



**Kalama v Piero (Environment and Land Appeal 13 of 2021)
[2022] KEELC 3998 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 13 OF 2021
MAO ODENY, J
JUNE 29, 2022**

BETWEEN

LAWRENCE WAHE KALAMA APPELLANT

AND

FLORIS PIERO RESPONDENT

RULING

- 1 This ruling is in respect of a Notice of Motion dated September 17, 2021 by the appellant/applicant seeking the following orders; -
 - a. Spent
 - b. The honourable court be pleased to grant the applicant leave to lodge appeal out of time
 - c. Pending *inter parties* hearing and determination of this application hereafter, he court be pleased to issue an order of arresting hearing of Notice of Motion to show cause slated on September 21, 2021.
 - d. Pending hearing and determination of the appeal, the court be pleased to issue an order for stay of execution of decree and all other consequential order issued in Land Case no 29 of 2018 Lawrence Washe Kalama v Floris Piero.

Counsel agreed to canvas the application vide written submissions which were duly filed.

Applicant's case

- 2 The application is supported by the annexed affidavit sworn by Lawrence Washe Kalama the appellant who stated that at the time of institution of the lower court suit against the respondent he was represented by the firm of Mwaure Mwaure and Waihiga advocates but vide a Notice of change of



advocates dated June 29, 2018 filed on the same date he was represented by the firm of Wesley John Austin & Co advocates.

- 3 He deponed that through his new counsel, he was informed that a consent was filed on July 9, 2018 which consent was adopted as an order of the court on July 10, 2018. He further deponed that the said consent was entered into by his advocates after the Notice of change of advocates had been filed.
- 4 The respondent filed a replying affidavit dated November 26, 2021 stating that the appellant approached him for an out of court settlement in Land Case no 29 of 2018 which led to advocates of both parties drafting a consent that was filed in court and adopted as an order of the court on July 10, 2018.
- 5 He further stated that the appellant has brought this application in bad faith and the same ought to be dismissed.

Appellant/applicants submissions

- 6 Counsel for the applicant identified two issues for determination namely, whether this application has been brought without undue delay and whether the applicant should be granted stay of execution orders.
- 7 On the first issue counsel submitted that the applicant was not aware of the lower court ruling which was delivered electronically on February 15, 2021 that he only became aware of the said ruling on September 6, 2021 when he was served with a Notice to Show Cause.
- 8 Counsel submitted that the intended appeal has high chances of success and therefore the decree and all consequential orders issued in Land Case no 29 of 2013 should be stayed pending the hearing and determination of the intended appeal.

Analysis and determination

- 9 The issues for determination are as to whether the applicant should be granted leave to appeal out of time and whether the court should grant and order of stay of execution pending appeal.

- 10 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.”

- 11 Section 95 provides thus: -

95. 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.

- 12 Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from judgment of the subordinate court to the High Court is 30 days. An applicant must satisfy the court that he/she had a good and sufficient cause for not filing the appeal in time.



- 13 The judgement that the Applicant seeks to appeal against was a consent judgment dated July 9, 2018 and adopted as a judgment of the court on July 10 2018. This application was filed on September 17, 2021 which is more than 3 years from the date of the judgment.
- 14 The applicant has not shown any good or sufficient cause why he did not file the appeal within time. The applicant just stated that he was not aware of the ruling and just became aware when he was served with a notice to show cause. He admits that he had instructed counsel in the case where a consent judgment was entered.
- 15 In the case of *Edith Gichungu Koine vs Stephen Njagi Thoithi* [2014] eKLR the Court of Appeal held that: -
- Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
- 16 Similarly in the case of *First American Bank of Kenya Ltd vs Gulab P Shah & 2 Others* Nairobi (Milimani) HCCC no 2255 of 2000 [2002] 1 EA 65 the court set out the factors to be considered in deciding whether or not to grant such an application: -
- (i). the explanation if any for the delay;
 - (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
 - (iii). Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the applicant.
- 17 Further in the Court of Appeal case of *Omar Shurie v Marian Rashe Yafar* [2020] eKLR the court outlined factors to consider when dealing with an application for leave to appeal out of time as follows: -
- i) the length of the delay
 - ii) the reason for the delay
 - iii) the chances of the appeal succeeding if the application is granted
 - iv) the degree of prejudice to the respondent if the application is granted
- 18 The applicant has not explained the delay in filing the current application and the judgment that he wants to appeal against is a consent judgment which was adopted as the order of the court. This would be an uphill task to set aside a consent unless he proves that it was procured through fraud, mistake or coercion. The delay in filing the appeal for over 3 years cannot be wished away.
- 19 I find that the application lacks merit and is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF JUNE, 2022.

M.A ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave



of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

