.
 24. A party seeking an equitable order ought to be forthright and anchor his applications on allegations he can prove. As the Applicant has not given a reasonable/plausible explanation for delay in filing Notice of Appeal, I am not convinced that he deserves the order of extension of time.
 25. In the premises, save that this court grants the firm of K. N. Nyamweya & Company Advocates leave to come on record for the Defendant herein, I find no merit in the prayer for leave to appeal out of time and the application dated 29th January 2019 is hereby dismissed with costs.
 26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM



A. NYUKURI

JUDGE

In the Presence of;

Mr. Nyamweya for Defendant/Applicant

Mr. Mbuvi for Respondent

Ms Josephine – Court Assistant

