



Malesi v Nderitu & another (Environment & Land Miscellaneous Case E206 of 2021) [2022] KEELC 3724 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3724 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E206 OF 2021**

OA ANGOTE, J

JULY 28, 2022

BETWEEN

BEATRICE MALESI APPLICANT

AND

PETER NDERITU 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

RULING

1. In the Notice of Motion dated November 18, 2021, the Applicant has sought for the following orders:
 - a. That this Honourable Court be pleased to enlarge the time in which the Appellant/ Applicant can file her appeal against the judgement of the learned Senior Resident Magistrate I. Gichobi (Ms) dated and signed at Kangema on November 30, 2018 but delivered at Nairobi in the absence of all parties by D O Mbeja (Mr) Senior Resident Magistrate on December 24, 2018.
 - b. That the costs of this application abide in the decision of the intended appeal.
2. The application is supported by the grounds on the face of it and the Supporting Affidavit of even date, sworn by Livingstone Maina Ombete, the Appellant's advocate. The Appellant's advocate deponed that the Applicant filed a Notice of Motion application in this court for enlargement of time to file her appeal dated May 7, 2019; that the court ruled on this application on January 30, 2020, in the absence of the Applicant's counsel and that he had instructed his clerk to attend court and ask counsel to hold his brief. However, it was deponed, his clerk did not attend court on the day the matter was scheduled for Ruling.
3. The applicant's counsel deponed that he learnt of the court's decision on February 17, 2020, following which he purported to file an appeal on February 18, 2020, by which time the 14-day window period for filing an appeal had lapsed. It was deponed that the Applicant filed an application to enlarge the



- time to file her appeal on February 25, 2020 but was compelled to withdraw the intended appeal and application on November 15, 2021, as they were found by the court to be incompetent.
4. The Applicant's advocate deponed that the 14-day window to file an appeal expired on February 13, 2020 while the applicant purported to file her appeal five days later; that the Applicant ought not to be blamed for her counsel's inability to attend court when the Ruling was delivered and the subsequent legal errors and that leave should issue to file an appeal against the learned Senior Resident Magistrate's decision.
 5. The 1st Respondent opposed the application vide a Replying Affidavit dated March 24, 2022. The 1st Respondent deponed that the application is frivolous, vexatious, an abuse of the court process and should be struck out with costs. According to the 1st Respondent, despite knowing that the matter was coming up for judgement, the Applicant's advocate did not attend Court by himself or instruct another advocate to attend on his behalf and that had the Applicant's advocate attended court, he would have filed the Appeal in the prescribed time.
 6. It was urged that the Applicant has not disclosed a good and sufficient cause for failing to file the appeal in time; that he has also not demonstrated that due diligence was done to obtain the judgment in reasonable time and that extension of time is not a right but a remedy that may be granted to a deserving party.

Submissions

7. The Applicant's counsel submitted that the court has the discretion to extend time to file an appeal, so long as there is no inordinate delay and where such delay has been satisfactorily explained. Counsel argued that in this case, the inordinate delay has been satisfactorily explained. Counsel relied on the case of *Silas Kanyolu Mwachha vs Josephine Kavive James*- Malindi High Court Misc. Application No.19 of 2021 where the court held that where there is an inordinate delay which is satisfactorily explained, leave to extend time can still be granted.
8. The Applicant's counsel acknowledged that counsel for the Applicant was not diligent in exercising his professional obligations. However, it was submitted, dereliction of duty by a party's lawyer should not affect a party's legal right; that the Applicant has been eager to appeal against the lower court's decision and that the intended appeal raises profound legal issues including whether a party can lose a parcel of land allocated to him on the basis that it is adjacent to another parcel of land.
9. The Applicant's counsel finally urged that there would be no prejudice on the 1st Respondent's part if this appeal is filed, heard and determined on merit and that the 1st Respondent had failed to give a solid reasons why the Applicant's counsel's mistake should be visited on the Applicant in denying her the right to file her appeal.
10. On his part, the 1st Respondent's counsel pointed out the dissonance in the Applicant's pleadings and submissions. It was submitted that while the Applicant has indicated in his application that they are seeking to appeal the judgement dated November 30, 2018 and delivered on December 24, 2018, in their submissions, they state that they are appealing against the judgement signed on November 30, 2015 and delivered on December 24, 2016.
11. It was submitted on behalf of the 1st Respondent that the Applicant through her counsel is abusing the process of this court and wasting judicial time. Counsel relied on the Supreme Court's decision



in *Nicholas Kiptoo Arap Korir vs IEBC & 7 others* Application no 16 of 2014 (2014) eKLR where the court held as follows:

“...Where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence.”

12. Counsel also relied on the case of *County Executive of Kisumu vs County Government of Kisumu & others* (2017) eKLR, where the Supreme Court reiterated the principles for filing an appeal out of time, as clearly stated in the Nicholas Salat case mentioned above, where it was held as follows:

“The under-lying principles that a Court should consider in exercise of such discretion:

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 for 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 respondents 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.”

