Ngaruni v M'rithaa (Miscellaneous Application E027 of 2022)
[2023] KEELC 18164 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18164 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISCELLANEOUS APPLICATION E027 OF 2022

CK YANO, J

JUNE 21, 2023

BETWEEN

CHARLES KIRAGU NGARUNI ..... APPLICANT

AND

CHARLES MURITHI M'RITHAA ..... RESPONDENT

RULING

1. The applicant herein moved this court *vide* an application dated 15th August 2022 wherein he seeks for:

    1. That the application be certified as urgent and the same be heard expeditiously.

    2. That the Honourable court be pleased to grant leave to the applicant to appeal out of time against the judgement delivered on 17th July 2019 in Nkubu PM's ELC suit No.9 of 2018 - *Charles Murithi M'Rithaa v Charles Kiragu Ngaruni*.

    3. That costs of the application be in the cause.

2. The application is supported by the affidavit sworn by the applicant on 15th August 2022 and is premised on the following grounds;-

    a. Thatthe judgement in Nkubu PM's ELC suit No.9 of 2018 was delivered on 17th July 2019.

    b. That immediately the applicant requested the firm of Mokua& Coadvocates to file an appeal upon giving them instructions however the same was not filed.

    c. That the applicant has been making several trips towards pursuing the same in vain until when he took the personal initiative to follow up in the courts.

    d. That Meru ELC Appeal No. 60/20 which he was acting under the impression to be his case was shocked to discover was not his case.

e. That 30 days to prefer an appeal against the judgement of the trial court expired on 17th August 2019.

f. That the respondents herein are extracting a decree anytime now there being no stay thus execution is foreseeable soon with no stay orders hence just apprehension of harm by the applicant/intended appellant.

g. That no prejudice will be suffered by either party if leave is granted.

h. That the application ought to be granted in the interest of equity and justice.

i. That no prejudice will be occasioned upon the Respondent if the applicant is granted leave to file an appeal out of time.

3. The applicant in his supporting affidavit dated 15th August 2022 avers that he is aggrieved and dissatisfied with the Judgement and decree of Honourable J. Irura (PM) delivered on the 17th day of July, 2022 (sic) in Nkubu Principal Magistrate's Court ELC No. 9 of 2018 and he intends to appeal against the same and has annexed a copy of the said judgement marked "CKN-1".

4. The applicant avers that he has an arguable appeal with overwhelming prospects of success which Appeal is based on such grounds as set forth in the annexed Memorandum of Appeal intended to be filed and has annexed a copy of the memorandum of appeal marked "CKN-2".

5. The applicant states that the application will not occasion any prejudice to the respondent and that he undertakes to lodge the intended appeal and record thereof expeditiously within such time as the Honourable Court may order upon requisite leave being granted.

6. The applicant states that he is willing to abide by any conditions set by the Honourable court for the grant of the orders sought.

7. The Applicant avers that in fact he did instruct the advocate and made some payment immediately the said judgement was delivered and has annexed copies of the said receipts as proof of payment marked "CKN-3".

8. The Applicants states that the respondent herein is extracting a decree and anytime there being no stay thus execution is foreseeable soon with no stay orders hence there is just apprehension of harm to the Applicant.

9. The Applicant further states that in all circumstances of the case for the ends of justice in the case to be met and for the honour and dignity of the Honourable court to be upheld, the orders sought in the application ought to be granted.

10. The Applicant states that in view of the fore going and unless the application for extension of time is heard urgently on priority basis, the respondent threatens to evict him from his rightful portions of land.

11. The respondent filed his replying affidavit dated 24th October 2022 in opposition to the application. He states that the application is an afterthought and simply an act to try and forestall and frustrate his execution of a lawfully obtained decree for the following reasons; that the judgement was delivered in his favour on the 17th July 2019 and that was in the presence of the applicant as per the last page of the judgement on the coram, that after the judgement, he extracted the decree which was issued on the 23rd July 2019 and he annexed a copy marked "CMM2", that soon in the month of August it became apparent that the applicant was refusing to execute the transfer instruments forcing him to apply in

court at Nkubu vide an application dated 19th August 2019 under certificate of urgency and annexed the copy marked "CMM3".

