



Land Settlement Fund Board of Trustees & another v Ondeng & 2 others (Miscellaneous Civil Application E035 of 2021) [2022] KEELC 3563 (KLR) (13 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E035 OF 2021**

**A OMBWAYO, J
MAY 13, 2022**

BETWEEN

**LAND SETTLEMENT FUND BOARD OF TRUSTEES 1ST APPLICANT
ATTORNEY GENERAL 2ND APPLICANT**

AND

**DAVID OWINO ONDENG 1ST RESPONDENT
KOSETIONY KIPRUTO TINDERET 2ND RESPONDENT
KIPROTICH KORIR 3RD RESPONDENT**

RULING

1. The applicants herein filed a notice of motion application under order 50 rule 6, order 51 rule 1 of the *Civil Procedure Rules*, 2010, sections 1A,1B,3,3A and 75 of the *Civil Procedure Act*, article 159 of *the Constitution* of Kenya, 2010 and all other enabling provisions. The Applicants sought for the following orders:
 1. That this Application be and is hereby certified urgent.
 2. That this Honourable court be pleased to allow the Applicant to Appeal the Judgment in Kisumu Chief Magistrate’s Court Civil Suit No. 437 of 2018 delivered on December 16, 2019out of time.
 3. That this Honourable Court be pleased to order stay of execution of the Judgment delivered on December 16, 2019pending the hearing and determination of the intended appeal.
 4. That the costs of this Application be in the cause.
2. The Application was based on grounds that the Applicants are aggrieved by the decision of the trial court and it intends to appeal the same as there was double compensation to the 1st Respondent by the



- trial court. That the trial court awarded the 1st Respondent damages on the current market value of the suit property at Kshs. 8,200,000/= together with the purchase price of the suit property at Kshs. 1,200,000/=.
3. It was stated that the Learned Trial Magistrate failed to consider the fact that the current value of the suit property took into account the purchase price of the suit property. That the 1st Respondent was awarded valuation fees without adducing to the trial court receipts to prove that valuation occurred and that the Learned Trial Magistrate failed to consider the fact that the suit property was not developed by the time the 1st Respondent was sued in Kisumu High Court Civil Case No. 67 of 2010 and therefore the 1st Respondent lost the right to be awarded rent after selling the property. That the Learned Trial Magistrate erred in awarding the 1st Respondent totaling to Kshs. 240,000/=.
 4. It was further stated that the Learned Trial Magistrate erred in fact by awarding the 1st Respondent costs payable to Josana Academy Kshs. 318,063/= which the court in High Court Civil Case No. 67 of 2010 had refused to grant and that the Learned Trial Magistrate erred in awarding the 1st Respondent Kshs. 300,000/=, the cost of the fees paid to the advocates defending High Court Suit No. 67 of 2010 yet he had lost the case filed against him by Josana Academy. That the Learned Trial Magistrate erred in fact in awarding the 1st Respondent traveling and subsistence expenses during the trial at Kenya Shillings 126,738.64/= separately instead of including them in the bill of costs.
 5. That the Learned Trial Magistrate erred in fact by awarding the 1st Respondent Kshs.94,470/= for the work done on the suit property before the injunction was issued yet the valuation of the suit property was done after the Respondent had incurred the expenses and the amount awarded for work done should have formed part of the current market value. That the 2nd Applicant received instructions to Appeal late which has prompted this Application to Appeal out of time. That the Applicants shall suffer serious injustice if the orders sought are not awarded by this court and the Respondents are unlikely to suffer any prejudice if this Application is allowed.
 6. The Application was supported by the Affidavit of Grace Essendiwho relied on the grounds in the Application.
 7. The matter was placed before the Judge on 15th December 2021 and the same was not certified urgent. The Judge directed the Respondents to respond within 7 days and parties to file and exchange submissions within 14 days of service.
 8. The 1st Respondent filed a Replying Affidavit on 29th December 2021 where he deposed and stated that Judgment in the Chief Magistrate's Court Civil Suit No.437 of 2018 was delivered by the Senior Principal Magistrate, Honourable Mr. R.K. Ondieki on the 16th day of December 2019 and due to the pandemic, he obtained a copy of the decree and certified copy of the certificate of order of Judgment and costs on 3rd May 2021 and his Advocate forwarded the same to the 2nd Applicant through the Principal Litigation Counsels Office at Kisumu who duly forwarded the settlement.
 9. That the Principal Litigation Counsel is the regional representative of the Honourable Attorney General and advises the State Law Office whether it should settle decrees or appeal against the decree of the court before settlement of the decree and since the Applicants were fully aware of the Judgment from 16th December 2019 they ought to have appealed within the prescribed time.
 10. That despite the long inordinate delay of 730 days the Applicants' counsel has in her Affidavit not explained the cause of the delay and has merely reproduced in her Affidavit her grounds of appeal. That the intended Appeal does not stand any chances of success since the Defendants/Applicants did not adduce any evidence at the hearing although some of them filed a Statement of Defence. That he has



perused the Affidavit of the Applicants' Counsel and finds out that the Applicants stand to suffer no prejudice as a result of the judgment.

11. He further stated that the Applicants did not intend to Appeal and this Application has been instituted in order to buy time or as a delaying tactic to avoid expeditious settlement of the fruit of the Judgment in his favour and he therefore prayed for the Application to be dismissed with costs.
12. The 2nd and 3rd Respondents failed to file their reply to the Application.