13. Counsel further submitted that the Applicant’s conduct in filing an appeal that was bad in law was not excusable, as ignorance of the law is not a defence. He relied on the case of *Jimcab Services Limited v Bartholomew Benard Osodo & Another* [2018] eKLR where the court held that the Applicant’s conduct should be excusable and one that justifies the court’s intervention.

Analysis and Determination

14. The issues for determination in this matter are whether this court should allow the Applicant to file her appeal out of time. The law on filing an appeal out of time to this court is set out in Section 16A(2) of the *Environment and Land Court Act* No 19 of 2011 which states:

“(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in



matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the *Environment and Land Court Act*, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

15. A similar provision is set out in the proviso to Section 79G of the *Civil Procedure Act* Cap 21 Laws of Kenya. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR exhaustively considered the power of the court to grant extension orders as follows:

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

16. The Supreme Court derived the following principles which a court should consider in exercising its discretion to grant extension of 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 for 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 respondents 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.

17. It is thus for this court to determine whether the case as presented by the Applicant has disclosed reasons for the delay, and whether the Respondent will suffer prejudice if the orders sought are granted. The court will also consider whether this application has been brought without undue delay.

18. The facts in this case are that the parties herein had a dispute that was heard and determined by the Senior Resident Magistrate Hon I Gichobi. The date of the decision by the learned Magistrate is not clear from the Applicant’s pleadings, neither has it been annexed on the Applicant’s advocate Supporting Affidavit.

19. While the Notice of Motion indicates that the Judgement by the learned magistrate was dated November 30, 2018 and delivered on December 24, 2018, the Applicant’s advocate’s submissions



state that the Judgment is dated November 30, 2015 and was delivered on December 24, 2016. It is therefore not clear to this court the date of the impugned Judgment or even the contents thereof.

20. In addition, there is dissonance between the application herein and the Supporting Affidavit as to when the Applicant herein first sought leave to file her appeal out of time. In the application, counsel indicates that the application was made on May 7, 2020 while the supporting affidavit states that the application was made on May 7, 2019. The latter date is restated in the submissions filed.
21. The Applicant has submitted that the reason for the delay in filing the Appeal was due to the failure of her advocate to attend court. The record shows that the Applicant's counsel filed an application for leave to file the appeal out of time, which leave the court granted on January 30, 2020. However, the Applicant's counsel squandered this opportunity by failing to appear in court on the date the application was coming up.
22. Counsel thereafter purported to file the appeal on February 18, 2020, by which time the 14-day window period granted by the court had lapsed by five days. The Applicant also filed an application to enlarge the time to file her appeal on February 25, 2020 which he withdrew with the intended appeal on November 15, 2021. The proceedings about all these occurrences are not before this court.
23. With respect to errors made by advocates, the court in *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR held as follows:

“Blunders 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 determined on its merits. 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 the parties and not the purpose of imposing discipline”

24. The law provides that a party seeking the equitable remedy of extension of time must show sufficient cause for the delay. ‘Sufficient cause’ was defined in the Indian case of *Parimal v Veena* [2011] 3 SCC 545 which was cited with approval by the Court of Appeal in *BML v WM* [2020] eKLR:

“Sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.”

25. The Appellate court also cited with approval the case of *Ratnam v Kumarasamy* [1964] 3 ALL E R 933 where the Privy Council stated that:

“The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party



in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

26. The Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR also articulated that an advocate has a duty to the court as well as to the client as stated below:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. Halsbury’s Laws of England, 4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court’s expectations this way:

‘...I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...’

27. The Appellate court went on to rely on the case of *Ketteman & others v Hansel Properties Ltd* [1988] 1 All ER 38 where Lord Griffin stated:

“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.”

28. The Applicant seeks to file an appeal against a decision that was made in 2015 and delivered in 2016 (according to his advocate’s submissions). This accounts for a delay of six years. The reasons they have given for the delay have been errors or mistakes by their advocates, who continue to represent them in this suit.

29. It is trite law that it is the duty of a litigant to pursue the prosecution of their case. This was well stated in the case of *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No 397 of 2002 where Kimaru, J expressed himself as follows:-

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case.”

30. Being an equitable remedy, the Applicant needed to show that she was not guilty of indolence, which she has failed to do. In fact, the Applicant did not even avail to this court a copy of the impugned Judgment by the Magistrate to enable the court know the date it was delivered and the reasons thereof, or the subsequent applications and rulings delivered by this court.



31. That being the case, it is the finding of this court that the Applicant has failed to show sufficient cause for the delay in filing her appeal. This application is therefore dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF JULY, 2022

O A ANGOTE

JUDGE

In the presence of;

Mr Ombete for Applicant

Ms Mungui holding brief for Omari for 1st Respondent

Ms Katila for 2nd Respondent

Court Assistant - June