12. The respondent further avers that the applicant was served with the same and soon an appointment of advocate was filed by the firm of Mokua Obiria & Co. Advocates and has annexed a copy of the appointment marked "CMM4." That the application was heard and he was successful and an order was granted for the court's executive officer to execute the transfer instruments and has annexed thereto marked CMM5" a copy of the order given on 11th September 2019.

13. The respondent avers that the transfer instruments were executed by the court and he has annexed a copy of the transfer application for consent and the attendant consent marked "CMM 6A, B & C."

14. The respondent contends that he also served the County Surveyor with the said decree who visited the suit land with a view to implement the same and did so on 14th July 2021 at 10.30 hours and the respondent annexed copies marked "CMM7 &8" of a letter by the County Surveyor and the attendant mutation form duly executed for effectuation of the decree.

15. The respondent avers that effectively a title was issued in his names on 30th November 2021 and he has annexed copies of the attendant certificate of official search and the title to parcel no. Igoji/Mweru II/1968 issued on 25th February 2022.That justice has been served and all the execution proceedings were notified to the applicant who participated in full. That the applicant remained adamant even after the title was issued in his names forcing him to apply for eviction as he had now entered his premises which he had constructed on the Suitland.

16. The respondent further avers that the only application in court at Nkubu is dated 17th June 2022 and a copy of which he has annexed marked "CMM 11", adding that the applicant has been evading the hearing of the said application since directions were served on him on the 4th of July 2022. Copies of the directions and the attendant mention notice marked "CMM 12 (a) & (b)" have been annexed.

17. The respondent contends that recently on the 18th of October 2022, he received a notice of appointment of Advocates by the firm of Otieno C. Advocates and the attendant replying affidavit sworn by the applicant on 14th September 2022, and that his interest were drawn to paragraph 3 & 4 of the replying affidavit which stated that it is in the interest of justice that the orders sought should not be granted since the applicant has an appeal in Meru ELC Court no.27/22 pending determination within the applicant's knowledge and that it is for the interests of justice that the court do await the outcome of the said cause before making the substantive orders. The respondent states that there is no appeal and the applicant knows as much but mislead the court that he has an appeal at Meru ELC No. 27/2022.

18. The respondent avers that it is now 4 years since the judgement was delivered and that though the applicant has frustrated the execution of the decree, he now had the title and that the applicant has all the time instructed two firms of advocates.

19. Lastly the respondent avers that he has demonstrated that the application is an afterthought and that the delay is inordinate and he shall suffer great prejudice if the same is allowed.

20. The court directed that the application be canvassed by way of written submissions. The Applicant filed his dated 30th November 2022 and the respondent filed his dated 25th January 2023.

Applicant's Submissions

21. The applicant submitted that the dispute herein is traced to a claim for land on a constructive trust against the applicant. It is the applicant's submission that Section 79G and 95 of the *Civil Procedure*

Act which he cited are applicable in the instant application. That the courts have established working principles of the above law and the factors to be considered when determining an application seeking leave to appeal out of time as discussed by the Court of Appeal in *Omar Shurie Vs Marian Rashe Yafar* [2021] eKLR that the court's discretion is subject to the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.

22. On whether the length and reason of delay was reasonable, the applicant submitted that whereas about two years have lapsed since the judgement was delivered on 17th July, 2019, the applicant who at the trial court was unrepresented has been more than willing to lodge the impending appeal save for the delays occasioned on the part of his then advocate on record Mokua Obiria & Co. Advocates as of 22nd August, 2019 per payment receipt on record and 4th September, 2022 per notice of appointment. The applicant argued that his advocate on record upon receiving instructions to lodge appeal against the judgement did not proceed to do so and would later mislead the applicant into believing that he had filed the appeal under ELC Appeal No. 60/2020.

