



**Reynolds Construction Company (Nigeria Limited) v M'Mboroki (Environment and Land Miscellaneous Application E036 of 2021) [2022] KEELC 2447 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2447 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E036 OF 2021**

**CK NZILI, J  
JULY 20, 2022**

**BETWEEN  
REYNOLDS CONSTRUCTION COMPANY (NIGERIA LIMITED) APPLICANT  
AND  
FESTUS M'ARITHI M'MBOROKI ..... RESPONDENT**

**RULING**

1. The court is asked to stay or suspend the Nkubu ELC Case No. 153 of 2018 between parties herein till the hearing of an intended appeal and in the alternative strike out the suit for lack of jurisdiction. The application is supported by the supporting affidavit of Fred Matebo sworn on the even date.
2. The grounds are that its application dated November 22, 2019 was dismissed on January 27, 2021 without notice; it only learned about the same on August 4, 2021; failure to notify it on the delivery date, occasioned injustice for it could not file an appeal; the application was dismissed without considering their written submissions; it was made in error for jurisdictional issues had been raised; unless the stay is granted the intended appeal would be rendered nugatory; it will stand to suffer irreparable loss and damage and that the trial court will proceed and render a decision without jurisdiction and embarrass itself.
3. The application is opposed by a replying affidavit sworn by Thurairia Atheru advocate on October 18, 2021 on behalf of the respondent/plaintiffs. It is averred the suit was filed on March 23, 2019 and adjourned on November 13, 2019 at the instance of the applicant. That thereafter on December 20, 2019 the applicant filed an application dated November 22, 2019 seeking for dismissal of the suit but did not prosecute it for a whole year. That parties were ordered to file written submissions and on December 16, 2020 by consent they fixed a ruling date for January 27, 2021 but the applicant deliberately failed to attend the ruling.



4. That after 30 days a mention for June 9, 2021 was taken and served upon the applicant who failed to show up despite service and a hearing date for August 4, 2021 was fixed and service effected upon the applicant, upon which Mr. Kamande also wrote an email seeking for adjournment on account of indisposition. That on August 4, 2021 the plaintiff attended court with witnesses and Mr. Kiogora Arithi advocate held brief for Mr. Kamande an adjournment was granted and by consent the matter was fixed for hearing on November 23, 2021 without any indication to the court of an intention to appeal against the said ruling. That the respondent had sought for leave to file the suit out of time. That the claim was not on occupation of land or boundary but negligence hence Section 18 of the [Land Registration Act](#) was inapplicable. That there has been inordinate delay with no explanation at all and similarly the applicant ought to deposit the sum claimed in court as security. That the application is frivolous, a delaying tactic and should be dismissed.
5. By written submissions dated February 28, 2022 the applicant states they are entitled to leave to file an appeal out of time as the delay was occasioned by no fault of their own but lack of notice on the delivery of the ruling, which was in bad faith and contrary to the right to a fair hearing. Reliance was placed on *Kenya Shell Ltd vs Kobil properties Ltd* (2006) 2 E.A 132 CAK, Sections 79 a & 95 of the [Civil Procedure Act](#) and *Nicholas Kiptoo Arap Korir Salat vs IEBC* (2014) eKLR.
6. As regards inordinate delay the applicant submits it only came to know of the dismissal on August 4, 2021. On stay of the proceedings the applicant submitted under Order 42 Rule 6 (1) [Civil Procedure Rules](#), they had an arguable appeal, the application was filed expeditiously and it was in the interest of justice to allow it.
7. Reliance was placed on Global Tours and Travel Ltd NRB HC Winding Up Cause No 43 Of 2000 and *Mrao Ltd vs First American Bank (K) Ltd and 2 others* (2003) eKLR on prima facie irregularly assumed jurisdiction contrary to Section 18 (2) [Land Registration Act](#) for boundaries were yet to be established or determined by the land registrar. Reliance was placed on *Azzuri Ltd vs Pink Properties Ltd* (2018) eKLR, *George Kamau Macharia vs Dexka Ltd* (2019) eKLR.
8. On whether the suit was time barred reliance was placed on Section 4 (2) of the *Limitations of Actions Act* and *Alba Petroleum Ltd vs Total Marketing (K) Ltd* (2019) eKLR.
9. On delay the applicant submitted the application was timeously filed after establishing the application had been dismissed. Regarding the interest of justice to grant stay of proceedings the applicant submits the issue before the trial court was on boundary dispute whose jurisdiction falls under the Land Registrar and not the court. Reliance was placed on *Speaker of National Assembly vs James Njenga Karume* (1992) eKLR, *Christopher Ndolo Mutuku & another vs CFC Stanbic Bank Ltd* (2015) eKLR.
10. Further the applicant submitted the court should be guided by *Owners of M.V Lillian(s) vs Caltex (K)* (1989) KLR 1 and in the matter of advisory opinion of Supreme Court Constitutional Application No. 2 of 2011 and find the suit falling under the powers of the land registrar under Section 18 (2) of the [Land Registration Act](#) and strike it out with costs.
11. The respondent submitted the orders sought were discretionary in nature and the applicant had failed to meet the key considerations namely substantial loss, there has been unreasonable inordinate delay, there are falsehoods being peddled by the applicant and the application was against the overriding objective for just expeditious, proportionate and affordable resolution of civil disputes.
12. Reliance was placed on *Dilppack Kenya Ltd vs William Muthama Kitonyi* (2018) eKLR for lack of quality reason for the delay. The respondent submitted the conduct of the applicant did not qualify it to deserve discretionary orders. Reliance was placed on *Hunker Trading Co. Ltd vs Elf Oil Kenya*



*Ltd Nrb Civil Application No. 6 of 2010, First American Bank of Kenya Ltd vs Gulab P. Shah & 2 others* (2002) ICA 65.