Applicants' Submissions

13. I have perused the court file and I do confirm that the Applicants failed to file their submissions as ordered by the court.

1st Respondent's Submissions

14. The 1st Respondent filed his submissions on December 29, 2021 where he stated that where a party intends to file an appeal out of time, one must satisfy the court that he had good and sufficient cause for not filing the appeal in time as provided for under section 79G of the Civil Procedure Act.
15. That the Applicants in their Affidavit supporting the Application have reproduced the allegations in the draft Memorandum of Appeal in an attempt to convince the court that the Appellant has an arguable appeal. It was the 1st Respondent's submission that the Applicant is required to satisfy the court that he had a good reason or sufficient cause for not filing the Appeal within the prescribed period of 30 days.
16. That the Applicants were present when Judgment was delivered and they must provide a satisfactory explanation or reason for the delay before the court turns its attention as to whether the Appeal has merit or not and whether it has chances of succeeding. That the long delay has not been explained by the Applicants. It was further submitted that breach of contract occurred on 2012, the valuation report on the basis of which part of the Judgment was made on 16th October 2015, judgment was delivered on 16th December 2019 and up to date the 1st Respondent has not been paid the fruits of his Judgment.
17. That an Appeal will grossly prejudice the rights and interests of the 1st Respondent if the Application is allowed and the Appeal does not have a good chance of success. He submitted that an extension of time to file an Appeal is not a legal right of a party but an equitable relief or remedy which is available only to the vigilant and not to the indolent
18. The 1st Respondent relied in the case of *Union Insurance Company Ltd v Ramzan Abdul Dhanji*, Nai. C.A. Applic. No. 238 of 2000-Julius Muthoka Ndolo v Danson Mutuku Muema, Stecol Corporation Ltd v Susan Awuor Mudembi (2021) e KLR, MFI Document Solutions Ltd v. Paretto Printing Works Limited (2021) eKLR.
19. The 1st Respondent prayed that there is no reasonable ground shown why leave to appeal out of time should be granted to the Applicants and the Application should therefore be dismissed with costs.

2nd and 3rd Respondent's Submissions

20. I have perused the court file and confirm that the 2nd and 3rd Respondents failed to file their submissions.



Analysis and Determination

21. This court has considered the Application, the Affidavits and the Submission of the 1st Respondent and the Authorities. The law that guides extension of time to file an Appeal out of time is provided for as below:

Section 79G of the *Civil Procedure Act* provides as follows:

“ 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.

Section 95 provides as: -

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.

22. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

- (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) An order on an award stated in the form of a special case;
- (c) An order modifying or correcting an award;
- (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) An order under section 64;
- (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) Any order made under rules from which an appeal is expressly allowed by rules.

23. The Applicants have sought orders for extension of time and in their Supporting Affidavit, they have failed to give reasons for the orders to be granted. I do confirm that the grounds in the Application and



reasons given in the supporting Affidavit together with the grounds in the Intended Memorandum of Appeal are the same. I agree with the 1st Respondent that the Applicants have not satisfied the parameters for orders of granting an Appeal out of time to be granted.

24. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 (referred to by the Court of Appeal in *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR) set out the guiding principles to be applied in considering an application for extension of time as;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are:

- i. first the length of the delay;
- ii. secondly, the reason for the delay;
- iii. thirdly (possibly) the chances of the appeal succeeding if the application is granted; and,
- iv. fourthly, the degree of prejudice to the respondent if the application is granted.”

1. Length of the delay and reasons thereof;

24. It is not in dispute that Judgment in Kisumu Chief Magistrate’s Court Civil Suit Number 437 of 2018 was delivered on 16th December 2018 and the same was delivered in the presence of both parties. There is a delay of 730 days on the part of the Applicants and it is this court’s view that 730 days is beyond the Statutory period for Filing an Intended Appeal. The Supporting Affidavit filed by the Applicants does not clearly explain the reasons for the delay. I do find that the reasons for the delay have not been explained by the Applicants to the satisfaction of this court.

2. Chances of the appeal succeeding if the application is granted

25. In the case of *Kenya Power & Lighting Company Ltd v Rose Anyango & another* the Court stated that;

‘On whether the intended appeal has chances of success is not for this court to decide at this stage save that from the draft intended memorandum of appeal annexed, I am satisfied that the intended appeal is not frivolous on the face of it. The applicant will have an opportunity to satisfy the court on the merits of its appeal and the Respondents will have a chance to respond to the merits or demerits of the appeal once filed.’

26. In *Divya J. Patel v Guardian Bank Limited* [2020] eKLR, Mohammed JA. held that an arguable appeal is not one that must succeed but one which is not frivolous and merits consideration by the court.

27. At this stage am not able to ascertain whether the Applicant has an arguable Appeal. However, having looked at the Intended Memorandum of Appeal, the same does not raise triable issues that need to be determined by this court. The Application has not been brought in good faith as the Appeal is an afterthought and a waste of court’s time. The Applicants are using delay tactics in order to deny the 1st Respondent from enjoying the fruits of the Judgment delivered in his favour.

3. The degree of prejudice to the respondent if the application is granted

28. Although the Applicants are aggrieved by the Judgment of the lower court and are desirous of appealing against the said judgment out of time, this court finds that there is no prejudice that the



Applicants are likely to suffer. The Applicants have failed to demonstrate the prejudice that they are likely to suffer in the event the orders sought are not granted. I do find that this Application lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