23. The applicant further submitted that the delay was further occasioned when the applicant was misled to believe that his advocate on record was in the conduct of the matter virtually only for the applicant to realize that there was never an appeal under Meru ELC Appeal No. 60/2020 throughout the onset of COVID-19.

24. That tired of a never-ending imaginary appeal, the applicant followed up the matter only to realize that Meru ELC Appeal No. 60/2020 was non-existent and a mere falsehood and that he was acting under false impression as to Meru ELC No. 60/2020 and that it is therefore clear that whereas the applicant gave instructions to his then advocate on record, only 5 days after statutory time for appeal had lapsed, failure to lodge the appeal was attributable to the previous advocate which did not only rob the applicant to lodge the appeal within time but also led him into believing that Meru ELC Appeal No. 60/2020 had in fact been filed as his appeal, and was being prosecuted, hence the prolonged delay to file the instant application. The applicant submitted that the delay in filing the appeal was therefore not intentional and such a mistake of a legal advisor should and cannot be visited on an innocent applicant as to deny him right of appeal.

25. The applicant relied on the decision of the Court of Appeal *Harrison Wanjohi Wambugu v Felista Wairimu Chege & another* [2013] eKLR which cited Apaloo, J.A's decision in *Philip Chemowolo & another -vs- Augustine Kubede* [1982 -88] KAR 103 at 104 stating that:

> " Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline."

26. The Applicant submitted that besides the court has been lenient for mistakes by advocates as in the instant application in which the applicant can only be cited as innocent and due diligent litigant determined to appeal against the judgement.

27. The Applicant further relied in the case of *J.G. Builders v Plan International* [2015]eKLR, where F. Muchemi, J held that:

> " The door of justice is not closed because a mistake has been committed by a lawyer who ought to know better. The court should do whatever is necessary to rectify it. "

28. On whether the appeal has chances of success if the application is granted, the Applicant submitted that the intended appeal has overwhelming chances of success which if the extension of time to appeal is not granted will frustrate the applicant's determination to pursue his interests of justice at the higher court exposing him to irreparable damage. The applicant argued that he has an arguable appeal per the grounds in memorandum of appeal.

29. The third issue was whether there is a degree of prejudice to the respondent if the application is granted and the Applicant submitted that there is no prejudice to be suffered by the respondent should the extension orders sought be granted and that in fact, it is the applicant who stands to suffer irreparable damage should the application be denied. The applicant argues that it is because he risks eviction from the suit property, a land he has called home, lived and developed for over 60 years as compared to respondent who has stepped on the suit property two times, the first time at around 2010 when the children of the applicant chased him away and second time, after the lower court's judgement, while in the company of surveyor and police officers.

30. The Applicant states that the respondent has never possessed the suit property and that in any event, the court ought to strike a balance between the respondent's judgement made in his favor against the applicant's unfettered right of appeal against the lower court's judgement.

31. The Applicant submitted that as such, there is no higher degree of prejudice to be suffered by the respondent if order extending time of appeal is allowed and that the applicant if not allowed to put in his appeal although late, stands to lose his right of appeal, a constitutional right which would certainly occasion injustice and irreparable loss.

32. The Applicant prayed that his application be allowed with costs.

Respondent Submission

33. The respondent submitted that the court should find that the applicant has not satisfied the provisions of section 79 G and that in view of the deposition in paragraph 3(a-p) of the Replying Affidavit, there is no sufficient reason demonstrated by the applicant to warrant the exercise of discretional relief by the court.

34. The respondent relied in the decision of Meru ELC Misc appeal No. E013 of 2022 *Emily Kinyua wife of Fedesio Kinyua Mark (deceased) vs Lawrence Murithi Mbabu*.

35. The respondent also submitted that the applicant had brought the application 4 years after the judgement was determined and that the delay is inordinate and that the reasons given are flimsy and without foundation and that the application is only meant to frustrate the eviction of the applicant adding that the respondent already has title.