13. On striking out of the suit the respondent submitted that looking at the draft memorandum of appeal it dwells on issues that should be addressed before the lower court and it was only fair the matter be heard by the trial court.
14. Having gone through the application, the reply and the written submissions the issues for my determination are:
  - i. If there has been inordinate delay in filing the application.
  - ii. If the delay has been explained.
  - iii. If the applicant has an arguable appeal.
  - iv. If there is justification in staying or striking out the suit.
15. On the first issue counsel for the respondent has stated the applicant in the application dated January 20, 2019 took a year to be prosecuted and on 16.12.2020 a date for ruling was fixed by the court for January 27, 2021. The applicant has not denied the contents of paragraph 5 – 14 of the replying affidavit which gives the chronology of events and non-attendance before the trial court on the part of the applicant and its counsel on record.
16. The applicant states its constitutional rights as to fair hearing were infringed yet it does not explain why they did not attend court or make a follow up to know the outcome of the application.
17. Further as early as March 15, 2021 the applicant was served through registered post with a mention notice for 9.6.2021 through its law firm's known address. This fact has not been denied at all. It cannot therefore be true that the applicant came to know about the dismissal of their application after August 4, 2021.
18. The parties were given clear timelines to file written submissions and attend court for the fixing of the ruling date, on December 16, 2020 and the applicant was ably represented on that date. There would have been no other need to notify the applicant since it was presumed the advocate who held their brief would communicate the same to them.
19. Further, between December 16, 2020 and August 3, 2021 that by itself was inordinately long period of time. If at all the applicant had been vigilant to prosecute the application and the suit. The court in *Nicholas Kiptoo Koriri Salat (supra)* held that extension of time is not a right of a party, and being an equitable remedy, it was only available to a party deserving it, since a burden is on the applicant to lay a basis to the satisfaction of the court why it should exercise discretion in its favour. The applicant has not in my view given plausible explanation why they did not attend court and take the ruling on January 27, 2021 and or in the alternative soon thereafter follow up to know the fate of the application.
20. There is no reasonable explanation for the delay. Other than trying to apportion blame and instead of owning up the mistake by taking responsibility, the applicant is trying to blame it on the court yet the applicant was ably represented by Mr. Arithi. These facts have not been denied at all. On that score alone, I find the extension of time unmerited for failure to explain the delay. See *George Mwenda Mutburi vs Mama Day Nursery & Primary School* Nyeri C.A NO. 47 of 2014.
21. The applicant submitted it has a constitutional right of fair hearing and appeal and if there is no stay of proceedings the intended appeal which is said to have arguable points would be rendered nugatory and the applicant would suffer irreparable loss.



22. Courts have held an arguable appeal need not succeed so long as it raises a bonafide issue for the determination of the court. See *Richard Ncharpi Leiyagu vs IEBC & 2 others* (2013) eKLR.
23. The right to fair hearing also includes adherence to rules of procedure and court processes. The same is also subject to the rights of one's opponent. In this matter, the trial court did all which was required of it by giving the applicant an opportunity to be heard on the application for striking out notwithstanding it was filed late at the eve of the hearing.
24. Further, the trial court gave parties adequate time to file written submissions and attend the fixing of the ruling date. To my mind that was all what the trial court was expected to do to safeguard the rights of the applicant. If the applicant therefore failed to attend the ruling and or so soon thereafter try to find out its outcome within a reasonable time, it cannot blame the trial court for its acts of omission and or commission.
25. As to the intended appeal being rendered nugatory the court has perused the draft intended memorandum of appeal alongside the ruling. An applicant must show sufficient cause why stay of proceedings should be granted. The applicant's view is the trial court is likely to determine a suit where it has no jurisdiction and embarrass itself. In other words, the applicant says its intended appeal has arguable points or merits. The applicant has not attached the statement of defence filed before the trial court. At page 9 and 10 of the ruling the trial court quotes the part of the applicants defence where the damage was admitted but indicated as an act of God and exacerbated by the respondent's sloppy land and gravity which may have worked towards directing water and soil to the suit land.
26. Further looking at the plaint dated December 24, 2018 the claim was based on negligent excavation of soil and dumping the same hence causing damage on the respondent's land during the construction of Kionyo – Chogoria road.
27. The case is not about a boundary dispute at all. Similarly looking at the issue raised in the application dated November 22, 2019 the same were both matters of facts and law requiring ventilation by viva voce evidence.
28. In my view the applicant still retains rights to be heard on merits during the hearing by the trial court. See *Mwangi vs Kenya Airways Ltd* (2003) KLR.
29. In view of the foregoing I find no merits in the application. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 20<sup>TH</sup> DAY OF JULY, 2022**

**In presence of:**

Atheru for respondent

Kamande for applicant

**HON. C.K. NZILI**

**ELC JUDGE**

