



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISC APPLICATION NO. E050 OF 2021

JOSEPH KABUGO NJENGA..... 1ST APPLICANT

EUNICE NJOKI NGUNJIRI..... 2ND APPLICANT

DISTRICT LAND REGISTRAR, THIKA.....3RD APPLICANT

=VERSUS=

NJERI KOMU NDINI..... RESPONDENT

RULING

1. On 15/12/2020, **Hon C A Otieno Omondi**, SPM, rendered a judgment in **Ruiru SPMC E & L Case No 56 of 2020**. The learned magistrate made a finding to the effect that **Njeri Komu Ndini** was the rightful owner of land parcel number **Ruiru East/Juja East/Block 2/1342 (sic)**. About one year later, a notice of motion dated 3/12/2021 was brought seeking an order enlarging the time for lodging an appeal against the said judgement. The said notice of motion was expressed as having been brought by the above three applicants. There is, however, no indication that the Land Registrar was indeed privy to the said application. The said application is the subject of this ruling. The application was expressed as premised on two affidavits sworn by **Joseph Kabugo Njenga** [the 1st applicant] and **Eunice Njoki Ngunjiri** [the 2nd applicant], respectively, both dated 3/12/2021.

2. The 1st applicant deposed that his previous advocate did not notify him about the hearing of the suit, hence he was not able to attend court to “defend himself” in the suit. He added that he instructed his previous advocate to file an appeal, only to realize later that the advocate did not file the appeal. He further deposed that his previous advocate had “**with due diligence** sought for the whereabouts of the court file without trace and had on several occasions contacted the executive officer for assistance to no avail until recently” when his current advocate was able to trace the court file and requested for certified copies of proceedings and judgment. It was his case that the delay was not inordinate since the judgment was rendered on 15/12/2020. He added that he stood to be prejudiced if the order sought was not granted. Lastly, he deposed that he had “unassailable grounds of appeal” with high chances of success.

3. On his part, the 2nd applicant deposed that she was not heard in the trial court because she was not served with the court pleadings relating to the suit, hence she was not able to defend herself. It was her case that she was dissatisfied with the findings of the trial court and wished to lodge an appeal against the judgment. She added that the 1st applicant notified her that the respondent had filed an application seeking contempt orders against the 3rd applicant for declining to comply with the judgment of the trial court. She added that, together with the 1st applicant, they instructed the 1st applicant’s previous advocate to file an appeal against the trial court’s judgment but the said advocate failed to file the appeal. She contended that she stood to suffer irreparable loss, damage and prejudice if the order sought was not granted. It was her case that judgement having been delivered on 15/12/2020, the delay was not inordinate.

4. The respondent opposed the application through a replying affidavit sworn on 16/12/2021. She deposed that the 1st applicant’s contention that he was not notified about the hearing was dishonest, adding that the hearing date was taken in the presence of the parties. He added that the applicants had sufficient time to lodge an appeal but elected to be indolent. She further deposed that the time taken before bringing this application was inordinate and unjustifiable. She contended that the intended appeal was an afterthought manouvre intended to “deny the course of justice.” The respondent further deposed that no evidence had been placed before the court to demonstrate that the previous advocate attempted to access the court file. She added that the Land Registrar had already enforced the judgment of the court. She urged the court to reject the application.

5. The firm of **L. M. Kinuthia & Associates** filed written submissions dated 21/12/2021, expressed as relating to the 1st and 3rd applicants. Counsel cited **rule 4** of the **Court of Appeal Rules (sic)** and the decision in **Vishva Stone Supplies Company Limited v RSR Store (2006) Limited [2020] eKLR** and submitted that a wrong committed by an advocate against a client should not be visited on the client. Counsel added that the applicants had demonstrated that they were not responsible for the delay, adding that it would be unfair and unjust to hold the applicants responsible for non-compliance and decline to exercise discretion in their favour. Counsel urged the court to invoke **rule 1(2)** of the **Court of Appeal Rules (sic)** and **Article 159(2)(d)** of the **Constitution** and grant the orders.

6. The respondent filed submissions dated 17/1/2022 through the firm of **Kinuthia Kahindi & Co. Advocates**. Counsel for the respondent

identified the following as the two issues falling for determination: (i) Whether the delay by the applicants to file an appeal was inordinate and lacked proper justification; and (ii) Whether the applicants were properly served.

7. On whether the delay by the applicants to file an appeal was inordinate and lacked proper justification, it was counsel's submission that the applicants' had not provided a sufficient reason that would lead to their application being allowed and that a party seeking extension of time had to establish the basis upon which the court ought to exercise its discretion in his favor. Counsel relied on the decision in **Leo Sila Mutiso v Rose Wangari Mwangi C.A No. Nairobi 255 of 1997**. On whether the applicants were properly served, counsel submitted that the applicants were fully aware of the proceedings and judgment in the trial court. Counsel urged the court to reject the application.

8. The court has considered the application, the response to the application; the relevant legal frameworks; and the prevailing jurisprudence on the question falling for determination in the application. The single question falling for determination in the application is whether the applicants have satisfied the criteria upon which our courts exercise jurisdiction to enlarge the time for lodging an appeal.

9. The Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** outlined the following principles which guide our courts when exercising jurisdiction to enlarge time:

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) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

5) Whether there will be any prejudice suffered by the respondent 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.

10. The present application was brought approximately one year after the judgment had been rendered. In response to the application, the respondent swore an affidavit deposing that the Land Registrar had already enforced the judgment and cancelled the entries and the title which had been adjudged fraudulent. That means the judgment has been enforced. Secondly, the applicants have deliberately withheld material information which would be useful to the court when exercising jurisdiction to enlarge time in an application of this nature. They have withheld the exact dates when they became aware of the judgment; the exact date when they instructed the alleged previous advocate to lodge an appeal; the exact date when their previous advocate unsuccessfully sought to access the trial court file; and the identity of the previous advocate whom they allegedly instructed to lodge an appeal. It is clear from the foregoing that the applicants are seeking an equitable remedy but have elected not to be candid.

11. Further, the reasons tendered by the applicants to explain the delay are contradictory. They allege that they were not aware of the judgment and they at the same time blame their unidentified previous advocate for failing to act on their instructions to lodge an appeal within the prescribed time. They allege that their previous advocate exercised due diligence and at the same time blame his lack of diligence for the predicament they find themselves in. They have not presented any evidence to support their contention that the trial court file was missing or that their previous advocate wrote to the trial court registry asking for records from the trial court file for the purpose of lodging an appeal.

12. The 2nd applicant contended that she was never served with court papers. There is, however, evidence tendered by the respondent, showing that the 2nd applicant was properly served. Further, there is no evidence that she ever challenged the impugned judgment in the trial court on the ground of lack of service.

13. The applicants contend that the delay of one year is not inordinate. I do not agree with them on that. The suit giving rise to the impugned judgment was filed at Milimani Environment and Land Court in 2014. It was subsequently transferred to Ruiru Senior Principal Magistrate Court. The respondent waited for six years for the case to be concluded. Approximately one year after the conclusion of the case, the applicants want to re-open it through this application. A period of one year under the above circumstances is, in my view, inordinate.

14. The totality of the foregoing is that the applicants have failed to satisfy the criteria upon which jurisdiction to enlarge time is exercised. The result is that I find no merit in the application dated 3/12/2021. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Kinuthia Nyambura for the Applicants

Mr Omondi for the Respondent

Court Assistant: Lucy Muthoni