36. The respondent submitted that he has spent 4 years of post judgement to execute the decree and that the applicant has been resisting, making the respondent file plethora of applications as can be seen in his replying affidavit in the subordinate court in which he was successful and that the respondent has title now and that it is the eviction that has made the applicant apply to frustrate it. The respondent submitted that the degree of prejudice is without measure as against him.

37. The respondent pointed out that the Covid pandemic happened in March 2020 and the cessation by road, rail or air was made effective *vide* legal notice no. 50: The *Public Health (Covid-19 restriction of movements of persons and related measures) Rules, 2020 which was done in March*, 2020. That the judgement of subordinate court was delivered on 17th July 2019 and the excuse of Covid pandemic which happened 8 months after the judgement cannot come to aid of an indolent litigant as the applicant.

38. The respondent submitted that litigation must come to an end and prayed for the court to dismiss the application with costs.

Determination

39. I have considered the application herein and the response by the respondent as well as the submissions filed and it is my opinion that the issue which this court ought to determine is whether the orders sought should be granted or not.

40. The applicant substantially seeks for leave to file an appeal out of time. The decision which is sought to be appealed is from the lower court. Under Section 79G of the *Civil Procedure Act*, appeals from the decisions of the lower court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.

41. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now settled. The court ought to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See *Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi* - Civil Application No. NAI 255 of 1997 (unreported) and *Thuita Mwangi –vs- Kenya Airways Limited* [2003] eKLR. The question therefore is whether taking into account the facts of the instant case, the applicant has satisfied the said conditions.

42. As for the length of the delay, the judgment of the trial court was delivered on 17th July 2019. The instant application was filed on 15th August 2022. The 30 days' period within which the applicant ought to have filed the appeal lapsed on 18th August, 2019. The application has been brought after a period of over four (4) years. It is my considered view that the application was brought after unreasonable delay.

43. In justifying the said delay, the applicant deposed that judgement in Nkubu PM's ELC suit No.9 of 2018 was delivered on 17th July 2019 and that immediately he requested the firm of Mokua & Co advocates to file an appeal upon giving them instructions. However the same was not filed. That he has been making several trips towards pursuing the same in vain until when he took the personal initiative to follow up in the courts. That the appeal Meru ELC Appeal No. 60/20 which he was acting under the impression to be his case was not his case.

42. It is my opinion that the reasons for the delay were not well explained, are farfetched, and frivolous and the delay was quite inordinate.

43. As for the chances of the appeal succeeding, as alleged by the applicant, at the stage of determining whether to grant leave to file an appeal out of time on the grounds that the appeal is arguable, it is trite that the court is bound to consider whether the said intended appeal raises a *bona fide* issue for

determination by the Court. The court is not supposed to determine as to the success of the appeal but as to whether the same is arguable. An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. (See *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008).

44. In this case, the respondent states that execution has been carried out in full and he already has title. Therefore the application has been overtaken by events.

45. As for the prejudice which the parties might suffer, the respondent has averred that he stands to suffer prejudice since he is unable to enjoy his land and therefore there must be an end to litigation.

46. As it has always been held, extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal, it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. Discretion of the court must always be exercised judiciously. The applicant although having expressed his intentions to be heard by this court on appeal, it is my considered opinion that he ought not be given an opportunity to pursue the appeal since the delay is quite inordinate and the reasons given for the delay are not convincing. The respondent has clearly elaborated that he already has title to the property and that the applicant has been indolent in pursuing the appeal. In my considered view, the applicant has slept on his rights to challenge the judgement for too long and has failed to explain the inordinate delay. Equity aids the vigilant and not the indolent.

47. For the above reasons, it is my considered opinion that the applicant herein has not satisfied the conditions for grant of leave to appeal out of time. Consequently, the application is dismissed with cost to the respondent.

48. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE 2023

In the Presence of

Court assistant – V. Kiragu

Mrs. Muia for respondent

No appearance for Otieno c for applicant

C.K YANO

JUDGE